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Suspecting the States: Supreme Court Review of State-Court State-Law Judgments

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SUSPECTING THE STATES: SUPREME COURT REVIEW OF STATE-COURT STATE-LAW JUDGMENTS

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INTRODUCTION

At the Supreme Court these days, it is unfashionable to second-guess states' fealty to federal law without real proof that they are ignoring it. As the Court declared in *Alden v. Maine*[1]:

> We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[2]

Accordingly, without proof that a state has "systematic[ally]" shirked its supremacy clause duty to honor Article I legislation, the Court appears unwilling to enforce compliance in a particular case.[3] Likewise,

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1. 527 U.S. 706 (1999) (holding that the Constitution's state sovereign immunity principle prohibits Congress from enforcing Article I legislation through private lawsuits against unconsenting states in their own courts).

2. *Alden*, 527 U.S. at 755 (quoting U.S. CONST. art. VI).

3. *Id.* at 758. *See infra* notes 346-367 and accompanying text (discussing this aspect of *Alden* in greater detail). In *Alden*, where the Court held that states are constitutionally entitled to raise or waive sovereign immunity in their own courts against Article I claims by private individuals, the Court rejected the argument that Maine had violated the supremacy clause by raising its sovereign immunity against *federal*-law claims, while waiving sovereign immunity against closely analogous *state*-law claims. Prior to *Alden*, this type of discrimination against federal law would have raised serious supremacy clause concerns. *See* Testa v. Katt, 330 U.S. 386, 394 (1947) (holding that states must permit state courts to hear federal claims that are of "same type" as state-law claims within state courts' jurisdiction); *accord* Brief for Petitioners at 34-37, *Alden* (No. 98-436) (making argument that *Testa*'s nondiscrimination principle prohibited Maine from raising sovereign immunity against only federal claim); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 149 (4th ed. Supp. 2000) [hereinafter HART & WECHSLER

the Court makes Congress prove a broad "pattern" of federal-law transgressions by many states before it can hold any state accountable to individuals for violating their constitutional rights.[4] Indeed, a handful of even egregious anecdotes simply cannot overcome the Court's presumption that all states can be trusted to meet their federal-law duties.[5]

So, too, the Court has made clear that lower federal courts must presume state courts can be trusted to apply federal law properly unless there is a demonstrable reason not to. The Court's abstention doctrines continue to shift federal constitutional claims from federal to state court, absent extraordinary proof that those claims will be mishandled there.[6] Once state courts lay hold of federal law, moreover,

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Supp. 2000] (observing *Alden*'s apparent conflict with *Testa*'s nondiscrimination rule); *see also* Howlett v. Rose, 496 U.S. 356, 369 (1990) (noting that the supremacy clause imposes an obligation on states to permit state courts to hear federal claims when state courts may hear similar actions) (citing FERC v. Mississippi, 456 U.S. 742, 760 (1982) (holding that states must permit state agency to hear federal claims similar to state law claims); Douglas v. New York, 279 U.S. 377, 387-88 (1929)). For a thorough analysis of states' supremacy-clause-based obligation not to discriminate against federal claims in state courts, see Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 49-52, 161-70.

4. *See, e.g.*, Bd. of Trustees v. Garrett, 531 U.S. 356, 368-72 (2001) (holding that the congressional record showing states' irrational discrimination against the disabled was too scanty to support legislation permitting the disabled to sue states for violations of the Americans with Disabilities Act); *id.* at 369 (criticizing Congress for relying on a "general finding" that " 'historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem,' " where the "great majority of" the record's specific examples "do not deal with the activities of states"); *see also* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 89-91 (2000) (holding that Congress failed to compile a factual record sufficient to show a "pattern" of state discrimination on the basis of age to justify permitting individuals to enforce the Age Discrimination in Employment Act against states); City of Boerne v. Flores, 521 U.S. 507, 530-31 (1997) (holding that Congress failed to compile a factual record sufficient to show a widespread "pattern" of states violating religious free exercise rights to justify the Religious Freedom Restoration Act; criticizing Congress for reliance on "anecdotal evidence" of state misconduct). *See generally* Ruth Colker & James Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85-86 (2001) (discussing cases).

5. *Garrett*, 531 U.S. at 369-70 (stating that "half a dozen examples" in congressional record of states irrationally discriminating against the disabled "fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based"); *see also City of Boerne*, 521 U.S. at 530-31 (criticizing Congress's reliance on "anecdotal evidence" of specific state misconduct).

6. *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987); Younger v. Harris, 401 U.S. 37 (1971) (prohibiting inferior federal courts from enforcing federal rights by enjoining ongoing state judicial proceedings in which those rights may be adjudicated; directing federal action to be dismissed, forcing parties to proceed in state court, absent evidence of "bad faith and harassment" or other extraordinary circumstances). For comprehensive discussions of the Court's various abstention doctrines, see Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989) [hereinafter Friedman, *Revisionist Theory*]; *see also* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1222-1336 (4th ed. 1996) [hereinafter HART & WECHSLER]; *cf.* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that state courts are structurally less likely to be appropriately sympathetic towards federal-law claims or claim-

even their erroneous rulings must be honored in later federal habeas corpus challenges, so long as state courts made a "reasonable, good faith interpretatio[n]" of existing federal law.[7] And in defining the scope of federal due process guarantees, the Court has combined its faith in state courts with a faith in state law to force would-be federal-court plaintiffs to pursue state-law remedies in state court instead.[8]

When it comes to the Supreme Court's own power over state courts, however, the Court works from a different presumption even though its formal jurisdiction over them is quite limited. Since at least the 1789 Judiciary Act, the Court has been authorized to review state-court judgments only on questions of federal law.[9] Indeed, the Court has long recognized that where a state-court judgment rests on an "adequate and independent" state-law ground — where state law, standing alone, can fully explain the state court's ruling — the Supreme Court lacks jurisdiction to review even a *federal* question the state court decided too, no matter how wrong the state court got it.[10]

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ants); *see also* Michael Wells, *Beyond the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609 (1991). *But see* England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411, 421-22 (1964) (noting that where, under *Pullman* abstention, a federal lawsuit is stayed so that the state court may decide a novel state-law question, the putative federal claimant may reserve the right to return to federal court for resolution of the federal question by explicitly declaring so on the state-court record). *See generally* Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 246-49 (2000) (discussing *Younger*'s foundation in principles of "Our Federalism").

7. *See* Williams v. Taylor, 529 U.S. 362 (2000); O'Dell v. Netherland, 521 U.S. 151, 156 (1997) ("[T]he *Teague* doctrine validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."); Teague v. Lane, 489 U.S. 288 (1989). Congress has followed the Court's lead, recently specifying that federal courts must withhold habeas corpus relief on a federal claim that a state court has decided unless that ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (Supp. 2002). *See Williams*, 529 U.S. at 410-12 (holding that under the 1996 Act "an unreasonable application of federal law is different from an incorrect application of federal law").

8. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981) (holding that a state-court state-law tort remedy, available only after property deprivation, adequately satisfied due process and so precluded a federal-court lawsuit under 42 U.S.C. § 1983).

9. *See* Judiciary Act of 1789, § 25, 1 Stat. 73, 85 (grant now codified at 28 U.S.C. § 1257 (1993)); Michigan v. Long, 463 U.S. 1032 (1983); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). *See generally infra* Part II (discussing jurisdictional rule).

10. *See* Lee v. Kemna, 534 U.S. 362, 375 (2002) (applying adequate and independent state grounds doctrine in separate context of federal habeas corpus; discussing doctrine's continued force on Supreme Court direct review of state-court judgments); Coleman v. Thompson, 501 U.S. 722, 729 (1991) (same); *Murdock*, 87 U.S. (20 Wall.) 590; *see also Long*, 463 U.S. 1032. *See generally* Alfred Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 983 (1965) (defining "adequate and independent state grounds" doctrine); *infra* Section II.C.3 (discussing same). Since at least 1893, the Court has recognized the adequate and independent state grounds doctrine as imposing a "jurisdictional" limit. *See Coleman*, 501 U.S. at 729 ("In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional."); *accord* Bush v. Gore, 531 U.S. 98, 114-15

And yet, the Court routinely claims the power to review a *state*-law decision that blocked a state court from considering a federal claim: the Court claims jurisdiction to review (and, when it chooses, to reverse) state courts' state-law judgments wherever they stand in the path of — or logically "antecede"[11] — federal interests. The Court claims this power, moreover, even where state law fully satisfies all federal constitutional and statutory standards, and so offers the Court no federal-law grounds for reversal.[12] And — contrary to the presump-

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(2000) (Rehnquist, C.J., concurring) (describing precedent where the Court had found state ground "novel" in light of pre-existing state law and therefore "inadequate to defeat our jurisdiction" in a discussion of *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Long*, 463 U.S. 1032; Herb v. Pitcairn, 324 U.S. 117, 128 (1945); Eustis v. Bolles, 150 U.S. 361 (1893)). But some commentators maintain — notwithstanding the Court's own repeated assertions to the contrary, *see Coleman*, *supra* — that the doctrine is merely a self-imposed prudential restraint showing respect for state autonomy. *See* 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, 1292 n.1 (1986); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-first Century*, 35 IND. L. REV. 335, 337 n.7 (2002) (adopting Matasar and Bruch view); *see also* Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 AM. U. L. REV. 1053, 1054 n.1 (1999) (same).

While an "adequate and independent state grounds" doctrine also governs collateral review of state judgments through federal habeas corpus, this Article considers only the doctrine's role in determining the Supreme Court's jurisdiction to reverse state courts on *direct* review. *See generally* Fay v. Noia, 372 U.S. 391, 416, 429-30, 433 (1963) (emphasizing differences in nature and function between direct *appellate* review and collateral *habeas* review; declaring that the "adequate state ground rule is a function of the limitations of *appellate* review" and emphasizing the "inherent and historical limitations of" the Court's appellate jurisdiction (emphasis in original)); Hill, *supra*, at 991 (discussing *Fay v. Noia*'s specially limited role for the Supreme Court on direct review — but not habeas review — of state-court judgments). Notwithstanding the functional differences between direct and habeas review, the Court now applies an adequate and independent state grounds doctrine to limit both, using precedents from both categories interchangeably. *See Lee*, 534 U.S. at 375. I do the same thing here.

11. This has become a term of art among commentators who have explored the Court's claim to appellate jurisdiction under such circumstances. *See infra* Part II; *see also* HART & WECHSLER, *supra* note 6, at 520-21 (defining antecedent state grounds as those where "a state law ruling serves as an antecedent for determining whether a federal right has been violated"); *id.* at 526 (describing case in which state statute of limitations was "antecedent" to federal due process claim) (citing Paschall v. Christie-Stewart Inc., 414 U.S. 100 (1973)); Hill, *supra* note 10, at 948-49 (referring to the antecedent state-law question as the "threshold" state-law question); Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1054 (1977). Some commentators, by contrast, use the term "antecedent state-law grounds" only to describe the relatively narrow category of cases — like constitutional contract-clause and property cases — where state law creates a substantive right and then federal law steps in to protect it. *See, e.g.*, Michael L. Wells, *Were There Adequate State Grounds in* Bush v. Gore?, 18 CONST. COMMENT. 403, 412 (2001) (describing "cases in which state law creates a right and federal law protects that 'antecedent' state right"). I use the terms "antecedent state-law grounds" and "antecedence-based jurisdiction" to describe the larger group of cases, where any state-law ruling blocks the path of a federal claim or other federal interest through state court. *See also infra* Part II (discussing cases).

12. This Article addresses only those cases where state law cannot be held to violate federal law outright. In a few rare decisions, where a party's failure to satisfy a state procedural rule barred pursuit of a federal claim, the Court declared that the state's rule itself violated federal due process principles. *See, e.g.*, Brinkerhoff-Faris Trust & Savings Co. v.

tion of state trustworthiness the Court now imposes on Congress and the lower courts — the Court claims this power even though it identifies no reason to suspect a state court of having evaded or otherwise cheated federal law in reaching its state-law judgment. It is enough that state law simply blocked federal law's path through state court.[13]

The Court staked this antecedence-based jurisdictional claim as early as 1813 when, in *Fairfax's Devisee v. Hunter's Lessee*,[14] it reversed the Virginia Court of Appeals (then the Commonwealth's highest court) on the purely nonfederal confiscation question whether and when Virginia had, under Virginia statutes and common law rules, legally confiscated a parcel of real property from an English landowner. The Virginia court appeared to rule, under state law, that the confiscation had been completed no later than 1782.[15] But the Supreme Court, pointing to federal treaties in 1783 and 1784[16] prospectively barring state interference with English subjects' property rights, reversed on that nonfederal confiscation question so that it could reach the federal issue logically next in line: whether the English claimant could invoke the treaties' protection to retain possession of the land.[17] The fact that the state-law ruling blocked that federal claim was enough, in the Court's view, to justify reversing it.[18]

Hill, 281 U.S. 673 (1930); *see also* Hill, *supra* note 10, at 943 ("[H]oldings that a state ground is inadequate are almost invariably made without reliance on the due process clause."); *id.* at 944-48 (describing the few cases in which a state ground was declared unconstitutional, and characterizing them as "tangential" to the "central problem" of the Court's doctrinal basis for inadequacy reversals on nonconstitutional grounds); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1130, 1137-45 (1986) (discussing the Court's various nonconstitutional reasons for holding state procedural grounds inadequate).

13. *See infra* notes 256-295 and accompanying text (tracing evolution of the view that the Court may review state-court judgment on state-law question logically anteceding federal-law question).

14. 11 U.S. (7 Cranch) 603 (1813) (Story, J.).

15. As discussed fully *infra* note 96 and accompanying text, there is some confusion about the exact grounds on which a majority of the Virginia court of appeals had decided this dispute. But the Supreme Court treated this state-law question — whether and when Virginia had properly confiscated the disputed property under state and common-law standards — as the one decided by that Virginia court, and I do too. *See infra* notes 91-103 and accompanying text.

16. Two treaties entered the dispute: 1783's Treaty of Peace and 1794's Jay Treaty. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 356 (1816); *infra* note 92 and accompanying text.

17. *See Fairfax's Devisee*, 11 U.S. (7 Cranch) 603 (holding that Virginia statutory law had not abrogated common law requirement of inquest of office to vest title of escheated land in Commonwealth, and since no inquest of office had been performed, title remained in English owner, and thus could be devised to heir whose rights then fell under Treaty protection prohibiting subsequent Virginia confiscation). The Court upheld its appellate jurisdiction to reach and decide this question in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *See infra* Section II.A (discussing *Fairfax's Devisee* and *Martin* cases in detail).

18. *See Martin*, 14 U.S. (1 Wheat.) at 357-58; *see also infra* Section II.A (analyzing the Court's jurisdictional reasoning).

The modern Court continues to assert antecedence-based jurisdiction. In *Bush v. Gore*,[19] three Justices, led by Chief Justice Rehnquist, argued that the Court should reverse the Florida supreme court's reading of Florida statutes regulating the vote for presidential electors. Although the Florida court had read those state statutes to authorize post-election-day manual recounts of imperfectly marked ballots, Chief Justice Rehnquist contended that the statutes did not, thus bringing forward the federal constitutional question logically next in line: whether Article II prohibits state courts from "alter[ing]" a state's election law after the votes are cast.[20] As in *Fairfax's Devisee* — on which Chief Justice Rehnquist relied[21] — the fact that the Florida court's state-law ruling blocked the Article II issue was enough, it seemed, to justify Supreme Court review of the state-law ground.[22]

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19. 531 U.S. 98 (2000).

20. *Bush*, 531 U.S. at 114-15 (Rehnquist, C.J., concurring). As others have observed, five Justices second-guessed the Florida supreme court on a second question of state law by holding that, on remand following the Court's decision, it was too late for a statewide manual recount to proceed on uniform standards correcting the equal protection flaws the Court had identified. *See, e.g.*, Frank Goodman, *Preface* to *The Supreme Court's Federalism: Real or Imagined?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 14-15 (2001); Laurence H. Tribe, EROG v. HSUB *and Its Disguises: Freeing* Bush v. Gore *From Its Hall of Mirrors*, 115 HARV. L. REV. 170, 186-87, 263-68 (2001) (discussing per curiam opinion's treatment of state-law deadline question); Mark Tushnet, *Renormalizing* Bush v. Gore: *An Anticipatory Intellectual History*, 90 GEO. L.J. 113 (2001). The five-member Court majority concluded that Florida law required any recount to be completed by December 12th, the day the Court handed down its decision and also the date a *federal* statute designated as a "safe-harbor" deadline before which Congress would accept without challenge any slate of presidential electors a state reported. *Bush*, 531 U.S. at 110-11. But the Florida supreme court had not read that deadline into the Florida statutes, even though it had earlier noted, in passing, that Florida statutes reflected the legislature's desire to take advantage of the safe harbor if possible; to the contrary, in ordering the manual recounts to proceed on December 8, the Florida court had set no fixed deadline for its completion, even while it acknowledged the time for completing those recounts was "desperately short." Gore v. Harris, 772 So. 2d 1243, 1261 (Fla. 2000); *see also id.* at 1268 (Wells, C.J., dissenting) (arguing that a recount would have to be completed by December 12th in order to take advantage of the congressional "safe harbor" provision, "*assuming* the majority recognizes a need to protect the votes of Florida's presidential electors" under that provision) (emphasis added). As Justice Breyer pointed out in dissent, Florida law may well have authorized the recounts to continue as late as December 18th, the date on which the presidential electors were scheduled to meet. *Bush*, 531 U.S. at 146-47 (Breyer, J., dissenting); *see also id.* at 135 (Souter, J., dissenting) (noting same, and adding that there was "no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors"). Professor Goodman contends that, in superimposing the December 12th deadline onto Florida law, the Court made "a federal intrusion upon state autonomy more drastic than any of the congressional intrusions nullified by the Court" in its recent decisions striking down federal legislation on federalism-related grounds. *See* Goodman, *supra*, at 14.

21. *Bush*, 531 U.S. at 115 n.1 (Rehnquist, C.J., concurring) (citing Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813)).

22. *See Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring) ("To attach definitive weight to the pronouncement of a state court . . . would be to abdicate our responsibility to enforce the explicit requirements of Article II."). Most scholars have minimized the *Bush v. Gore* concurrence's jurisdictional puzzle — that is, what might have given the Court power to re-

These examples, and other cases like them, raise a hard but largely unexplored question: given the longstanding black-letter rule that the Supreme Court may only review state-court judgments on questions of federal law,[23] what gives it jurisdiction to reverse state-court state-law rulings at all? The Court's early decisions provided ambiguous and contradictory answers; since the mid-1900s the Court has stopped trying to explain.[24] And while commentators have offered jurisdictional theories to make up the Court's own deficit, each fails in its own way.[25]

Instead, the Court's practice of state grounds reversals appears to rest, at bottom, on the intuition that — given the obvious need to enforce federal law's *supremacy* — there simply must be some federal

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verse the Florida court's state-law judgment despite its own limited jurisdiction to review only federal questions? — and have treated the case as raising primarily *merits* concerns. These scholars solve jurisdiction by characterizing the concurrence as raising the federal question of whether the state court's reading of state law violated Article II or a federal statute. *See, e.g.*, Harold J. Krent, *Judging Judging: The Problem of Secondguessing State Judges' Interpretation of State Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 493, 495 (2001) (analyzing various doctrines under which the Court, pre-*Bush* concurrence, held that state courts had violated federal law by "alter[ing] state law so as to defeat federal rights"); Tribe, *supra* note 20, at 186-88 (noting that the concurrence "affirmatively displaced the decision of a state's highest court on the meaning of state law," but concluding "[o]f course the federal judiciary has a role to play in policing what a state's courts do with respect to the manner in which presidential electors are chosen"); *id.* at 191-92 ("[I]t plainly was the Supreme Court's business, as it always is when a federal constitutional norm speaks directly to a challenged exercise of state power," absent justiciability flaws); Wells, *supra* note 11, at 417 ("*Bush* is actually a simple case of federal law constraining state authority .... No deference toward the state court's interpretation of state law is called for in such a case."); *see also id.* at 405 ("The existence of a federal constraint on state court authority, such as article II, is sufficient to justify [Supreme Court] intervention."); Solimine, *supra* note 10, at 347 (agreeing with Professor Wells that, in Rehnquist's concurrence, "it was the very state-law-based nature of the decision below that itself was alleged to violate the Federal Constitution"). *But see* Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1094-95 (2001) (summarizing article's argument that case was not justiciable on grounds of standing, ripeness, and political question).

As these commentators suggest, the Court may assert ordinary federal-question jurisdiction to decide that a state court's state-law ruling violates federal law outright (a power this Article does not address). *See* 28 U.S.C. § 1257 (1993); *supra* note 12 (noting rare occasions where the Court has declared a state ground "inadequate" because it violates federal law). But the *Bush v. Gore* concurrence did not do that. Instead, by invoking "adequate and independent state grounds" precedents, Chief Justice Rehnquist proceeded within the separate jurisdictional tradition this Article considers: where the Court claims power to reverse a state court's state-law judgment on *nonfederal* grounds. Thus, even if commentators can, post hoc, fit the *Bush* concurrence into the tidier federal-question paradigm, the concurrence itself, and the dissents it provoked, still reveal much about how those Justices view the Court's authority, within that separate jurisdictional tradition, to reverse state courts on state-law questions. I consider their debate for that purpose here. *See infra* Section III.B (discussing the *Bush* Justices' focus on the degree of deference the Court owes state courts' reading of state law).

23. *See supra* note 9 (citing authorities establishing rule). *See generally infra* Part II (discussing rule).

24. What Professor Hill observed in 1965 remains true today: "the doctrinal basis" for the Court's review of state-court state-law judgments "has seldom been explored — least of all by the Court itself." Hill, *supra* note 10, at 943.

25. I critique a number of these theories in Part IV, *infra*.

judicial mechanism for catching state courts that disingenuously manipulate antecedent state law to thwart federal interests and then shield their misconduct behind that superficially "adequate" state ground.[26] To many, it is unimaginable that the Supreme Court could lack the power to monitor whether state courts are cheating federal law this way. Indeed, in *Bush v. Gore* Justice Ginsburg declared outright that that suspicion of state-court misbehavior — sparked by "historical" events surrounding *but external to* a state court's judgment — best explains key cases where the Court has rejected state courts' interpretations of state law: the Court's treatment of Virginia law in *Fairfax's Devisee*, for example, masked its unarticulated concern about widespread states' rights attacks on the Marshall Court.[27] As Professor Alfred Hill made the point in 1965, some Supreme Court review of state-court decisions on antecedent state-law questions seems essential because otherwise federal law would have "only as much force as state courts are willing to accord it."[28]

But no matter how obvious the *need* appears, it remains critical to identify an affirmative jurisdictional basis for the Court's review of

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26. *See, e.g.*, Hill, *supra* note 10, at 949; *see also id.* at 990 (concluding that the supremacy clause offers a "doctrinal basis" for the Court's practice of reversing state-court state-law judgments for state-law error); *see also* HART & WECHSLER, *supra* note 6, at 520; PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 82 (4th ed. 1998) (noting that, in some cases, "if there were no limits" on state courts' "freedom" to decide antecedent state-law questions, federal rights and obligations standing next in line "might be easily evaded"); Wechsler, *supra* note 11, at 1054; *see also infra* Section IV.C (discussing commentators' reliance on supremacy-based intuition).

27. *See Bush*, 531 U.S. at 139-41 (Ginsburg, J., dissenting) (discussing Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813)). Justice Ginsburg argued further that mid-Twentieth Century decisions rejecting southern state courts' readings of state procedural rules to block those claiming federal civil rights reflected the Court's unarticulated suspicion of widespread southern "recalcitrance." *See id.* (discussing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (discussed *infra* notes 380-389 and accompanying text), and Bouie v. City of Columbia, 378 U.S. 347 (1964)). In each of these cases, Justice Ginsburg insisted, the larger historical context of States' political "recalcitrance" *itself* "warrant[ed] extraordinary action by [the] Court" even without a finding that those politics had contaminated the particular judgment under review. *Bush*, 531 U.S. at 141 (Ginsburg, J., dissenting) (concluding that the Florida supreme court "surely should not be bracketed with state high courts of the Jim Crow South"); *see also* Robert J. Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 870 (1994) (arguing that during this period "the Supreme Court concluded that state courts lacked good faith in handling the federal claims of civil rights demonstrators"); Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1738 (2001) (describing it as "inconceivable that the Justices' view of the [*NAACP v. Alabama*] case, both on the merits and on the alleged state procedural default, was uninfluenced by their knowledge that the state of Alabama, including its jurists, were engaged in a project of massive resistance toward *Brown v. Board of Education* . . . "); Solimine, *supra* note 10, at 348 (noting that Justice Ginsburg's "forthright description of the political context of [these] decisions . . . is refreshingly candid and . . . not matched in other opinions involving the adequate and independent ground doctrine"); Wells, *supra* note 11, at 418 (discussing the Court's greater scrutiny of state-court state-law judgments where "real world . . . context" suggests state "recalcitrance").

28. Hill, *supra* note 10, at 949.

state-court state-law judgments.[29] And that jurisdictional justification should, I suggest, also imply and dictate the conditions under which the Court may reverse a state-court judgment once it undertakes appellate review: the jurisdictional rule must explain *why* the Court has power to review state-court state-law judgments, but it should also explain *when* the Court may deny a state court's ordinary prerogative "to utter the last word" on what state law means.[30] In other words, the Court's power to police state courts' fealty to federal law should be limited by much the same *congruence* and *proportionality* criteria that the Court has imposed on Congress,[31] so that the scope of the Court's appellate jurisdiction over state courts — like the scope of Congress's legislative jurisdiction over states — reaches only so far as necessary to police actual, identifiable wrongdoing. To borrow the Court's own standard, "[t]he appropriateness of remedial measures must be considered in light of the evil presented."[32]

Currently, the Court appears to assume it has jurisdiction to *review* a state-court judgment on any antecedent state ground.[33] On the second key question — when may the Court *reverse* state grounds? — the Court has defaulted to an inconsistent hodge-podge of guidelines suggesting how much deference it should give a state high court's reading of state law on the merits: sometimes the Court conducts a de novo analysis of state law, other times it will reverse only where the state-court judgment lacks "fair support" or is "egregiously wrong" or something else.[34] Not only are these guidelines discretionary and inde-

29. *See infra* Part I (advocating clearly-defined jurisdictional rules because they provide essential operational limits on federal judicial power).

30. Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910) (Holmes, J.)); *see also id.* at 80 (declaring that federal courts violate "rights which . . . are reserved by the Constitution to the several states" when they refuse to honor state courts' interpretation of what state law means).

31. *See City of Boerne*, 521 U.S. at 530-31 (in exercising legislative power to regulate states under section 5 of the Fourteenth Amendment, Congress must prove "pattern" of state wrongdoing and then tailor remedy to achieve "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"); *id.* at 530-32 (invalidating Religious Freedom Restoration Act because, in part, law was "so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent unconstitutional behavior"); *see also Garrett*, 531 U.S. at 365, 374 (invalidating legislation enforcing Americans With Disabilities Act against states because Act was not "congruent and proportional to the targeted" state misconduct). For one critique of the Court's imposition of congruence and proportionality limits on Congress's section 5 legislative power, see Evan Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1158-67 (2001) (outlining critique). *See also id.* at 1153-58 (considering what "congruence and proportionality" mean).

32. *City of Boerne*, 521 U.S. at 530.

33. *See infra* Part III (discussing cases).

34. Commentators have attempted to systematize the Court's shifting deference guidelines, but none identifies a single set of criteria to constrain the Court's state-ground reversals. *See* Wells, *supra* note 11, at 414 (identifying three different approaches: de novo review, deferential review, and an "intermediate scrutiny" that asks whether the state-court decision

terminate[35] — imposing no real limit on the Court's use of judicial power — but they are also unmoored from any justification for why the Court has appellate jurisdiction in the first place.

This Article proposes an alternative rule: the Court may claim appellate jurisdiction to reverse state-court state-law judgments (absent an outright federal-law violation) only where it can identify and substantiate some concrete indication that the state court has deliberately manipulated state law to thwart federal law and then evade Supreme Court review. Simply put, the Court should have to rebut its own presumption that state courts can be trusted to self-enforce their supremacy clause obligations when applying state law.[36]

This "proven mistrust" rule would give jurisdictional teeth to the hunch that federal-law supremacy requires some mechanism permitting the Court to catch states that cheat. At the same time, it would also impose a meaningful limit on the Court's power to reverse state-court state-law judgments — something the Court's indeterminate and discretionary deference guidelines will never do[37] — and bring the

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" 'rests upon a fair or substantial basis' and uphold the state judgment 'if there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support' ") (quoting Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944)); Hill, *supra* note 10, at 965; *accord* Hill, *supra* note 10, at 963-65 (canvassing cases in which Court claimed to be granting state courts different degrees of deference when reviewing state-law grounds). In his *Bush v. Gore* concurrence, Chief Justice Rehnquist claimed to conduct "an independent, if still deferential, analysis of state law." Bush v. Gore, 531 U.S. 98, 114 (2000). Commentators have not yet agreed on how to characterize the degree of deference Chief Justice Rehnquist accorded the Florida supreme court's reasoning in *Bush v. Gore*. *Compare* Wells, *supra* note 11, at 416-17 (describing the concurrence's review as "deferential," though arguing that "[n]o deference ... [was] called for"), *with* Klarman, *supra* note 27, at 1735 (observing that the "concurring opinion argues for reduced deference"). *See also* Tribe, *supra* note 20, at 193 (arguing that the Court should reject state-court readings of state election statutes only if "manifestly unreasonable").

35. Thus, in *Bush v. Gore*, while three of the four dissenting Justices harshly criticized Chief Justice Rehnquist for according far too little respect to the Florida court's own reading of Florida law, none contradicted his basic assumptions that the Court had jurisdiction to conduct that review and that the Court's only limit — the only constraint on the Court's reversal power — was whether the review showed enough deference to the state court's conclusions. *See, e.g.*, *Bush*, 531 U.S. at 129, 131-33 (Souter, J., dissenting) (asserting that the Court "should not have reviewed ... this case" and then proceeding to argue that the Florida court's reading of state law was not so "unreasonable" as to overcome the Court's "customary respect for state interpretations of state law"); *id.* at 136-43 (Ginsburg, J., dissenting) (same); *id.* at 147-49 (Breyer, J., dissenting) (same). *See infra* notes 278-295 and accompanying text (developing this observation). Only Justice Stevens suggested that the Court lacked jurisdiction altogether, arguing that the dispute presented no "substantial" federal question. *Bush,* 531 U.S. at 123 (Stevens, J., dissenting). *Cf.* Hagans v. Lavine, 415 U.S. 528, 536-37 (1974) (holding that a federal-law claim cannot confer federal-question jurisdiction on an inferior federal court under 28 U.S.C. § 1331 if it is " 'so attenuated and unsubstantial as to be absolutely devoid of merit' ") (quoting Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904)).

36. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 755 (1999); *see also supra* note 4 (citing cases).

37. *See* Printz v. United States, 521 U.S. 898, 928 (1997) ("[A]n imprecise barrier against federal intrusion upon state authority is not likely to be an effective one."). For one discus-

Court within constitutional boundaries at least comparable to those it now imposes on Congress and other federal actors.[38]

The proven mistrust rule would also impose a more practical constraint, for it would force the Court to own up to its own suspicions (and perhaps prejudices) about why a particular state court, at a particular time, cannot be trusted to handle federal law candidly. If the Court is made uneasy by some political, historical, or cultural phenomenon — like states' rights attacks on the Marshall Court[39] or the fact that in November of 2000, Democrats outnumbered Republicans on the Florida Supreme Court[40] — then the Court should have to admit that mistrust and identify some concrete basis for it.[41] Requiring

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sion of the basic constitutional principle that all federal institutional power must be "limited," see Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 739, 823-34 (2001) (discussing the "limited" nature of authority delegated to federal institutions as a "principl[e] of constitutional structure").

38. *See supra* notes 1-8 and accompanying text (discussing cases); *see also* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (demanding "congruence and proportionality" between remedial federal legislation and proven state misconduct); Bd. of Trustees v. Garrett, 531 U.S. 356, 365, 374 (2001) (same).

39. *See supra* note 27 and accompanying text (discussing Justice Ginsburg's explanation of *Fairfax's Devisee*).

40. While the *Bush* majority Justices — all Republican appointees — did not admit this motivation, scholars have emphasized it. *See, e.g.*, Chemerinsky, *supra* note 22, at 1093-94 ("A large segment of the American people — certainly the majority of citizens who voted for Al Gore — regard the ruling as a partisan decision where five conservative Republican Justices handed the election to the Republican candidate, George W. Bush."); Richard A. Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613, 635 (2001) (arguing that the Florida Supreme Court had "abuse[d its] . . . discretion for partisan political ends," and so "if it abused its discretion, then the United States Supreme Court did not abuse its" own authority); Klarman, *supra* note 27, at 1723-24 (charging that *Bush* majority acted out of political partisanship); David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 746, 749 (2001) (suggesting that the *Bush* majority granted certiorari, despite the centrality of the case's state-law questions, in "an effort to thwart, by any means necessary, a perceived illegitimate act by the Florida Supreme Court"); Tribe, *supra* note 20, at 174 (noting some observers' argument that the Court simply prevented the "unprincipled partisans" on Florida's supreme court and "liberal canvassing boards" from "overturning the people's democratic choice"); *id.* at 194 & nn.64, 66 (attributing like reaction to Robert Bork and Judge Richard Posner); Tushnet, *supra* note 20, at 115-16 & n.21 (noting some observers' conviction that "[t]he Justices in the majority sincerely believed that they were observing a process in which a highly partisan state supreme court had simply gotten out of control and was attempting to steal the election from the rightful victor"); *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1384-85 (2001) (citing the "apparently widespread popular belief that politics motivated the decision" in *Bush v. Gore*). For one thorough evaluation of the voluminous literature criticizing or defending the Court's *Bush v. Gore* decision, see Louise Weinberg, *When Courts Decide Elections: the Constitutionality of* Bush v. Gore, 82 B.U. L. REV. 609, 611-620 (2002) (canvassing the "proliferation of list-serves, websites, and other correspondence — the outpouring of books and articles — in which academic shock continued to be registered long after the election") (citations omitted).

41. For one argument that the Court's very legitimacy depends on whether its decisions "are widely understood to be the correct ones given the social and economic milieu in which they are rendered," see Friedman, *supra* note 40, at 1387, 1448-55.

the Court to explain itself forthrightly would discipline and perhaps constrain the Court's use of power in an individual case; but elsewhere, this candor would strengthen the Court's jurisdictional claim.[42] And candor would begin to provide later courts, both Supreme and state, with principled precedents to discipline decision making in the future.[43]

Part I introduces the proven mistrust proposal and sets its foundation not only in the Constitution's structural and practical commitments to limited power exercised accountably, but also in the notion that the Court should not casually be exempted from the constitutional constraints it now enforces against Congress in its own dealings with the states. Part II then analyzes key cases demonstrating the Court's own ambiguous and contradictory justifications for its long practice of reversing on state grounds, despite the black-letter rule granting it jurisdiction only to review state courts' federal-law decisions. Part III traces the evolution of a view that the Court may reverse any state grounds that blocks — is "antecedent to" — consideration of a federal claim or other federal interest. Part IV considers commentators' efforts to validate the Court's practice of state grounds' reversals; and, finally Part V then returns to the proven mistrust proposal. It argues that, while the proven mistrust rule might compel different results in paradigm cases now considered beyond debate,[44] it honors the most compelling insights from the Court's own history of reviewing state-court state-law judgments, while offering meaningful jurisdictional limits the alternatives lack.

I. PROVEN MISTRUST

The proven mistrust proposal rests on three fundamental premises. First, the Supreme Court — like all other federal courts — is a court of limited jurisdiction and so may only act where it has an affirmative jurisdictional basis for acting.[45] Article III and the Constitution's separa-

42. *See, e.g., infra* notes 181-203 and accompanying text (discussing the Court's failure to invoke a compelling history of state animosity to Indian tribes — relying instead on an unpersuasive and cursory analysis of state common law — in *Ward v. Love County*, 253 U.S. 17 (1920)).

43. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

44. *See infra* Part V. I suggest, for example, that my jurisdictional rule might have produced a different outcome in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), while it might have produced the same result, but for different reasons, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

45. *See, e.g.*, Aldinger v. Howard, 427 U.S. 1, 15 (1976) (Rehnquist, J.) ("[F]ederal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress."); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1868) (same); Durousseau v. United States, 10 U.S. (6 Cranch) 307, 312 (1810) (holding that the Court must interpret jurisdictional statutes as denying all power not affirmatively granted).

tion of powers principle make formal jurisdiction a necessary precondition to the exercise of federal judicial power,[46] including the power to interfere with a state court's ordinary prerogative "to utter the last word" on what state law means.[47]

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46. The Court itself has always declared not only that all federal courts are constrained by formal jurisdictional limits, but that these limits are a primary way in which the separation of powers principle operates on the judiciary itself: "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation . . . of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998); *see also* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999) ("Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed."); *Steel Co.*, 523 U.S. at 94 (declaring that a federal court proceeding without jurisdiction "offends fundamental principles of separation of powers"). *See generally* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1207 & nn.1-3 (2001) [hereinafter Fitzgerald, *Is Jurisdiction Jurisdictional?*] (exploring the contradictions between the Court's rhetoric of limited federal court jurisdiction and the practice of dispensing federal judicial power based on how important the Court considers the federal interests at stake in a controversy and the demonstrated need for a federal, not state, remedy).

47. Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910) (Holmes, J.)); *see also Erie*, 304 U.S. at 80 (declaring that federal courts violate "rights which . . . are reserved by the Constitution to the several States" when they refuse to honor state courts' interpretation of what state law means). While some commentators argue that *Erie* rests only on statutory grounds applying only to federal diversity jurisdiction — namely, the Court's reading of the Rules of Decision Act — *Erie*'s own language describes a constitutional constraint inhibiting *all* federal judicial power to interfere with state courts' prerogative over state-law questions. *See id*; *see also id.* at 77-78 ("If only a question of statutory construction were involved," the Court would have hesitated to overturn *Swift v. Tyson*; "[b]ut the unconstitutionality of the course pursued . . . compels us to do so."). *But see* Levinson v. Deupree, 345 U.S. 648, 651 (1953) (finding *Erie* "irrelevant" where federal jurisdiction not "derived from diversity of citizenship"). I here argue that *Erie*'s principle of state-court prerogative over state law should strongly influence any theory of Supreme Court appellate jurisdiction to reverse state-law grounds, but I leave unanswered whether *Erie* formally governs the Court's jurisdiction in these cases. For a sampling of the commentary touching on this question, see Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 996-99 (1995) (discussing *Erie*'s constitutional basis and asserting that "the prevailing view among contemporary commentators is that *Erie* does indeed rest on a constitutional base . . . ."); *see id.* at nn.335 & 336 (citing earlier scholarship both questioning and confirming *Erie*'s constitutional basis); Peter Westen & Jeffrey S. Lehman, *Is There Life For* Erie *After the Death of Diversity?* 78 MICH. L. REV. 311, 312-16 (1980) (describing two "camps" on question of whether *Erie* "has meaning" for cases outside diversity jurisdiction); *id* at 316-41 (elaborating "Axioms of Federalism" demonstrating *Erie*'s pertinence outside diversity). *Compare, e.g.*, John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 700-06 (1974) (same); Henry J. Friendly, *In Praise of* Erie *— and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384-98 (1964) (same); Alfred Hill, *The* Erie *Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 438-45, 448 (1958) (discussing *Erie*'s constitutional foundation); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 509-10 (1954) (same); *with* John B. Corr, *Thoughts on the Vitality of* Erie, 41 AMER. U. L. REV. 1087, 1089, 1117-24 (1992) (arguing that *Erie* is "not mandated constitutionally"); Judith Resnik, *"Uncle Sam Modernizes his Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 643 (2002) (characterizing *Erie* as "district court analogue" to *Murdock*'s "concept of state control over state law at the level of the Supreme Court").

Second, the Court's jurisdiction, like all other federal institutions', must be subject to articulated and meaningful limits[48] — limits clear enough both to discipline the Court's own decision making and to enable others to hold it accountable when it goes too far, for if no one knows where the line lies, no one can criticize the Court for crossing it.[49]

Third, the Court should have to follow constitutional rules, in its dealings with states, at least as rigorous as those it enforces against Congress,[50] absent a compelling reason for exemption. Thus, not only the Court must honor the presumption of state trustworthiness that cases like *Alden* and *Garrett* imposed,[51] and also the principle that federal responses to state wrongdoing should be tailored to remedy a particular and proven "evil."[52] Moreover, the Court must also observe the more general federalism principles it has invoked to invalidate so many acts of Congress since 1995.[53] Demanding this symmetry is espe-

48. Pushaw, *supra* note 37, at 823-34 (discussing the constitutional principle of limited government power). As Professor Weinberg has observed, "Nor is it a novel proposition that the Supreme Court itself, the font of constitutional law, can violate the constitutional order." Weinberg, *supra* note 40, at 619 n.41 (citing Erie v. Tomkins, 304 U.S. 64, 78 (1938), where the Court struck down "the course pursued" by itself as well as other federal courts under the Swift v. Tyson doctrine, 41 U.S. (26 Pet.) 1 (1842)).

49. *See, e.g.*, Lapides v. Bd. of Regents, 122 S. Ct. 1640, 1645 (2002) (declaring that "jurisdictional rules should be clear" in holding that state defendant that removes state-law claims to federal court thereby waives sovereign immunity from federal supplemental jurisdiction over those claims); *see also* Printz v. United States, 521 U.S. 898, 928 (1987) (declaring "imprecise barrier[s] against federal intrusion upon state autonomy likely to be ineffective").

50. *See* Colker & Brudney, *supra* note 4, at 85-86 (arguing that the Court's recent federalism-based decisions show the Court's "growing disrespect for Congress," with the result that the Court "tak[es] greater power for itself, displacing Congress's proper . . . role"); *see also* Laura S. Fitzgerald, *Beyond* Marbury*: Jurisdictional Self-Dealing in* Seminole Tribe, 52 VAND. L. REV. 407, 408-09 (1999) (charting the Court's aggressive claims to power at Congress's expense); *see infra* note 57 (citing additional examples decided after 1999). For one argument, in another context, that courts should face *greater* constraints than should Congress in acting to enforce the Constitution's equal protection values, see Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1022 (2002) [hereinafter Dorf, *Equal Protection Incorporation*] ("[W]here judicial interpretation of the Equal Protection Clause is at stake, the need to constrain judges may require that equal protection doctrine track the form and content of the textual markers rather closely. Congress, on the other hand, should only be subject to a considerably weaker constraint requiring that there be some discernible limit to its powers. Accordingly, it should be permitted to enact antidiscrimination laws that substantially expand upon the Constitution's text. At some point, however, even legislation that may be plausibly understood as serving egalitarian values — such as the Gun Free School Zones Act — ceases to be antidiscrimination legislation as that term is commonly understood.").

51. *See* Bd. of Trustees v. Garrett, 531 U.S. 356 (2001); Alden v. Maine, 527 U.S. 706, 755 (1999); *see also supra* notes 1-8 and accompanying text.

52. *See* City of Boerne v. Flores, 521 U.S. 507, 530-31 (1997). *See generally supra* notes 3-5 and accompanying text (discussing current Court's repeated invalidation of legislation enforcing federal law against states because Congress had failed to tailor remedy to proven "widespread pattern" of state wrongdoing).

53. *See* United States v. Lopez, 514 U.S. 549 (1995); *see also* Printz v. United States, 521

cially important where state-ground reversals are involved because, as the Court has long acknowledged, federalism itself underlies the black-letter rule ordinarily prohibiting reversals on nonfederal grounds.[54] Thus, the Court's recent federalism decisions, which heighten protections for the autonomy of state institutions (including state courts),[55] suggest that states' dignity and independence interests now enjoy a constitutional status[56] inconsistent with any assumption that the Court may reverse even antecedent state grounds as a matter of course.[57]

U.S. 898 (1997) (holding that the Constitution's federalism principles prohibit Congress from forcing state law enforcement officers to participate in a federal firearms registration program); New York v. United States, 505 U.S. 144 (1992) (holding that the Constitution's federalism principles prohibit Congress from forcing state legislatures to participate in a federal program to dispose of low-level radioactive waste). *See generally* Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 234-41 (2001) [hereinafter Jackson, *Narratives*] (analyzing the Court's recent cases strengthening federalism as a limit on national power); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 699 (2000) [hereinafter Jackson, *Seductions*] (same). *But see* Colker & Brudney, *supra* note 4, at 84 (suggesting that the Rehnquist Court's decisions actually show a pattern of systematically claiming dominant authority for itself, rather than consistent deference to states).

54. Herb v. Pitcairn, 324 U.S. 117, 125 (1945) (Jackson, J.) (noting that the "reason" for the bar was "found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction . . . ."); *see also* Michigan v. Long, 463 U.S. 1032, 1040 (1983) (same); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630 (1874) (same).

55. *See, e.g.*, *Alden*, 527 U.S. 706 (holding that the Constitution's federalism and sovereign immunity principles deny Congress the power to authorize private actions to enforce Article I legislation against unconsenting states in state court); *see also supra* note 53 (citing cases).

56. *See generally* Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001); *see also* Althouse, *supra* note 6, at 246-49 (discussing the differences between post-*Lopez* "federalism" principles and earlier interpretations, as described, for example, in *Younger v. Harris*, 401 U.S. 37 (1971)).

57. *See* Jackson, *Narratives*, *supra* note 53, at 234-41 (analyzing the Court's recent cases strengthening federalism as a limit on national power). The Court's federalism decisions from *Lopez* forward would appear fundamentally to rework the constitutional balance between state and federal power. *See, e.g.*, Colker & Brudney, *supra* note 4, at 87-105 (arguing that recent decisions show not only the Court's heightened federalism commitment, but also a "new judicial activism . . . in which dis-respecting Congress has become an important theme"); Jackson, *Seductions*, *supra* note 53, at 699 ("There is no doubt that we are in the midst of a federalist revival. Since 1990, the Court has held unconstitutional seven different federal laws on the grounds that they extended beyond federal powers into the domain of the states."). Not everyone has always seen it this way. *See* Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741, 741 (2000) (asserting that, except for *United States v. Lopez*, 514 U.S. 549 (1995), and *City of Boerne v. Flores*, 521 U.S. 507 (1998), the Court's federalism decisions "do not yet fundamentally threaten" Congress's enumerated powers). Professor Dorf delivered this paper at a symposium held in October of 1999; since then, the Court has struck down three more federal statutes — two that attempted to regulate state conduct directly — declaring that they exceeded the scope of Congress's enumerated constitutional powers. *See Garrett*, 531 U.S. at 367-72 (holding that section five of the Fourteenth Amendment did not authorize Congress to subject state governments to a federal law prohibiting discrimination against the disabled, given insufficient record evidence of a pattern of actual state discrimination); United States

These ground rules demand that the Supreme Court's power over state courts be clearly limited and exercised with discipline. Yet at the same time — despite the black-letter rule barring state-ground reversals — federal law's supremacy does seem to depend on some federal judicial monitoring of state courts to make sure they do not exploit the opportunity antecedent state grounds present to thwart federal interests and then evade review behind a disingenuous "adequate" state ground.[58] So, how to enforce constitutional supremacy within real jurisdictional limits?

The first step is easy, for the Court may claim jurisdiction to *review* state grounds from a perfectly ordinary source: like any other federal court, it may exercise the jurisdiction necessary to determine its own jurisdiction.[59] Thus, given the Court's statutory appellate jurisdiction, granted since 1789, to review state courts' *federal*-law decisions,[60] the Court must have the power to monitor whether its authority is being compromised by a state's evasive mishandling of an antecedent state-law question. In other words, just as a federal diversity court may ask whether a party is lying about his state of citizenship or the dollar amount in controversy,[61] so may the Supreme Court ask whether a state-court judgment apparently resting on state grounds does genuinely rest there or instead masks an attempt to disfavor the federal interest standing logically next in line.[62]

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v. Morrison, 529 U.S. 598 (2000) (holding that neither section five of the Fourteenth Amendment nor the Article I commerce clause authorized Congress to create a federal civil remedy for gender-related violence in the Violence Against Women Act); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (holding that section five of the Fourteenth Amendment did not authorize Congress to subject state governments to a federal law prohibiting age discrimination in employment). For some of Professor Dorf's views on these more recent Court decisions, see Dorf, *Equal Protection Incorporation*, *supra* note 50, at 1020 ("Even if one thinks, as I do, that the Court has applied the congruence and proportionality test in an overly restrictive manner, given the Court's premises, some attempt to draw an outer boundary around Congressional power is necessary. Within these premises, an account of Section Five that permits Congress to define the Fourteenth Amendment independently of the Court's Section One jurisprudence must, at a minimum, include a limit on the Section Five power.").

58. *See infra* Part III (discussing federal judicial suspicion of states as a possible source of "antecedence"-based jurisdiction).

59. I am grateful to Lash LaRue and Barry Friedman for suggesting this to me. *See generally* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[4] (3d ed. 2002) [hereinafter 2 MOORE'S FEDERAL PRACTICE] (explaining that, on challenge to a court's jurisdiction, the trial court may take and weigh evidence to confirm its jurisdiction; "the existence of disputed material facts does not preclude the trial court from evaluating for itself the merits of jurisdictional claims").

60. *See* Judiciary Act of 1789, § 25, 1 Stat. 73, 85 (grant now codified at 28 U.S.C. § 1257 (1993)).

61. *See* 28 U.S.C. § 1441 (1994) (granting federal district courts jurisdiction over civil actions between parties who are citizens of different states, where the amount in controversy exceeds $75,000, exclusive of interest and costs); 2 MOORE'S FEDERAL PRACTICE, *supra* note 59, § 12.30[4].

62. *See infra* Section II.C.3 (discussing how some early nineteenth century Court deci-

But if the Court's jurisdiction to *review* state grounds does rest on this practical basis, then the Court should not be free to *reverse* a state-law decision for just any reason once that review is underway. To the contrary: if the Court has jurisdiction to review a state ground because it needs to check whether a state court is cheating federal law then the Court should be able to reverse that state-law judgment only where it can identify and substantiate some concrete indication that the state court has deliberately manipulated state law to thwart federal law and circumvent Supreme Court review.[63] That is, if potential state-court evasion is the "evil presented," then only state-court evasion justifies reversal.[64] The Court should not, then, claim power to disturb state rulings just because it found them erroneous, or even "egregiously" wrong, under state law.[65]

It may be unrealistic to require the Court, considering a single case, to document a state's "widespread pattern" of federal-law violations (like the Court now requires before Congress may regulate states under the Fourteenth Amendment),[66] or even a state's "systematic"

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sions handled suggestion of actual state wrongdoing).

63. *See* Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 49 (1944) (Douglas. J., concurring) (arguing that the Court lacked justification for inquiring at all into the New York court's state-law judgments on property questions antecedent to a federal due process challenge in the absence of any "suggestion here that state law has been manipulated in evasion of a federal constitutional right"); *see also* Hill, *supra* note 10, at 965 (characterizing the *Demorest* concurrence as contending that the "state ground could be disallowed only if circumstances warranted the inference of a willful evasion of the federal claim").

64. *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (demanding "congruence" between state wrongdoing and federal response). *See generally supra* notes 31-32 and accompanying text.

65. *Cf.* Hill, *supra* note 10, at 969-70 & n.106 (advocating Supreme Court reversal of state-court state-law decisions for "egregious error" or "arbitrariness" without inquiring into states' actual bad faith or hostility to the federal claim logically next in line, in order to "ensur[e] that federal claims are given their due under the supremacy clause"). Some have proposed these standards as offering a kind of "objective" proxy for identifying state-court misbehavior. *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 269, 269-71 (2d ed. 1990); Hill, *supra* note 10, at 969-70 & n.106; *see also* Krent, *supra* note 22, at 520 (analyzing the Court's ex post facto jurisprudence as attempting to prohibit a state's "arbitrary governance," and observing, "[p]erhaps no direct way to police judicial bias exists, but if a [court's state-law] construction is foreseeable, then it makes it less likely that animus was a determining factor"). While the Court has, in the past, inquired into the accuracy of a state-law judgment as one way to determine whether the state court had improperly "evaded" federal law, it has never gone so far as to hold that it could reverse state grounds on a finding of "erroneousness" alone, without the further inference of state misbehavior. Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157 (1917). *See generally* Part II (discussing cases). For one 1930 decision in which the Court used language that, while confusing, might be construed to endorse state-grounds reversal where *either* erroneous or indicating evasion, see *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540-41 (1930).

66. Bd. of Trustees v. Garrett, 531 U.S. 356, 367-72 (2001) (striking down a federal statute, passed under section five of the Fourteenth Amendment, because Congress had failed to compile a record proving a "widespread pattern" of state wrongdoing); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 89-91 (2000) (same); *City of Boerne*, 521 U.S. at 530-31 (same). For one critique of the Court's emphasis in these cases on the state of Congress's "legislative

discrimination against federal law (like the Court may now demand before it will use the supremacy clause to force a state court to hear a federal-law claim).[67] But it should be possible for the Court to articulate some concrete reason, particular to the case before it, why that particular state court should not be taken at its word on what state law means.[68] Indeed, the Court's own recent habeas corpus rules require an analogous finding: unless an inferior federal court can say that a state court's federal-law reading was not "reasonable" or a "good-faith application" of federal law, that reading must be honored even if it is wrong.[69] Surely a state court deserves no less respect, on direct review, when it decides a state-law question than it gets, on collateral review, when it decides federal-law questions in serious criminal, even capital, cases.

By demanding a sign of actual state wrongdoing, the proven mistrust proposal departs significantly from other commentary and from the Court's practice for most (but not all) of its history.[70] The modern Court only rarely takes suspicion of state-court cheating into account,

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record," see William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 89-90 (2001) (summarizing article's observation that between 1995 and 2001, the Court invalidated six federal statutes "based at least in part on the inadequacies of the record before Congress," and arguing that the Court now inappropriately "import[s] . . . from different institutional settings . . . the expectation that a written record will justify a legal judgment").

67. Alden v. Maine, 527 U.S. 706, 758 (1999); *see infra* Part III (discussing *Alden*).

68. For one possible analogue, consider the *Younger* abstention doctrine, in which the Court has carefully dictated what kinds of *facts* must be shown before a federal court may overcome the federalism-based presumption against interfering with a state-court proceeding where federal claims are at issue. Younger v. Harris, 401 U.S. 37 (1971) (indicating the facts that may show that a state proceeding reflects "bad faith or harassment," including repeated criminal indictment followed by dismissal and improper public use of illegally seized documents); *see also* HART & WECHSLER, *supra* note 6, at 1269 (noting that the *Younger* facts did not "exhibit any special factors that might tend to justify federal interference with a pending judicial action, such as a pattern of bad faith or harassment in which state courts were arguably complicit"); *id.* (stating that "[w]hatever may have been the case in other eras, by 1971 [when *Younger* was decided] there was no reason to think state courts generally untrustworthy in cases involving claimed federal rights") (citing Friedman, *Revisionist Theory*, *supra* note 6, at 561-63).

69. Teague v. Lane, 489 U.S. 288 (1989); *see* O'Dell v. Netherland, 521 U.S. 151, 156 (1997) ("[T]he *Teague* doctrine validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.") (internal quotations omitted); *see also* Williams v. Taylor, 529 U.S. 362, 410-12 (2000) (construing 1996 statute prohibiting federal habeas relief unless state court's federal-law decision inter alia "involved an unreasonable application of clearly established Federal law." The Court noted that, although "[t]he term 'unreasonable' is no doubt difficult to define . . . the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law"). It remains a somewhat open question whether this limitation on federal habeas power is jurisdictional or not. *See* Collins v. Youngblood, 497 U.S. 37, 41 (1990) (holding that, unlike ordinary subject matter jurisdiction rules, a state party could waive *Teague* limits).

70. *See infra* Section II.C.3 (discussing cases, over the roughly fifty years straddling the turn of the twentieth century, where the Court suggested actual state misbehavior when deciding whether state grounds were "adequate" to preclude Supreme Court review).

and then only when selecting which level of deference to give a state-court's reading of state law on the merits.[71] And even those who justify the Court's state-ground reversals on the need to police states' supremacy clause violations discount particularized state-court conduct, taking instead a more structural, prophylactic stance that simply assumes enough cheating by all states, over time, to warrant Supreme Court review all of the time.[72] Because an antecedent state ground always creates the *opportunity* for state courts to cheat federal law, that is, many consider sufficient the structural *probability* that a single state court will take that chance to cheat in a single case.

By requiring the Court to identify more specific wrongdoing, the proven mistrust proposal also contradicts scholars who have argued that the Court's jurisdiction over state courts would better rest on standards that free the Court from having to "attribut[e] bad faith to state officers sworn to uphold federal law."[73] Certainly, to make the

71. *Compare, e.g.*, Bush v. Gore, 531 U.S. 98, 136, 140 (2000) (Ginsburg, J., dissenting) (arguing that, absent proof of state "recalcitrance" comparable to what she thought southern courts showed during the mid-twentieth century civil rights struggles, the concurrence's review showed insufficient deference to the Florida court's state-law reading: "There is no cause here to believe that the members of Florida's high court have done less than 'their mortal best to discharge their oath of office.' ") (quoting Sumner v. Mata, 449 U.S. 539, 549 (1981)), *with Bush*, 531 U.S. at 114, 115, 119 (Rehnquist, C.J., concurring) (claiming to conduct "deferential" state-grounds review, concluding that the judgment was "of course, absurd" and one "no reasonable person" would reach). Suspicions of state-court misbehavior may also affect the Court's discretionary grant or denial of certiorari, quite apart from raising more fundamental questions about jurisdiction. *See* Strauss, *supra* note 40, at 746 (suggesting that the *Bush* majority's "inchoate" sense that the Florida supreme court had misbehaved overcame the "strong presumption" against granting certiorari where, as in *Bush*, the case "raised difficult issues of state law and no obvious issues of federal law").

Professor Weinberg identifies another way in which the Court, on direct review, may express its "[r]age" at state court "arbitrar[iness]," "intransigen[ce]" or "recalcitrance": by reversing a state-court judgment and entering final judgment without remand. *See* Weinberg, *supra* note 40, at 642-44 (observing that in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816), the Supreme Court "short-circuited the recalcitrant Virginia Court of Appeals below — with whom it had been at odds throughout the Marshall Court period — and reversed without remanding[,]" with the effect that "[t]itle to vast lands in Virginia eerily changed hands up there on the Court's Olympic heights."); *see also id.* at 643 (noting that "Bush v. Gore puts one in mind of Martin v. Hunter's Lessee," and that "other illustrious examples of the use of and need for reversal and remand" include *NAACP v. Alabama*, *supra*). *But see id.* at 643 (observing that Chief Justice Rehnquist's *Bush* concurrence cited *Martin* and *NAACP v. Alabama* "only to make the quite different point that the Supreme Court must sometimes interpret state law for itself in deciding a federal question").

72. *See, e.g.*, HART & WECHSLER, *supra* note 6, at 521 (where state-law grounds are antecedent to a federal claim, "some [Supreme Court] review of the basis for the state court's determination of the state-law question is essential if the federal right is to be protected against evasion and discrimination — as *Martin* [*v. Hunter's Lessee*] itself exemplifies"); Wechsler, *supra* note 11, at 1055, 1056 (noting that antecedence-based appellate jurisdiction permits direct review where "necess[ary] to maintain the effectiveness and uniformity of the federal law"). *But see City of Boerne*, 521 U.S. at 530 ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.").

73. Hill, *supra* note 10, at 970; *see* REDISH, *supra* note 65, at 269-71 (suggesting preference that the Court avoid the "difficult and awkward" task of "inquir[ing] into the motives

Supreme Court come right out and call a state court a cheat would strain the conventions of comity between federal and state judiciaries.[74] But that conventional cordiality may only encourage the Court to interfere more frequently (and for less reason) with state courts' prerogative to say definitively what state law means. If the Court need find only error to reverse state grounds (even egregious error) then state courts deciding state law stand in no better relation to the Court than does any inferior federal court deciding federal law, no matter how deferential the Court's attitude.[75] By contrast, requiring the Court to articulate some concrete reason to mistrust a particular state court before reversing its state-law judgment would force the Court to show a real and functional respect — not just good manners — towards all the others.

Indeed, imposing the discomfort of calling states names is, in part, the point. By so raising the price of state-ground reversals, the proven mistrust rule would constrain the Court's casual use of a reversal power that does, after all, both encroach on states' turf and exceed the limits of the Court's formal jurisdiction — limits with both constitutional and statutory roots.[76] That ought to be an uncomfortable thing to do.

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of the state court"); Klarman, *supra* note 27, at 1738 (noting that the cases on which the *Bush v. Gore* concurrence relied for authority to reverse state-law decisions "involved situations where state courts had manifested, beyond a shadow of a doubt, the willingness to defy federal law"; not addressing the fact that the Court did not explicitly say so in the decisions themselves); *see also* Lapides v. Bd. of Regents, 122 S. Ct. 1640, 1645 (2002) (noting that, "while jurisdictional rules should be clear," a state's "[m]otives" for removing case from state to federal court "are difficult to evaluate"). In a letter to this author dated March, 2002, Professor Hill restated his view more strongly:

> In what circumstances, if ever, cognizance should be taken of judicial motive, presents a problem more basic than either of us have dealt with. I have always understood inquiry into legislative motive to be strongly discouraged, if not actually forbidden. I have assumed that the question of judicial motive should be treated similarly.

Letter from Alfred Hill to Laura S. Fitzgerald, Mar. 20, 2002 (on file with the author); *cf.* Michigan v. Long, 463 U.S. 1032 (1983) (where ambiguous whether the state-court judgment rests on state or federal-law grounds, the Court adopted a presumption against state-law reliance, thus ensuring Supreme Court jurisdiction to review more state-court judgments absent a "clear statement" to contrary by state court).

74. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971). It may make Congress just as uncomfortable to prove a broad pattern of particularized misconduct before enacting legislation to regulate states. *See* Bd. of Trustees v. Garrett, 531 U.S. 356, 367-72 (2001). This Article asks, but does not answer, whether imposing that discomfort on Congress is appropriate if it is too much to impose on the Court. *See infra* Part V.

75. *Cf.* Alden v. Maine, 527 U.S. 706, 755 (1999) (holding that the Constitution requires Congress to show actual, not theoretical, respect for state courts, which imposes a practical constraint on power to legislate); *see also* United States v. Lopez, 514 U.S. 549, 583 (1995) (referring to "etiquette of federalism").

76. Herb v. Pitcairn, 324 U.S. 117 (1945); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630, 635 (1875) (explaining the adequate and independent state grounds doctrine as required by federalism principles and by the Article III rule against advisory opinions); *see also* Judiciary Act of 1789, § 25, 1 Stat. 73, 85 (grant now codified at 28 U.S.C. § 1257 (1993)). *See generally infra* Part II (discussing sources of jurisdictional limit).

II. THE WINDING PATH OF A JURISDICTIONAL CLAIM

Where has the Court gotten the power to reverse state courts' state-law judgments? Neither the Constitution's text nor its framing history offer much to work with. Article III does not mention state courts or state law at all.[77] And while Article VI makes federal substantive law "the supreme Law of the Land," binding both federal courts and "the Judges in every State,"[78] the Constitution nowhere specifies what effect *state* law ought to have — in federal or state court — on nonfederal questions.[79] Of course, during framing and ratification, the Constitution's friends and enemies did thoroughly debate the role of state courts in the new system, including whether state courts should be allowed to decide questions of federal law.[80] And in wrangling over what became the supremacy clause they addressed state courts' obligations to honor and enforce federal law.[81] Yet they paid

77. *See* U.S. CONST. art. III.

78. U.S. CONST. art. VI.

79. For one argument that Article III was meant to include state common law among the "laws of the United States" placed within the federal courts' potential subject matter jurisdiction, see 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION 610-40 (1953) (developing argument); *see also* 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION 785, 781 (1953) (identifying the moment when the Court, under Jeffersonian influence, gave up its constitutionally mandated jurisdiction as United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (holding that Article III granted federal courts no implied power to exercise common-law criminal jurisdiction)); *see also* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE (Wythe Holt & L.H. LaRue eds., 1989) (critiquing *Erie*'s reading of section 34 and arguing that in 1789 there was no such thing as "state [common] law" as we now think of it, articulated by a formal and hierarchical state judiciary).

80. For a thorough analysis of the framing and ratification debates over the state courts' capacity to decide federal questions, see generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 172-74 (1996) (summarizing the debates during the Convention on the question of whether state courts could obviate the need for an inferior federal judiciary); Collins, *supra* note 3, at 119-26; *id.* at 126-29 (discussing the debates leading to the Madisonian Compromise, and later affecting debates on the First Judiciary Act); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998) (offering a thorough recounting of the convention debates that produced Article III and the supremacy clause).

81. Those debates make clear that the Supreme Court was meant to exercise appellate jurisdiction over state-court decisions on federal questions as a means of enforcing states' obligation to follow federal law. Hamilton, for example, argued that the Supreme Court must have appellate jurisdiction over state-court decisions on Article III questions in order to ensure national uniformity; otherwise, state courts would have to be denied jurisdiction over such questions altogether:

> The national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the union, and an appeal from them will as naturally lie to that tribunal, which is designed to unite and assimilate the principles of national justice and the rules of national decisions. The evident aim of the plan of convention is that all the causes of the specified classes, shall for weighty public reasons receive their original or final determination in the courts of the union.

little attention to the converse question: what power should the Supreme Court have to reverse a state court's decision declaring what *state* law means?[82]

The Judiciary Act of 1789, by its terms, answered, "None," and thus first codified the black-letter rule that the Supreme Court may review state-court judgments only on questions of federal law. While the Act's section 25 authorized the Court to "re-examin[e] and revers[e] or affir[m]"[83] a final judgment by a state's "highest court" on certain specified federal-law questions,[84] it denied the Court jurisdiction to review state-court decisions on all other questions, including

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THE FEDERALIST NO. 82, at 556 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see id.* at 555-56.

82. During the ratification debates, Article III's critics, like George Mason, charged that "the judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several States." JONATHON ELLIOT'S DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 475 (James McCllelan & M.E. Bradford eds., 1989). But its advocates insisted, to the contrary, that the national judiciary would dominate state courts *only* on questions that were purely federal. As Hamilton argued, Article III "carefully restricted" the federal judiciary's jurisdiction "to those causes which are manifestly proper for the cognizance of the national judicature," THE FEDERALIST NO. 81, at 552 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), which Hamilton limited to those actually specified in Article III. *See* THE FEDERALIST NO. 80, at 534-41 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (discussing Article III's heads of jurisdiction as the "proper objects" of a federal judiciary). When Hamilton did mention the Supreme Court's involvement with the "common law," it was only to suggest that some Article III cases would arise in a common-law "mode" — that is, using the traditional procedural forms of a common-law, as opposed to civil law, claim — thus limiting the Court to reviewing questions of law, and not of fact. *See* THE FEDERALIST NO. 81, at 551 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Elsewhere, Hamilton more specifically limited the scope of Article III's "federal question" jurisdiction to causes "which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation," and "those which concern the execution of the provisions expressly contained in the articles of union." THE FEDERALIST NO. 80, at 539, 534-35 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

83. *See* Judiciary Act of 1789, § 25, 1 Stat. 73, 85 (now codified at 28 U.S.C. § 1257 (1993)).

84. *Id.* Congress did not authorize the Court to review state-court decisions on just *any* federal-law question, but only those

> in any suit . . . where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up of claimed by either party, under such clause of the said Constitution, treaty, statute or commission . . . .

1 Stat. 73, 85 (1789). Section 25 thus conditioned the Court's appellate jurisdiction over state-court judgments not only on a state court's decision of a federal question, but on that court's decision of a federal question *in a particular way* — against the party attempting to raise federal law to his advantage. The Supreme Court lacked jurisdiction if the state court had decided a federal question in that claimant's favor, no matter how erroneous that decision might be. This limit on the Court's appellate jurisdiction remained until repealed by Congress in 1914. Act of Dec. 23, 1914, c. 2, 38 Stat. 790.

those involving state law.[85] And, at least since 1875, the Court has embraced the adequate and independent state grounds doctrine, which goes beyond the statute's basic bar: where a state court's final judgment can rest on state law standing alone, then the Court lacks jurisdiction[86] even to review any federal question the state court may have decided too, no matter how erroneously.[87]

At the black-letter level, these rules remain in place today.[88] Yet, since at least 1813 the Court routinely has reversed state courts on state-law questions, leaving behind a string of ambiguous and contradictory clues to explain why.

A. *The Court's Early Claims:* Martin v. Hunter's Lessee *and* Osborn v. Bank of United States

In *Martin*, the early Court claimed a broad power to reverse state grounds from two separate sources: from the Court's statutory and constitutional role of enforcing federal law's supremacy,[89] and from reading section 25 to grant an expansive supplemental jurisdiction over all questions — state or federal — arising in any case where federal interests may lurk.[90]

Martin capped more than twenty-five years of litigation over land in Virginia's Northern Neck, owned by Thomas Sixth Lord Fairfax at

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85. Section 25 concluded:

> But no other error shall be assigned or regarded as a ground of reversal in any such case . . . than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

Judiciary Act of 1789, § 25, 1 Stat. 73, 85.

86. The Court has recognized this doctrine to impose a jurisdictional — not merely prudential — bar at least since 1893. *See* Eustis v. Bolles, 150 U.S. 361 (1893); *see also supra* note 10 (citing additional sources).

87. *See* Michigan v. Long, 463 U.S. 1032 (1983); Hill, *supra* note 10, at 983 n.166 (noting that the presence of an adequate state ground deprives the Supreme Court of "coercive power" to force state courts to reconsider a "waiver" of compliance with state procedural grounds because "the presence of an adequate state ground means either a lack of jurisdiction; or an extremely limited jurisdiction which encompasses the power to affirm, or to remand for special purposes, but not to reverse" (citing cases)).

88. *See* Lee v. Kemna, 534 U.S. 362, 375 (2002) (applying adequate and independent state grounds doctrine in separate context of federal habeas corpus; also discussing doctrine's continued force on Supreme Court direct review of state-court judgments); Coleman v. Thompson, 501 U.S. 722, 729 (1991) (same). They remain in place even though Congress long ago repealed the explicit statutory language that codified them. *See infra* notes 118-134 and accompanying text (discussing Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875)).

89. *See infra* Section II.A.1 (discussing *Martin*'s supremacy-based claim).

90. *See infra* Section II.A.2 (discussing *Martin*'s supplemental jurisdiction claim). As I discuss in Part III, *infra*, both of *Martin*'s claims today influence prominent commentators in their pursuit of a theory to justify the Court's state-grounds reversals.

his death in 1781.[91] As viewed by the Supreme Court, the dispute centered on one question: had the Commonwealth of Virginia, under nonfederal common law and state statutory rules, legally confiscated that land from its English owner by the time new treaties between the United States and Great Britain prohibited states from thereafter seizing English subjects' property?[92] If Virginia had legally seized the land in time, that left nothing in English hands for the treaties to protect (and Virginia could grant good title to another, Hunter's lessor[93]). If not, the land had remained in what became the federally-protected hands of Lord Fairfax's English heir, Denny Fairfax.[94] Virginia's highest court rejected Martin's claim and awarded the property to Hunter's lessor,[95] but the U.S. Supreme Court disagreed: it held that title had not legally passed to Virginia in time, and so the land belonged to the Fairfax heir.[96]

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91. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 355-56 (1816). First commenced in a Winchester, Virginia state court in 1791, the suit was an action in ejectment, a nonfederal cause of action through which two or more adverse claimants to the same real estate could resolve which held the superior right to possess it. *See Martin*, 14 U.S. (1 Wheat.) at 355-56; *see also id.* at 304. As discussed below, *infra* notes 92-103 and accompanying text, this long-running property dispute produced two separate Supreme Court decisions, issued three years apart: 1816's *Martin* is the second and more familiar decision; the first was *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813). The parties' stipulation of facts appears in *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 604. For a thoroughly detailed discussion of all the issues and events in this convoluted litigation, see 2 CROSSKEY, *supra* note 79, at 785-817.

92. Two treaties entered the dispute: 1783's Treaty of Peace and 1794's Jay Treaty. *See Martin*, 14 U.S. (1 Wheat.) at 356; *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 621-24 (discussing arguments based on 1783 Treaty of Peace); *see also id.* at 624-28 (discussing arguments based on 1794 Jay Treaty, which further protected the property rights of "British subjects who now hold lands in the territories of the United States . . . ") (quoting language of Jay's Treaty). The parties' numerous arguments emphasized each treaty, both together and in the alternative. The Supreme Court, deciding the merits, emphasized the 1794 Treaty as the one which dispositively marked Virginia's last chance to confiscate the property from Fairfax hands without violating federal law. *See Fairfax's Devisee*, 11 U.S. (7 Cranch) at 627; *see also Martin*, 14 U.S. (1 Wheat.) at 359-60 (noting that in deciding the merits, "the [C]ourt did not deem it necessary to rest . . . upon the treaty of peace, believing that the title of the defendant was, at all events, perfect under the treaty of 1794"). But in later resolving the challenge made to the Court's appellate jurisdiction altogether, the Court emphasized the 1783 Treaty of Peace. *See id.* at 356-57.

93. *See Martin*, 14 U.S. (1 Wheat.) at 356 (recounting that the original plaintiff, Hunter's Lessee, "claimed the land under a patent granted to him by the state of Virginia, in 1789, under a title supposed to be vested in that state by escheat of forfeiture").

94. *See id.* at 356 (recounting that the "original defendant claimed the land as devisee under the will of Lord Fairfax"); *accord Fairfax's Devisee*, 11 U.S. (7 Cranch) at 621-24 (elaborating adverse claims). Denny Fairfax died before the Virginia Court of Appeals decided the dispute, devising his Virginia holdings to Philip Martin, who was then substituted as party appellee in that court and as defendant in error in the Supreme Court. *See* Hunter v. Fairfax's Devisee, 15 Va. (1 Munf.) 218 (1810).

95. This gave Hunter's lessee the superior claim to possession and the right to an order ejecting the Fairfax claimant. *Hunter*, 15 Va. (1 Munf.) at 231-32. At that time, Virginia's high court was called the Court of Appeals.

96. *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 628 (announcing the Court's "opinion that the judgment of the Court of Appeals of Virginia ought to be reversed," and that the pro-

The Court's decision, explained by Justice Story, boiled down to two nonfederal rulings. First, he declared, the common law permitted a sovereign (like the Commonwealth of Virginia) to confiscate the property of an alien (like the British Fairfaxes) only if that sovereign executed an adjudication of escheat, known as an "inquest of office,"[97] which all agreed Virginia had not done.[98] Second, while a sovereign could always legislatively "repeal" the common law inquest requirement,[99] Justice Story declared *as a matter of Virginia law* that Virginia

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Fairfax judgment of the state trial court should be "affirmed"). The Court entered a mandate "requiring the judgment rendered in this very cause . . . to be carried into due execution." *Martin*, 14 U.S. (1 Wheat.) at 323.

Perhaps undercutting *Martin*'s assertion of broad appellate jurisdiction to reverse state courts on state-law questions, *see infra* note 103 and accompanying text, the state court appeared to decide the dispute on more ambiguous grounds than either the Supreme Court then — or I have now — emphasized. *See Hunter*, 15 Va. (1 Munf.) at 231-32, 235-38, where the two voting Virginia judges agreed only on the ground that state legislation passed in 1796 to settle this particular dispute compelled a ruling in favor of Hunter's lessee, whose claim derived from Virginia's confiscation; only one of those two judges also declared, in the alternative, that Virginia had successfully seized the property by 1782, leaving the 1783 Treaty of Peace with "nothing left whereon to operate." *Id.* at 231; *see also* HART & WECHSLER, *supra* note 6, at 496 (summarizing the Virginia judges' opinions). The Supreme Court, however, refused to consider the 1796 compromise legislation as a grounds for judgment because it rested on matters outside the formal record — which, in turn, consisted of a "special statement of facts in the nature of a special verdict" agreed upon by the parties. *Martin*, 14 U.S. (1 Wheat.) at 356; *see also Hunter*, 15 Va. (1 Munf.) at 223 (noting, "[a]t the trial, the parties agreed a case in lieu of a special verdict"). Thus, the Supreme Court reviewed what it treated as the Virginia's court decision on the question highlighted here: whether Virginia had properly confiscated the property before the federal treaties went into effect. *See Fairfax's Devisee*, 11 U.S. (7 Cranch) at 620-28; *see also Martin*, 14 U.S. (1 Wheat.) at 360 (rejecting the argument that the Virginia court had decided the case under state compromise legislation, concluding that "[a]t all events, we are bound to consider that the court did decide upon the facts actually before them," that is, those facts about Virginia's various efforts to confiscate the Fairfax property before the treaties were operative). The Virginia Court of Appeals opinions would not have entered the record presented to the Supreme Court on the writ of error authorized by section 25 of the Judiciary Act of 1789. *See* § 25, 1 Stat. 73, 85 (now codified at 28 U.S.C. § 1257 (1993)).

97. Justice Story's "inquest of office" requirement rested exclusively on English common-law authorities. *See Fairfax's Devisee*, 11 U.S. (7 Cranch) at 621-22 (citing English precedents); 3B AM. JUR. 2D, *Aliens and Citizens* § 2553 (1998) (describing the "inquest of office" as "adjudication of escheat"); *see also* Doe *ex dem.* Governeur's Heirs v. Robertson, 24 U.S. 332 (1826) (discussing requirement). Justice Story also referred to "inquest of office" as an "office of entitling" which was "necessary to give this notoriety, and fix the title in the sovereign." *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 621. In the Virginia courts, Hunter's lessee had admitted that an inquest of office would have been necessary to a successful confiscation "under the general laws as applying to ordinary cases." *Hunter*, 15 Va. (1 Munf.) at 224.

98. The parties stipulated to this fact. *See Fairfax's Devisee*, 11 U.S. (7 Cranch) at 622 (noting stipulation); *accord Hunter*, 15 Va. (1 Munf.) at 223-34. Thus, Justice Story noted, "it would seem therefore to follow, upon common law reasoning, that the grant [from Virginia] to the lessor of the original Plaintiff . . . issued improvidently and erroneously, and passed nothing." *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 622.

99. Counsel for Hunter's lessee had contended "[t]hat the common law as to inquests of office and seizure, so far as the same respects the lands in controversy, is completely dispensed with by statutes of the commonwealth, so as to make the grant to the original Plaintiff . . . complete and perfect . . . ." *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 622; *see also*

had not done so, rejecting several arguably good statutory candidates[100] including one, enacted in 1782, which a Virginia Court of Appeals judge had read as legally confiscating the land before the federal treaties took effect.[101] But ruling otherwise, the Supreme Court

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Hunter, 15 Va. (1 Munf.) at 234 (noting claimant's argument that Virginia's statutes "were equivalent [to], and supplied the place" of the inquest of office). The Supreme Court agreed that state statutes could dispense with the common-law requirement: "we will not say that it was not competent for the legislature, (supposing no treaty in the way) by a special act to have vested the land in the commonwealth without an inquest of office for the cause of alienage." *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 622; *see also id.* at 623 (referring to permissible "repeal" of common-law requirement).

100. *See Fairfax's Devisee*, 11 U.S. (7 Cranch) at 622-27 (discussing and rejecting repeal arguments based on Virginia statutes enacted in 1777, 1779, 1782 — all before the 1783 Treaty of Peace — and also two passed in 1784 and 1785, before the 1794 Jay Treaty). Justice Story rejected all the Virginia candidates because they failed to satisfy his own "clear statement rule": given how "useful," "important," and "salutary" he considered the common-law inquest of office rule, Justice Story declared, "The common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Id.* at 623. *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (analyzing clear statement rules as "substantive" canons that reflect judges' own values and superimpose them onto the interpreted texts). One Virginia Court of Appeals judge took a different approach to statutory interpretation, and identified a 1782 statute as effectively — although implicitly — repealing the common law. *See Hunter*, 15 Va. (1 Munf.) at 230-31 (Roane, J.) (citing, inter alia, Kinney v. Beverley, 12 Va. (2 Hen. & M.) 318, 344 (1808). *But see Hunter*, 15 Va. (1 Munf.) at 233-34 (Fleming, J.) (disagreeing with Judge Roane and arguing that the legislature must be explicit in substituting other means of confiscation for "office found").

101. *See Hunter*, 15 Va. (1 Munf.) at 229-30. Some detail is necessary to judge whether the Virginia judge's reading was plausible. The 1782 statute was enacted after the 6th Lord Fairfax died in 1781, leaving the disputed land to Denny Martin. Although the deceased Lord Fairfax had been a citizen of Virginia, Martin remained a British subject. The Virginia legislature, concerned that Lord Fairfax's extensive Virginia landholdings "had devolved on alien enemies," *id.* at 228, passed the 1782 statute to gain control over that property's disposition. *Id.* As to some of the land — that which had been granted to the use of others during Lord Fairfax's life — the statute sequestered the quit rents due in that legislative session and ordered them paid into the state treasury. *Id.* As to other portions of the land — that which was vacant, or "waste and ungranted," *id.* at 223, at Lord Fairfax's death (including the land at issue in this litigation) — the 1782 statute provided that anyone wishing to "make entries for vacant lands" could do so under the same procedures that Lord Fairfax himself had followed in his own offices, and that such entries were "good and valid in law" until the legislature adopted another "mode" of allocating the property. *Id.* at 228-29. Judge Roane, of the Virginia Court of Appeals, concluded that this provision amounted to a legislative act of confiscation without inquest of office:

> As there could be no conceivable motive with the Legislature to abstain from taking possession of those vacant lands, and granting them out, thereby to settle the country while it was taking possession of the quit rents and granted lands thereof, the authorizing entries to be made therefor, is as strong a mode as they could possible have adopted to declared that they then and there took possession of the same.

Id. at 229. Thus, Judge Roane concluded, the 1782 statute accomplished a successful confiscation, notwithstanding the common-law rule:

> [I]n fact, this new and ridiculous idea of the necessity of ordinary and particular inquests of office, as applying to the case in question, or of any other symbol of investiture, than that most notorious one of all, (an act of the Legislature,) had not then occurred to the mind of the General Assembly: in relation to the Commonwealth, the mere assumption of the lands by law was sufficient, though, as to the grantees of the Commonwealth, other acts were nec-

concluded that Virginia had not gained good title over the Fairfax lands before the treaties placed them under federal protection.[102]

But what authorized the U.S. Supreme Court to decide all these dispositive but nonfederal questions? The Court gave two separate answers, developed in two later cases, *Martin v. Hunter's Lessee*[103] and *Osborn v. Bank of United States*.[104]

1. *The Court's Role of Enforcing Federal Law's Supremacy Authorizes State-Ground Reversals*

Martin, the Court's second and last decision in the Virginia-Fairfax land dispute, is best known for broadly reading Article III to claim for the Court a special role of enforcing federal law's constitutional supremacy in state courts, so justifying the Court's appellate jurisdiction to review state courts' *federal*-law decisions.[105] But *Martin* also invoked

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essary to complete their title: it is, however, enough to avoid the bar presented by the [1783] treaty that the title (including the possession) of the lands was then completely in the Commonwealth.

Id. at 230. This 1782 confiscation by statute, according to Judge Roane, meant that "the title of the Commonwealth to the land in question, having been perfected by a seisin under the act of 1782, or, in other words, the confiscation being complete, that treaty had nothing left whereupon to operate." *Id.* at 231. The other voting member of Virginia's Court of Appeals disagreed. *See id.* at 234-35 (Fleming, J.) (concluding that the 1782 legislation showed "the Legislature was quite undetermined on the subject of this territory, and had done nothing that squinted at an inquisition of office: and, therefore there was, from any act of government at that time, scarce a semblance of a title vested in the Commonwealth").

102. *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 627 (concluding that Virginia's failure to properly confiscate the disputed property by 1794, at the latest, meant that the 1794 Jay Treaty "completely protect[ed] and confirm[ed]" the Fairfax claimant's title, even if the 1783 Treaty of Peace had left him "wholly unprovided for").

103. 14 U.S. (1 Wheat.) 304 (1816); *see, e.g.*, David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 686 n.356 (1982) (identifying *Martin*'s "final" question whether the Court "had jurisdiction not only to construe the treaty but also to determine whether escheat had been accomplished before the treaty took effect" as a purely nonfederal question). The *Martin* decision followed the Virginia high court's defiance of the Court's 1813 order to award the disputed property to Denny Fairfax, on the grounds that the Supreme Court lacked appellate jurisdiction over *any* decision by a state court. *See Martin*, 14 U.S. (1 Wheat.) at 323-24 (quoting the Court of Appeals' explanation for refusing to execute the mandate). *Martin* is better known for its separate ruling, in response, that the Constitution meant the Supreme Court to review state-court decisions on *federal* questions. *See id.* at 338-52; *see also* Collins, *supra* note 3, at 55-58; Currie, *supra*, at 681-87.

104. 22 U.S. (9 Wheat.) 738 (1824).

105. *See Martin*, 14 U.S. (1 Wheat.) at 338-52 (reasoning that the Constitution authorized Congress to grant appellate jurisdiction over state-court judgments because otherwise the Court could not carry out its Article III role of enforcing the supremacy and uniformity of federal law); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 210-19 (1985) (discussing Story's related argument that Article III mandates that certain federal-law questions be within the jurisdiction of some federal court; analyzing the merits and "mistakes" of Justice Story's mandatory view of federal-court jurisdiction); Collins, *supra* note 3, at 55-58 (discussing *Martin*'s significance for modern doctrines concerning state-court obligations and limitations under the

federal supremacy to claim the distinct power to decide any state-law question that blocked federal law's path through state court.[106] Brushing off arguments that the Court could consider only whether federal law gave Denny Martin a superior claim to the land, Justice Story declared that so limiting the Court's jurisdiction would permit state courts to "evade" appellate review "at pleasure."[107]

> How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. *If the court below should decide, that the title was bad, and therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty?*[108]

Unless state courts were always to have the last word on what federal law meant in cases like *Martin* — an unacceptable result given Story's supremacy-based reading of Article III — then the Court must of course have the power to reverse on state grounds.[109]

2. *Supplemental Jurisdiction Over State-Law Questions:* Martin *and* Osborn

Martin also justified state-ground reversals as a natural and necessary supplement to its statutory appellate jurisdiction to review state courts' *federal*-law decisions. When section 25 granted appellate jurisdiction over state-court "cases" involving federal questions — and not just over isolated federal questions — it gave the Court a broad supplemental jurisdiction to decide even nonfederal common-law and state statutory questions arising alongside federal questions in a single dispute.[110] Thus, once the Fairfax claimant argued that Virginia failed

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Constitution's supremacy clause); Currie, *supra* note 103, at 681-87 (discussing *Martin*'s reasoning on the constitutionality of appellate jurisdiction over state-court judgments on Article III questions).

106. *See infra* Part III (discussing the twentieth century Court's gradual return to a *Martin*-like approach to state grounds reversals).

107. *Martin*, 14 U.S. (1 Wheat) at 357.

108. *Id.* at 358 (emphasis added).

109. *See infra* Section III.A. (tracing more recent elaborations of this aspect of *Martin*).

110. Asking "[w]hat is the case for which . . . [section 25] provides a remedy . . . ?", Story responded, "a *suit* where is drawn in question the construction of a treaty." *Martin*, 14 U.S. (1 Wheat.) at 358 (summarizing section 25) (emphasis added). In reasoning other commentators have criticized as "disingenuous" and "questionable," Justice Story maintained that the federal treaty's presence in this dispute made review of the state-law questions unavoidable. He declared:

> How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of

to confiscate the land in time, leaving it in English hands long enough to gain federal protection under the post-War treaties,[111] the U.S. Supreme Court was free to decide even nonfederal questions in the same case.[112]

Martin claimed this supplemental jurisdiction primarily from section 25.[113] But eight years later, *Osborn v. Bank of United States*[114]

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the title, before the court can construe the treaty in reference to that title.

Id; *see also* 1 CROSSKEY, *supra* note 79, at 615 (calling reasoning "questionable"); Currie, *supra* note 103, at 686 n.356 (calling Story "disingenuous"). Professor Currie crisply identified Story's flaw: "As a matter of logic, the state court's threshold determination of its own law could certainly have been accepted . . . ." *Id.*; *cf.* Fox Film Corp. v. Muller, 296 U.S. 207, 210-11 (1935) (distinguishing adequate and independent state-law grounds for decision — over which the Supreme Court enjoys no appellate jurisdiction — from state-law decisions that "constitute a preliminary step which simply had the effect of bringing forward for determination the federal question," over which federal appellate jurisdiction may attach). For a more detailed discussion of when and how the Supreme Court has asserted appellate jurisdiction to review a state-law decision deemed *antecedent* to a federal claim, see *infra* notes 256-295 and accompanying text.

111. *Martin*, 14 U.S. (1 Wheat.) at 356. Justice Story reasoned:

> It is apparent . . . that the title thus set up by the plaintiff [Hunter's Lessee] might be open to other objections; but the title of the defendant was perfect and complete, if it was protected by the treaty of 1783. If therefore, this court had authority to examine into the whole record, and to decide upon the legal validity of the title of the defendant, as well as its application to the treaty of peace, it would be a case within the express purview of the 25th section of the act; for there was nothing in the record upon which the court below could have decided but upon the title as connected with the treaty; and if the title was otherwise good, its insufficiency must have depended altogether upon its protection under the treaty. Under such circumstances it was strictly a suit where was drawn in question the construction of a treaty, and the decision was against the title specially set up or claimed by the defendant. It would fall, then, within the very terms of the act.

Id. at 356-57.

112. *Id.* at 358-59. It made no difference, indeed, that the dispute itself turned primarily, if not entirely, on nonfederal grounds. Justice Story declared, "It is . . . the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction." *Id.* at 358. It is worth noting here that *Martin* characterized this land dispute in a way that differed significantly — in emphasis if not in actual substance — from Justice Story's merits analysis in *Fairfax's Devisee*. On the merits, Justice Story had stressed the reasons, under the common law and Virginia statutes, why Virginia's confiscation efforts had failed, thus disabling the Commonwealth from granting good title to Hunter's lessor; he treated the federal treaties, essentially, as just setting the deadlines by which Virginia's efforts would have had to succeed. *See supra* notes 97-102 and accompanying text (recounting the merits reasoning in *Fairfax's Devisee*). But in *Martin*, Justice Story characterized the dispute as turning primarily, if not exclusively, on the treaties themselves, declaring: "there was nothing in the record upon which the court below could have decided but upon the title as connected with the treaty; and if the title was otherwise good, its sufficiency *must have depended altogether upon its protection under the [1783] treaty*." *Martin*, 14 U.S. (1 Wheat.) at 357 (emphasis added); *see also* Collins, *supra* note 3, at 55 n.42 (noting, without citation, that "Story later explained *Martin* as a case that arose under federal law of which the state court had 'incidentally take[n] cognizance' insofar as the federal questions arose only by way of defense or reply to the state law criminal action") (alteration in original).

113. *Martin* offers some suggestion that Article III also supports the Court's claim to broad supplemental jurisdiction over state courts: had Congress not prohibited the Court from reversing on nonfederal *alternative* grounds, Justice Story declared, the Supreme Court would "unquestionably" have enjoyed the "right of revising *all* the points involved in the

made that claim fully constitutional. There, Chief Justice Marshall declared that federal courts may decide not only those federal-law questions falling squarely within Article III's "judicial power," but also all other questions — including state-law questions — in any case that even threatens to raise a question under federal law.[115] Marshall explained:

> We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction . . . *then all the other questions must be decided as incidental to this, which gives that jurisdiction.* Those other questions cannot arrest the proceedings.[116]

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cause." *Martin*, 14 U.S. (1 Wheat.) at 359 (emphasis added) (citing Smith v. Maryland, 10 U.S. (6 Cranch) 286 (1810)). Justice Story might have meant that section 25 — and not Article III itself — would have granted the Court that "right" absent the statute's restrictive language; under that reading, Article III must still have permitted Congress to grant the Court broad supplemental jurisdiction to review state-court decisions, even if the Constitution did not grant that jurisdiction itself. *Compare* United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966), *with* Aldinger v. Howard, 427 U.S. 1, 18-19 (1976); *see also infra* note 116 (discussing the Court's shifting stance about whether federal supplemental jurisdiction requires a statutory grant). But Justice Story's definition of which questions comprised a single "case" sounds generalized and not limited to section 25. *See Martin*, 14 U.S. (1 Wheat) at 358. Moreover, read alongside *Martin*'s earlier claims that Article III mandates federal jurisdiction over all "cases" within the federal "judicial power" — including those that originate in state courts and raise federal questions only "incidentally" to those state-law actions, *see id.* at 338, 342, — and *Martin*'s assertion that that jurisdiction must extend to Supreme Court appellate review of state-court decisions on such incidental federal questions, *id.*, it is reasonable to discern a constitutional and not just statutory foundation for Justice Story's claim to broad supplemental jurisdiction.

114. 22 U.S. (9 Wheat.) 738 (1824).

115. *See Osborn*, 22 U.S. (9 Wheat) at 822-24 (declaring that Congress may grant jurisdiction over any case in which a question within the Article III judicial power "forms an ingredient of the original cause," even if that question — like the Bank's capacity to sue or be sued in the statute there — was not in fact raised (and is very unlikely to be raised) in the case). In *Osborn*, an Ohio branch of the National Bank pursued common law replevin and equitable remedies against state officials who had burglarized the branch and seized $100,000 to pay a state tax imposed on the Bank's Ohio operations. *Id.* at 739-41. Although the Bank plaintiffs filed in federal court, invoking jurisdiction under the federal statute that created the National Bank and authorized it "to sue and be sued in any court of the United States," *id.* at 817, the Bank sought only nonfederal relief: namely, replevin's standard remedy of the return of property improperly held by another. In the end, that is exactly what the federal court granted, and what the Supreme Court affirmed, with one relatively minor adjustment. *See id.* at 871 (affirming lower court's order to return the seized money, but reversing the order to pay interest on that amount for the time the money was in defendant's possession, since common law did not authorize interest under those circumstances).

116. *Osborn*, 22 U.S. at 821-22 (emphasis added). The Court has followed this same constitutional reasoning in developing its doctrine of supplemental federal jurisdiction, to govern when inferior federal courts may exercise original jurisdiction over nonfederal claims between nondiverse parties. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 371

In other words, Article III itself contemplated broad federal jurisdiction to decide any question — federal or state — arising alongside one within the federal "judicial Power."[117]

(1978). In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the Court held that an inferior federal court properly hearing a federal question may also constitutionally decide any nonfederal question within the same "case or controversy" as the federal question, which the Court defined further as any question presented by the "common nucleus of operative fact" that presents the federal question. *Id.* at 725 (defining which claims "compris[e] but one constitutional 'case' " for purposes of Article III's extension of federal judicial power to cases and controversies arising under federal law). While the Court has sometimes suggested that federal supplemental jurisdiction requires a statutory grant as well as *Gibbs*'s constitutional authorization, *see* Aldinger v. Howard, 427 U.S. 1, 18 (1976), the Court has never repudiated *Gibbs*'s definition of what constitutes an Article III "case or controversy." *But see* Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1416 (1983) (arguing that it is not "obvious" that *Gibbs* established a constitutional test, as opposed to simply interpreting the statutory grant of federal question jurisdiction at issue there, *see* 28 U.S.C. § 1331 (1993)). In 1990, Congress enacted legislation governing the exercise of supplemental original jurisdiction by inferior federal courts. *See* 28 U.S.C. § 1367 (1993). That statute speaks only to federal district courts, and it says nothing at all about the Supreme Court or its appellate jurisdiction to review state-court decisions. For a thorough discussion of federal supplemental jurisdiction, including cases from *Osborn* forward developing that principle, see Matasar, *supra*, at 1407-17 (recounting the development of supplemental jurisdiction from *Osborn* through *Gibbs* and *Kroger*, to support the argument that *Gibbs* unduly restricts supplemental jurisdiction to fewer nonfederal claims than *Osborn* — which linked jurisdiction to contemporary pleading rules that governed which claims could be pursued in one case — would have permitted).

117. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) — decided three years before *Osborn* — Chief Justice Marshall offered what might have been a more qualified view of the scope of the Court's appellate jurisdiction over state-court judgments on questions other than those specified in Article III. In *Cohens*, reprising *Martin*, Virginia challenged the constitutionality of Supreme Court appellate jurisdiction over a state-court criminal judgment. Virginia argued, inter alia, that such federal supervision violated the Constitution's federalism principles, which prohibited the "complete consolidation of the States, so far as respects the judicial power" with the national judiciary. *Id.* at 422. While the *Cohens* Court reaffirmed *Martin*'s ruling that the Constitution did contemplate Supreme Court appellate jurisdiction over state-court judgments, *id.*, Chief Justice Marshall did so with what could be read as a significant reservation. Noting that any "complete consolidation of the States" under the federal judiciary "would authorize the legislature to confer on the federal Court appellate jurisdiction from the State Courts in all cases whatsoever," *id.*, Marshall observed: "The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases in the decision of which the nation takes an interest, is too obvious not to be perceived by all." *Id.*; *see also id.* at 420 (quoting with approval statement in THE FEDERALIST NO. 82 (Alexander Hamilton), declaring, "The evident aim of the plan of the national convention is, that all the causes of the *specified classes* shall, for weighty public reasons, receive their original or final determination in the Courts of the Union") (emphasis added). At least one commentator has argued that Marshall's qualifying language excludes appellate jurisdiction over all questions (like common-law and state statutory questions) other than those "few specified cases" identified in Article III, in that author's view, because Marshall was "striving . . . to introduce a certain element of confusion as to what the Court's position was, and, so, to soothe and mollify elements in the country that were resentful of the sweeping doctrines of Justice Story's great opinion in *Martin v. Hunter*." 2 CROSSKEY, *supra* note 79, at 816. In any event, in 1824's *Osborn v. Bank of United States*, Chief Justice Marshall claimed or reclaimed a supplemental appellate jurisdiction at least as robust — and far more constitutionally explicit — than any Story asserted in *Martin*.

B. *Launching A Middle Era: Murdock v. City of Memphis*

In *Martin* and *Osborn*, the early Court claimed a robust prerogative to reverse on state grounds, but 1875's *Murdock v. City of Memphis*[118] signaled a more reserved approach. There, the Court not only disclaimed jurisdiction to review state-court judgments on nonfederal issues, but it also ruled that the Court should not review state-court decisions even on federal-law questions — no matter how erroneous — where state grounds supply an adequate and independent basis for the state court's judgment.[119] In doing so, *Murdock* launched an era of greater restraint in which the Court puzzled over the scope of its own power to reverse on state grounds and, for awhile, followed more rigorous standards in doing so.

For one thing, *Murdock* overtly repudiated *Martin*'s claim to broad supplemental jurisdiction under section 25. In 1867, Congress had reenacted that grant with one controversial change: it omitted language that had explicitly restricted the Court's review of state-court judgments to those "errors" that "immediately respec[t]" the federal-law questions triggering the Court's appellate jurisdiction in the first place.[120] Ruling that Congress had not intended by this to change the scope of the Court's jurisdiction, *Murdock* read that now-tacit restriction to permit a far more limited review than *Martin* had done when the restriction was express: *Murdock*, unlike *Martin*, read the statute to permit review of the specific federal questions triggering jurisdiction in the first place, but none other.[121] Emphasizing how very narrowly Congress had defined even those *federal* questions within the Court's appellate jurisdiction — denying review unless the state court

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118. 87 U.S. (20 Wall.) 590 (1875).

119. As HART & WECHSLER notes, some suggest that *Murdock* and its immediate successors regarded the adequate and independent state grounds doctrine "merely as prudential." HART & WECHSLER, *supra* note 6, at 524. But since 1893, the Court's practice, on identifying an adequate state ground, has been to dismiss for lack of jurisdiction. *See* Eustis v. Bolles, 150 U.S. 361, 370 (1893).

120. The omitted clause read:

> But no other error shall be assigned or regarded as a ground for reversal in any case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

Judiciary Act of 1789, 1 Stat. 73, 86-87 (1789); *see* Act of Feb. 5, 1867, 14 Stat. 385, 386-87 (1867). In *Martin*, Justice Story had read this provision narrowly, concluding that it meant only to prohibit the Court from considering state grounds for relief raised as an alternative to a federal claim. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 352-54 (1816).

121. The Court stated:

> We are of opinion that upon a fair construction of the whole language of the section the jurisdiction conferred is limited to the decision of the questions mentioned in the statute, and, as a necessary consequence of this, to the exercise of such powers as may be necessary to cause the judgment in that decision to be respected.

Murdock, 87 U.S. (20 Wall.) at 627-28.

decided *against* the federal claimant[122] — *Murdock* asked: "Is it consistent with this extreme caution to suppose that Congress intended, when those cases came here, that this court should not only examine those [federal] questions, but all others found in the record? — questions of common law, of State statutes, of controverted facts, and conflicting evidence?"[123] Answering "No," *Murdock* flatly rejected the argument — central to *Martin* — that when "one of the [federal] questions mentioned has been decided . . . this court has jurisdiction, and that jurisdiction extends to the *whole case*."[124]

Murdock also rejected *Martin*'s supremacy-based claim to a broad power to reverse on state grounds. While *Murdock* recognized the Court to be not only the "most appropriate" but also the "only proper tribunal" for finally and uniformly deciding questions arising under federal law,[125] that role was not implicated by state-law questions:

> [n]o such reason nor any necessity exists for the decision by this court of other questions [than federal ones] in those cases . . . . The State courts are the appropriate tribunals . . .[126] for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly.[127]

Not only did *Murdock* undercut the expansive supremacy-based and "whole case" jurisdictional claims driving *Martin* and *Osborn*, but it also identified two constitutional principles arguing against broad Court authority to reverse state grounds.[128] First was federalism itself.

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122. *Id.* at 625-26 (stressing "the most important part of the statute," defining which federal questions fall within the Court's appellate jurisdiction).

123. *Id.* at 626.

124. *Id.* at 627 (emphasis added).

125. *See id* at 626.

126. Here, the Court added "as this court has repeatedly held," but without citation. *Id.*

127. *Id.* at 626; *see also* Currie, *supra* note 103, at 686 n.256 (describing *Murdock* as holding that "the purposes of uniformity and protection of federal rights, which *Martin* had identified as underlying article III, did not generally require the Supreme Court to review state law questions in state court cases"). *Murdock* stressed that the Court's authority to render final and conclusive decisions on federal questions was essential, given the potential for "various and conflicting" rulings by state courts. *Martin*, 14 U.S. (1 Wheat.) at 632. But this purpose "does not require that, in a case involving a variety of questions, any other should be decided than those described in" section 25. *Id.*; *see also id.* at 632-33 (repeating that "[i]t cannot . . . be maintained that it is in any case necessary for the security of the rights claimed under the Constitution, laws, or treaties of the United States that the Supreme Court should examine and decide other questions not of a Federal character"). As others have pointed out, "[t]he Court's clear recognition in Murdock that it lacks authority to review a state court on issues of state law should be contrasted with its conclusion in *Swift v. Tyson*, [41 U.S. (16 Pet.) 1 (1842)] that the federal courts sitting in diversity need not follow state court decisions on issues of common law." HART & WECHSLER, *supra* note 6, at 520.

128. Contrast the commentators cited *supra* note 10, who argue that adequate and independent state grounds doctrine is merely a self-imposed prudential restraint.

Murdock stressed the "general principle" that state courts retained a structural "independence" from federal supervision on all questions "arising under their local law" — indeed, on all questions except those within the Article III judicial power.[129] Indeed, so "vital in its essential nature to the independence of the State courts" was it to restrict federal review to federal questions that it "may well be held to have been superfluous, or nearly so" in section 25 itself.[130] To *Murdock*, state independence mandated the "fundamental" rule that the Court's "jurisdiction was limited to the correction of errors relating *solely* to Federal law."[131]

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129. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626, 630 (1875).

130. *Id.* at 630. *Murdock* stressed that this limit was not merely statutory:

> And though it may be argued with some plausibility that the reason of this is to be found in the restrictive clause of the act of 1789, which is omitted in the act of 1867, yet an examination of the cases will show that it rested quite as much on the conviction of this court that without that clause and *on general principles* the jurisdiction extended no further.

Id. (emphasis added).

131. *Id.* (emphasis added). *Murdock*'s federalism views have resurfaced even where the Court pursues its practice of reversing on state grounds. For example, in *Herb v. Pitcairn*, 324 U.S. 117 (1945), Justice Jackson, for the Court, declared the "reason" for the adequate and independent state grounds doctrine (prohibiting Court review of state courts' federal-law decisions where state law can fully support judgment) to be "found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Id.* at 125-26. In fact, even as the *Herb* Court claimed the power to reverse state grounds it found "inadequate," *see id.* at 125, Justice Jackson declared the jurisdictional bar itself "so obvious that it has rarely been thought to warrant statement." *Id.* So too, in *Michigan v. Long*, 463 U.S. 1032 (1983), the Court identified "[r]espect for the independence of state courts" as one of the "cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Id.* at 1040. And even Chief Justice Rehnquist in *Bush v. Gore*, urging an aggressive merits review of a state-court state-law judgment, admitted that "[i]n most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (including "*cf.*" citation to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)); *see supra* note 47 (citing debate about whether *Erie*'s constitutional rulings apply outside diversity context). *But see* Coleman v. Thompson, 501 U.S. 722, 729-30 (1991) (suggesting that federalism concerns explain the rule barring federal review of adequate and independent state grounds in a *habeas* proceeding, but that a "somewhat different" principle — the ban of advisory opinions — explains the same rule on direct review).

It is unclear whether the federalism principles invoked in *Murdock*, *Herb*, and *Long* are those constitutionally *mandating* state freedom from federal interference — as in *New York*, *Printz*, and *Alden* — or, instead, are federalism principles that simply counsel the Court, as a matter of prudence, to decline jurisdiction it may legitimately exercise, like federalism in *Younger v. Harris*, 401 U.S. 37 (1971). *Cf.* Althouse, *supra* note 6, at 246-49 (discussing the differences between post-*Lopez* "federalism" principles and earlier interpretations, as described, for example, in *Younger v. Harris*). *But see* Lee v. Kemna, 534 U.S. 362, 388 (2002) (Kennedy, J., dissenting) (asserting that adequate and independent state grounds "deprives th[e] Court of jurisdiction" on direct review and that that bar "has always been 'about federalism'" (citing *Coleman*, 501 U.S. at 726)).

Second, *Murdock* held, state-ground reversals violated Article III's rule against advisory opinions:[132] the "adequate and independent state grounds" doctrine was necessary "to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant . . . ."[133] As the Court later elaborated:

> [O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.[134]

C. *A Middle Era: Circumscribed Power and the Dilemma of Trust*

Even though *Murdock* — retreating from *Martin* and *Osborn* — disclaimed an expansive power to reverse on state grounds, it did not renounce those reversals altogether. *Murdock*'s adequate and independent state grounds doctrine simply focused the Court on a more precise jurisdictional question: when are a state court's state-law decisions "adequate" to bar the Court from reaching federal claims or interests lurking in the same case?[135] From *Murdock* through at least the mid-1920's, the Court's attempts to answer that question raised even more fundamental questions: When can we trust state courts to apply their own laws without cheating federal interests that may lurk nearby? How can we know when they don't?

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132. *See* U.S. CONST. art. III, § 2 cl. 1 (federal judicial power extends only to live "cases or controversies").

133. *Murdock*, 87 U.S. (20 Wall.) at 635; *see also* Leathe v. Thomas, 207 U.S. 93, 98-99 (1907) (Holmes, J.) (citing *Murdock* for the rule that the Court's jurisdiction attaches only where the state court's decision on a federal question was "necessary to the decision of the case").

134. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). *Michigan v. Long* reaffirmed this reasoning: the adequate and independent state grounds doctrine stems from the "jurisdictional" prohibition on advisory opinions. 463 U.S. at 1041-42 (citing Herb v. Pitcairn 324 U.S. 117 (1945)); *accord Coleman*, 501 U.S. at 729-30 (suggesting that, while Article III's ban on advisory opinions prohibits Court consideration of adequate and independent state grounds on *direct* review, federalism and comity concerns provide a "somewhat different" basis for the rule when applied to prohibit collateral federal review of state-court judgment in habeas proceedings).

135. I concentrate here on the Court's development of standards to determine whether an asserted state ground is "adequate" — not whether that ground is "independent" of any federal ground "and broad enough to sustain the judgment." *See, e.g.*, Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917); Beaupre v. Noyes, 138 U.S. 397, 402 (1891) (concluding, given an apparent nonfederal ground for the state court's decision, "Whether sound or not, we do not inquire. It is broad enough, in itself, to support the final judgment, without reference to the federal question").

1. *Do We Trust States or Suspect Them? A Short History of Ambivalence*

The Constitution's values of state independence and of federal supremacy have been in tension from the start.[136] At the constitutional convention, the "crucial issue" in integrating national and state governments was how to resolve "the anticipated rivalry [between them] . . . short of overt resort to coercion."[137] Nationalists proposed three "mechanisms" to enforce federal law against recalcitrant states: "the use of coercive force against defiant states . . . ; the negative on state laws; or the legal prosecution of individuals who violated or interfered with national law."[138] Proposals for the second of these — a federal veto on state laws — took two basic forms. Some federal body (whether its make-up was political, judicial, or mixed), could review state laws before they went into effect to ensure their compliance with federal law.[139] Or a federal court could do so afterwards, exercising

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136. Professor Fallon has explored how the law of judicial federalism, in general, embodies a like conflict between a "federalist" urge — which presumes state courts "to be as fair and competent as federal courts" — and a "nationalist" urge, which presumes that federal courts will always offer a more competent forum for enforcing federal rights. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141,1143-45 (1988).

137. RAKOVE, *supra* note 80, at 171. Professor Rakove has argued that this concern overshadowed issues about state representation in the federal government, or how the states would "project" their "political influence" nationally. *Id.*

138. *Id.* at 172.

139. Madison persistently advocated a proposal authorizing Congress to veto state laws "contravening . . . the articles of union, or any treaties subsisting under the authority of the union," as well as "all Laws which it shd. Judge to be improper." *See* RAKOVE, *supra* note 80, at 81 (quoting from II RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27-29 (Max Farrand ed., rev. ed. 1937) [hereinafter *RECORDS*]; I *RECORDS* 245)). Professor Kramer has argued extensively that Madison's veto proposal formed the prescriptive " 'hinge' " to his theory, most familiarly developed in Federalist No. 10, that populist state governments under the Articles of Confederation demonstrated the worst effects of rampant factionalism, contributing to the national state of affairs making the constitutional convention — and the Constitution itself — necessary. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 634-35, 626-27 (1999) (describing Madison's position, in a letter to Thomas Jefferson, that states' "[e]ncroachments . . . on the general authority, sacrifices of national to local interests, interferences of the measures of different States, form a great part of the history of our political system") (alteration in original); *see also id.* at 649 (characterizing the national veto as the "keystone to Madison's plan for the Union, the critical ingredient that made his whole scheme work"). *But see id.* at 646-47 (arguing that, while many other delegates shared Madison's "disenchant[ment] with politics as it was being practiced in the states and thought that the state governments were irresponsible," they did not share "Madison's insight that countering the irresponsibility of internal state government might be a proper goal of federal constitutional reform"). A new federal Congress, in Madison's view, should thus have the authority to veto state laws " 'in all cases whatsoever' " in order to "screen out those that were the product of a factious majority." *Id.* at 634, 649; *see also id.* at 633, 634-35 (explaining Madison's conviction that the very size of national government — that is, the "extended republic" — would itself "neutraliz[e] the threat of a factious majority" in Congress and thus place Congress in the best position to police faction's worst effects in states). Professor Kramer observes, however, that Madison appears to have held these views alone among his Convention and ratification colleagues. *See id.* at 649-53 (detailing delegates' opposition to Madison's proposal for an unlimited national veto; concluding that by mid-summer at the

what was to become ordinary judicial review.[140]

The Convention chose the latter, expressing its choice not through an explicit directive that federal courts monitor state obedience, but by adopting the supremacy clause.[141] Still, loading onto that clause the heavy work of ensuring state compliance with federal law, the Convention also necessarily placed supremacy's enforcement squarely on the courts — both federal *and* state.[142] And it did so even while some of the Constitution's strongest advocates feared "that the Courts of the States can not be trusted with the administration of the national laws."[143]

Convention, even Madison recognized "that his theory was a flop with the other delegates"). But a more limited proposal, for a national legislative veto on *unconstitutional* state laws, had backing until the vote to accord states equal representation in the Senate, after which the legislative veto was voted down altogether. *See* RAKOVE, *supra* note 80, at 80-82.

140. *See* RAKOVE, *supra* note 80, at 81-82. This debate fed into the Convention's ongoing dispute over whether to create an inferior federal judiciary — "a complete system of national courts" that could effectively police States' compliance with their supremacy clause obligations — or, instead, to create only the Supreme Court and rely otherwise on existing state courts. *Id.* at 172.

141. On the same day the delegates voted down Madison's proposal for a legislative negative on state laws, they also adopted a "substitute resolution" that made federal statutes and treaties the "supreme law of the respective states," binding on their judiciaries "any thing in the respective laws of the individual States to the contrary notwithstanding." RAKOVE, *supra* note 80, at 82 (quoting II *RECORDS*, *supra* note 139, at 27-29; I *RECORDS*, *supra* note 139, at 245) (noting that the proposal was "ironically presented as a weak measure" after defeat of the more virulent legislative veto); *see* Kramer, *supra* note 139, at 652-53 (noting that on August 23rd, even a limited national veto proposal was defeated "by an alliance of those who continued to abhor the very idea, those who found the practical objections telling, and those who believed the addition of the Supremacy Clause eliminated the need for a negative by putting courts in a position to protect federal interests"); *see id.* at 653 n.180 (detailing how the proposal for the Supremacy Clause "reduced still further the need for a legislative veto, placing the primary responsibility for preventing state encroachments on federal interests in the courts"). The clause was altered by the Committee of Detail and also, later, by the full Convention to read, as finally adopted:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. *See* RAKOVE, *supra* note 80, at 173-74 (recounting the steps between the clause's original language and the final ratified version).

142. Once a supremacy clause was substituted for the legislative negative, "it was evident that the authority of the national government would depend on judicial enforcement." RAKOVE, *supra* note 80, at 173. Moreover, "the problem of balancing the respective authority of national and state courts came to the fore." *Id.* And the Supreme Court would have the last word on that problem: the supremacy clause gave the Supreme Court ultimate power "to resolve conflicts between national and state laws" through the practice of judicial review. *Id.* at 175-76 (quoting, inter alia, James Madison's assertion, in THE FEDERALIST NO. 39, that " 'in controversies relating to the boundary between the two jurisdictions' of national and state governments, 'the tribunal which is ultimately to decide, is to be established under the general government' ").

143. RAKOVE, *supra* note 80, at 173 (quoting II *RECORDS*, *supra* note 139, at 46). Three of five Committee of Detail members evidently shared this view, and it influenced their rewriting of the supremacy clause to spell out state judges' obligations more explicitly. *See id.*; Collins, *supra* note 3, at 58-78 (discussing the "shifting" views during the Constitution's

Alexander Hamilton conveyed the same ambivalence during ratification. Defending the Constitution's failure to draft state courts exclusively to exercise original jurisdiction over Article III cases — the choice, that is, to permit Congress to create an inferior federal judiciary — Hamilton in one breath expressed both trust and mistrust of state courts: while "the fitness and competency of those courts should be allowed in the utmost latitude," still they could not be counted on.

> The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the states, would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.[144]

And, perhaps much like those in the Convention itself, Hamilton countered his anxiety by advocating broad Supreme Court review whenever state courts did decide federal questions:

> [I]f there was a necessity for confiding the original cognizance of causes arising under those [national] laws to [state courts] there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or diffidence of the subordinate tribunals, ought to be the facility or difficulty of appeals.[145]

2. *Ambivalence and the Court*

This same tension between federal-law supremacy and state autonomy — this built-in ambivalence between trusting and suspecting states — has infused the Court's attitude towards state courts. In 1816's *Martin v. Hunter's Lessee*,[146] for example, the Court declared confidently that it should and did have jurisdiction to review state-court decisions on state-law questions whose resolution determined whether a federal question had to be reached or not, because otherwise the Supreme Court's power to review federal questions "may be evaded at pleasure" by a calculating state court.[147] But, in 1821's

framing, ratification, and early implementation by Congress, about state courts' competence to decide federal-law claims). *See generally* Kramer, *supra* note 139, at 649 (noting that Madison advocated an *unlimited* national veto on state laws "because otherwise '[e]vasions might and would be devised by the ingenuity of the Legislatures' " attempting to encroach on federal prerogatives (quoting Madison's notes, Aug. 28, 1787) (alteration in original)).

144. THE FEDERALIST NO. 81, at 546-47 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

145. *Id.* at 547.

146. 14 U.S. (1 Wheat.) 304 (1816).

147. *Id.* at 357. Hamilton, by contrast, suggested that granting state courts concurrent jurisdiction over Article III questions without federal appellate review would tempt *parties* to evade the federal judicial power. THE FEDERALIST NO. 82, at 556 (Alexander Hamilton)

Cohens v. Virginia,[148] Chief Justice Marshall expressed both mistrust and trust of states in the same opinion. While claiming to "[d]ismis[s] the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its courts,"[149] Marshall nonetheless catalogued a history of state resistance to federal law — resistance both extreme and subtle — that compelled Supreme Court review of state-court decisions.[150] Moreover, presaging the modern debate over state and federal court "parity,"[151] Marshall warned:

> States may legislate in conformity to their opinions . . . . It would be hazarding too much to assert, that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States the judges are dependent for office and for salary on the will of the legislature . . . . When we observe the importance which . . . [the federal] constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist . . . .[152]

But in 1875's *Murdock v. City of Memphis*,[153] the Court refused to "impl[y] a mistrust of [state courts'] integrity or of their ability to construe those [state] laws correctly."[154] And as for the fear that state courts would deliberately read state law to avoid enforcing what the Supreme Court declared to be federal law, *Murdock* declared that inappropriate:

> It is not to be presumed that the State courts, where the rule is clearly laid down to them on the Federal question, and its influence on the case fully seen, will disregard or over look it, and this is all that the rights of the party claiming under it require.[155]

(Jacob E. Cooke ed., 1961) (worrying that "every plaintiff or prosecutor" could evade federal authority "at [their] pleasure" absent federal appellate review).

148. 19 U.S. (6 Wheat.) 264 (1821).

149. *Id.* at 416.

150. *Id.* at 386-87. Absent federal judicial control, the federal government and its laws would be "prostrate[d] . . . at the feet of every State in the Union. . . . Each member will possess a *veto* on the will of the whole." *Id.* at 385.

151. *See generally* Fallon, *supra* note 136 (discussing the constant conflict, in debates over judicial federalism, about whether to presume state courts are as competent or less competent than federal courts to enforce federal law properly); Neuborne, *supra* note 6 (expounding the classic argument that lack of institutional protections like life tenure makes state courts presumptively inferior in enforcing federal law); Wells, *supra* note 6 (same).

152. *Cohens*, 19 U.S. (6 Wheat.) at 386-87.

153. 87 U.S. (20 Wall.) 590 (1875).

154. *Id.* at 626.

155. *Id.* at 632. Accordingly, *Murdock* refused to accept the argument — a variant of which the Court had adopted in *Osborn v. Bank of United States* — that state-court inferiority required federal review of *all* questions, even nonfederal ones, arising in a case alongside federal questions. *Murdock* concluded that Supreme Court control of the federal questions

3. *Ambivalence and the Adequacy of State Grounds*

When *Murdock* shifted the Court's focus to the question of whether state grounds were "adequate" to preclude Court decision of lurking federal questions, this long-standing tension between trusting and mistrusting states came to the forefront. And for roughly five decades after *Murdock*, deciding the "adequacy" of state grounds came to mean, largely, deciding whether state grounds were genuine or, instead, a disingenuous attempt to thwart federal-law interests and then evade Supreme Court review.

Even before *Murdock*, the Court claimed the power to evaluate independently whether a nonfederal ground for a state-court judgment was indeed "adequate."[156] *Murdock* was clear that a state-law decision could not be reversed simply because erroneous under state law,[157] but then what else could make one "inadequate"?[158] In 1887's *Chapman v. Goodnow's Administrator*,[159] the Court introduced a stan-

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alone would adequately ensure federal-law's supremacy. *Murdock*, 87 U.S. (20 Wall.) at 632-33. But *Osborn* thought Article III "obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal courts," not "restrict[ing] [federal claimants] to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will." Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 822, 822-23 (1824).

156. *See Murdock*, 87 U.S. (20 Wall.) at 635; Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1871). As one post-*Murdock* Court explained, when evaluating a possible adequate and independent state ground, "[t]his Court must determine for itself whether the suit really involves any Federal question which will entitle it to review the judgment of the state court" under the jurisdictional statute succeeding Section 25. Newport Light Co. v. Newport, 151 U.S. 527, 536-37 (1894) (rejecting certification by the Chief Justice of Kentucky Court of Appeals that a federal question existed in the case, and dismissing writ of error for want of Supreme Court jurisdiction given the presence of adequate and independent state grounds for state-court decision). The modern Court makes this same point more succinctly: " '[T]he adequacy of state procedural bars to the assertion of federal questions' . . . is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.' " Lee v. Kemna, 534 U.S. 362, 375 (2002) (citing Douglas v. Alabama, 380 U.S. 415, 422 (1965) (alteration in original)).

157. *Murdock* authorized a "look into" the record to see whether a state court's nonfederal decisions "are sufficient to maintain the judgment of that court," but only to determine whether the nonfederal grounds were sufficiently *broad* to support a final judgment:

> [T]his examination into the points in the record other than the Federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain if any such have been decided, and their sufficiency to maintain the final judgment, as decided by the State court.
>
> Beyond this we are not at liberty to go, and we can only go this far to prevent the injustice of reversing a judgment which must in the end be reaffirmed, even in this court, if brought here again from the State court after it has corrected its error in the matter of Federal law.

Murdock, 87 U.S. (20 Wall.) at 635.

158. *See supra* note 135 (noting that this Article focuses on the Court's standards to evaluate state grounds "adequacy," not their "independence" from federal law).

159. 123 U.S. 540 (1887). Professor Hill identified *Chapman* as the "earliest case in which the Court expressly asserted its general authority to review the adequacy of a state ground actually passed upon by a state court." Hill, *supra* note 10, at 954.

dard: "All we have to consider is, whether [the asserted state-law ground] was the real ground of decision, and not used to give color only to a refusal to" give proper res judicata effect to a prior federal judgment.[160]

In the early years of the twentieth century, the Court continued to intensify the standards for measuring adequacy and began to worry out loud that state courts could manipulate state law to thwart federal law yet remain immune from Supreme Court review. In 1904, as the Court rejected a state court's ruling that a criminal defendant's constitutional challenge to the exclusion of blacks from his grand jury was defaulted because his two-page motion to quash the indictment was "prolix" under state law, Justice Holmes declared: "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is *plain* that the fair result of a [state-court] decision is to deny the rights."[161]

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160. *Chapman*, 123 U.S. at 546-47; *see also* Johnson v. Risk, 137 U.S. 300, 307 (1890) (asking whether the state-law ruling was "*good and valid* . . . sufficient of itself to sustain the judgment" or if, by contrast, it was "*palpably unfounded*" and so permitted Supreme Court review of the federal question also in the case) (quoting *Klinger*, 80 U.S. (13 Wall) at 257) (emphasis added). Both *Klinger* and *Johnson*, however, endorsed testing the "good[ness] and valid[ity]" of state grounds to solve a very particular problem: determining appellate jurisdiction where the state court's judgment left it unclear which, among possible federal and nonfederal grounds, were the basis for its judgment. *Klinger* declared:

> [W]here it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, *it will be presumed that the State court based its judgment on the law raising the Federal question*, and this court will then take jurisdiction.

Klinger, 80 U.S. (13 Wall.) at 263 (emphasis added). In the face of such uncertainty, the *Johnson* Court elaborated, "when put to inference as to what points the state court decided, we ought not to assume that it proceeded on grounds clearly untenable." *Johnson*, 137 U.S. at 307. But where the state court's grounds for decision were clear, "we should not, in order to reach a federal questions, resort to critical conjecture as to the action of the court in the disposition of such defence." *Id.* (asking whether state-law statute of limitations grounds for dismissal was "so palpably unfounded that we must presume that the state court overruled it?"); *see also Klinger*, 80 U.S. (13 Wall.) at 263 (holding that where the record shows that the state court "did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one"). The Court soon applied the "good and valid" and "palpably unfounded" tests even where the state court clearly had based its decision on nonfederal grounds, thus converting standards first announced to solve the particular problem of uncertainty — by assuming the state court would not have decided on "invalid" or "unfounded" grounds — into general standards for judging every asserted adequate state ground. *See, e.g.*, Leathe v. Thomas, 207 U.S. 93, 99 (1907) (Holmes, J.).

161. Rogers v. Alabama, 192 U.S. 226, 230 (1904) (Holmes, J.) (emphasis added). In 1907, Justice Holmes, speaking hypothetically, added that state courts might also try to evade Supreme Court review by taking advantage of the fact that, at the time, the Court's statutory appellate jurisdiction extended only to those state-court judgments deciding federal questions *against* federal claimants. "It may be imagined, for the sake of argument, that it might appear that a state court, even if ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court." *Leathe*, 207 U.S. at 99. *See* § 709 Revised Statutes (1874) (re-

But the Court soon expressed a more pervasive mistrust, and it added an additional standard for measuring a state ground's adequacy: "A case may arise in which it is apparent that a Federal question is sought to be avoided or is avoided by giving an *unreasonable* construction" to state law in applying it on a particular record; therefore, the Court must ask whether anything "justif[ies] a suspicion that there was any intent to avoid the Federal questions."[162] By 1917, moreover, the Court had expanded its "adequacy" review even further, holding:

> our jurisdiction is plain where the non-federal ground is so certainly unfounded that it properly may be regarded as *essentially arbitrary* or a *mere device* to prevent a review of the decision upon the federal question.[163] But, where the non-federal ground has *fair support*, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions.[164]

Even as the Court intensified its standards for testing a state ground's "adequacy" — making it theoretically harder to avoid the Court's appellate jurisdiction — it at first applied those heightened standards in ways that, while varying among cases, nonetheless tended to find state grounds adequate after all.[165] Sometimes, the Court tested the state court's asserted "good and valid reason" for its state-law de-

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enacting section 25 of the First Judiciary Act, 1 Stat. 73, 95-87 (1789)); *see also* The Judiciary Act of 1914, Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (authorizing the Court to review state-court rulings upholding a claim of federal right for the first time).

Justice Holmes cited no precedent for his hypothetical worry in *Leathe*; he did follow it immediately with *Johnson v. Risk*'s observation that, given uncertainty over which grounds the state court decided, the Supreme Court would presume it had decided the federal question to avoid the conclusion that it had rested on "palpably unfounded" state grounds. *Leathe*, 207 U.S. at 99 (citing *Johnson*, 137 U.S. at 307). Justice Holmes was, of course, not the first to worry that states could cheat under the adequate and independent grounds doctrine. In 1887's *Chapman* decision, the Court noted:

> We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of [the statutory grant], as if it had been specifically referred to and the right directly refused.

Chapman v. Goodnow's Adm'r, 123 U.S. 540, 548 (1887).

162. Vandalia R.R. Co. v. Indiana *ex rel.* South Bend, 207 U.S. 359, 367 (1907) (emphasis added); *see also* Terra Haute & Indianapolis R.R. Co. v. Indiana, 194 U.S. 579, 589 (1904) (Holmes, J.) (holding that the Court may not "decline jurisdiction of a case . . . because the state court put forward [an] . . . untenable construction" of state law to avoid constitutional challenge and that "[t]o hold otherwise would open an easy method of avoiding the jurisdiction of this court").

163. Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917) (citing *Leathe*, 207 U.S. at 99, and *Vandalia R.R.*, 207 U.S. at 367) (emphasis added).

164. *Enter. Irrigation*, 243 U.S. at 164 (citing, inter alia, *Leathe*, 207 U.S. at 99; Eustis v. Bolles, 150 U.S. 361, 369 (1893); and Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 635 (1875)) (emphasis added).

165. *But cf.* Rogers v. Alabama, 192 U.S. 226 (1904) (discussed *supra* note 161 and accompanying text).

cision simply by performing a quick, common-sense review of the facts and law on record.[166] In others, the Court conducted some independent review of the applicable state law.[167] In several others, the Court directly broached the question of how to identify a cheating state court, suggesting that suspicion might properly arise where a state court itself — not a party — introduced the dispositive nonfederal arguments.[168]

But three cases, decided between 1918 and 1923, suggest a hardening of the Court's suspicion against state courts, and a shortening of the Court's patience with claims that state grounds were "adequate" to preclude Supreme Court review. These are *Union Pacific Railroad v. Public Service Commission*,[169] *Ward v. Love County*,[170] and *Davis v. Wechsler*.[171] I discuss each in turn.

a. Union Pacific Railroad v. Public Service Commission.[172] A Missouri agency, acting under a state statute, charged the Union Pacific railroad a fee of over $10,000 for permission to issue almost $32 million in bonds secured by the entire Union Pacific system, even

166. *See, e.g.*, *Enter. Irrigation*, 243 U.S. at 165 (applying the "essentially arbitrary" or "without fair support" standard, the Court recited record facts and then concluded, essentially without further analysis, that the nonfederal estoppel decision "cannot be said . . . [to be] without fair support or so unfounded as to be essentially arbitrary or merely a device to prevent a review of the other ground of the judgment); *see also Vandalia R.R. Co.*, 207 U.S. at 366-67 (applying the "unreasonableness" standard, the Court reproduced the state court's reasoning on a nonfederal question, then declared, essentially without further comment, that the state court's decision was "a reasonable one" not "justify[ing] a suspicion that there was any intent to avoid the Federal questions"); Klinger v. Missouri, 80 U.S. (13 Wall.) 253, 263 (1871) (applying the "good and valid" standard, the Court decided — without citing any precedent at all — that the state court "could well have" found a juror unfit for a criminal trial because of his continued statements of loyalty to the Confederacy, and not because of his refusal to take an unconstitutional state test oath as a condition of jury service, and that this decision was "in the discretion of the [state] court, if not its duty"). *But see* Abie State Bank v. Bryan, 282 U.S. 765, 776-77 (1931) (refusing to accept nonfederal estoppel grounds as effectively denying Court review of a federal takings claim).

167. *See, e.g.*, Johnson v. Risk, 137 U.S. 300, 308-09 (1890) (applying the "good and valid" standard, reviewing Tennessee law on nonfederal statute of limitations as applied to a claim against a deceased's estate — noting one Massachusetts state decision and two U.S. Supreme Court decisions — and concluding that the Tennessee supreme court "would [not] have been erroneous" had it rested its decision on those nonfederal grounds).

168. *See Enter. Irrigation*, 243 U.S. at 165 (applying the "essentially arbitrary or mere . . . device" standard, and asking whether state grounds had "fair support," the Court emphasized that "the [nonfederal] question did not originate with the [state] court. It was presented by the pleadings, was in the minds of the parties . . . and was dealt with by counsel and court as a matter of obvious importance"); *see also* Leathe v. Thomas, 207 U.S. 93, 99-100 (1907) (applying the "palpably unfounded" standard, the Court emphasized that nonfederal grounds "were on the record and at issue. The plaintiff had notice that the defendant meant to prevail on whatever ground he could").

169. 248 U.S. 67 (1918).

170. 253 U.S. 17 (1920).

171. 263 U.S. 22 (1923) (Holmes, J.).

172. 248 U.S. 67 (1918).

though only a fraction of the railroad's line ran through the state and even though the railroad did no intrastate business in Missouri.[173] Union Pacific paid the fee under protest, then challenged the agency's decision, arguing, inter alia, that the state statute authorizing the fee interfered with interstate commerce in violation of the Constitution's Article I.[174] The Missouri supreme court held that Union Pacific had voluntarily applied to the agency for permission to issue the bonds, and was therefore estopped from challenging the fee charged in return.[175]

In the Supreme Court, the state agency argued the estoppel ruling constituted an adequate nonfederal ground for the judgment against the railroad, denying the Court jurisdiction to reach the railroad's commerce clause claim. The Court, speaking through Justice Holmes, disagreed: "[I]t is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived."[176] And without specifying any standard for judging the "adequacy" of the Missouri high court's ruling, Justice Holmes declared that Union Pacific had had no choice but to apply for the state bond permit, given the dire commercial consequences for refusing. Citing only Supreme Court precedent,[177] Holmes concluded, on the merits, that that kind of compulsion constituted duress and so could not estop the railroad's later constitutional challenge.[178]

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173. *Id.* at 68-69. The statute set the fee for such permission at a fixed percentage of the total bond issue, regardless of the issuer's actual presence — of lack of intrastate business — in the state. *Id.* at 69.

174. *Id.* at 68. Union Pacific also argued that the fee was "bad under the Fourteenth Amendment." *Id.* at 69.

175. *Id.* at 69; *see* Union Pacific R.R. v. Public Service Comm'n, 187 S.W. 827 (Mo. 1916).

176. *Union Pacific*, 248 U.S. at 69-70. For this, Justice Holmes cited *Creswill v. Knights of Pythias*, 225 U.S. 246 (1912), in which the Court held — with Holmes dissenting — that no adequate state ground existed where the Georgia supreme court had rejected a federal-law defense notwithstanding defendant's claim of plaintiff's laches. The *Knights of Pythias* majority reviewed what it considered the undisputed factual record and concluded, contrary to the Georgia court, that they "leave no room for any other but the legal conclusion of laches" by plaintiff, thus precluding equitable relief against defendant. *Id.* at 262. But Justice Holmes, in dissent, argued that the Court lacked appellate jurisdiction: "When a Federal right is held by a state court to have been lost by subsequent conduct that of itself involves no Federal question I think we are not at liberty to reexamine the decision unless we can say that the state court *in substance* is denying the right." *Id.* at 263 (Holmes, J., dissenting) (citing cases dismissing writ for lack of jurisdiction where state judgment rested on res judicata, estoppel, statute of limitations, and laches) (emphasis added). In *Union Pacific*, Justice Holmes cited the *Knights of Pythias* majority, not his own dissent; he did not specify what in the railroad's case made him conclude that Georgia had "in substance" denied the railroad's commerce clause rights.

177. *Union Pacific*, 248 U.S. at 70.

178. *Id.* at 70. *Union Pacific* is often cited as authority for an especially searching review of assertedly adequate state grounds wherever claims to vindicate federal rights are at stake. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1068-69 (1983) (Stevens, J., dissenting) (arguing

that the Court's "primary role" in reviewing state-court judgments "is to make sure that persons who seek to *vindicate* federal rights have been fairly heard"); *see also infra* notes 181-230 and accompanying text (discussing the Court's hardening of suspicion against states in *Ward v. Love County* and *Davis v. Wechsler*). But *Union Pacific* has also been cited, on the merits, for Holmes's substantive definition of "duress" in both constitutional and commercial contexts. *See, e.g.*, Davis v. United States, 328 U.S. 582, 600 (1946) (Frankfurter, J., dissenting) (voluntariness in the Fourth Amendment context); United States v. Bethlehem Steel Corp., 315 U.S. 289, 327 (1942) (Frankfurter, J., dissenting) (commercial duress). A pre-*Erie* case, *Union Pacific* might be understood as tacitly adopting a federal common-law rule to decide what conduct constitutes waiver of a federal right. *Cf.* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (adopting federal common-law rule to determine what constitutes laches by the United States precluding action to recover for mishandled commercial paper). Remember, in earlier cases, the Court had often been content to permit state courts to decide under state law what constituted waiver or estoppel even where federal rights were at stake. *See, e.g.*, Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157 (1917) (estoppel precluded due process challenge); Eustis v. Bolles, 150 U.S. 361 (1893) (waiver precluded contract clause challenge); *see also Knights of Pythias*, 225 U.S. at 263-64 (Holmes, J., dissenting) (citing cases in which a state court's estoppel or waiver rulings precluded Supreme Court decision on federal question, absent indication that the state court "in substance [was] denying the right"). In *Union Pacific* and after, however, the Court took a tougher stance. *See, e.g.*, Abie State Bank v. Bryan, 282 U.S. 765, 776-77 (1931) (holding the Nebraska Supreme Court's finding of estoppel inadequate to preclude Supreme Court decision on a federal takings challenge to a state bank regulation); *id.* at 776 (citing *Union Pacific* for the rule that a decision made "according to interest" in avoiding negative commercial consequences "does not exclude duress").

All the same, in 1925 the Court explicitly freed states to deem a federal claim *waived* if not raised in compliance with state appellate procedure rules, so long as they complied with the basic due process standards of "giv[ing] . . . the litigant a reasonable opportunity" to have the federal claim heard and decided on appeal. Central Union Tel. Co. v. City of Edwardsville, 269 U.S. 190, 194-95 (1925) (Taft, C.J.) (refusing jurisdiction where a claimant first appealed contract-clause and due process challenges against state tax from an Illinois trial court to an intermediate appellate court lacking jurisdiction to hear constitutional claims, instead of straight to the Illinois supreme court, as required under state law). Citing *Union Pacific*, among other precedents, the Court declared:

> [T]here is nothing in these cases which justifies this Court in ignoring or setting aside a required form of practice under the appellate statutes of the State by which federal constitutional rights, as well as state constitutional rights, may be asserted in the Supreme Court of the State or be held to be waived. . . .

Id. at 194 (citing also Davis v. Wechsler, 263 U.S. 22 (1923), discussed *infra* notes 204-230 and accompanying text). *But see* Hill, *supra* note 10, at 951 n.25 (distinguishing *intentional* waiver from *constructive* waiver, and asserting, without elaborating, that "a decision of a state court on intentional waiver of a federal right can hardly be deemed to rest on an independent state ground" (adding "*cf.*" cite to *Carnley v. Cochran*, 369 U.S. 506, 513-17 (1962), which holds, on federal habeas corpus grounds, that the state court should not have inferred waiver of the right to counsel from a record that did not disclose whether the defendant had been apprised of that right and waived it knowingly)). Adding to the difficulty in making sense of the Court's various positions, over time, on whether and when state-court "waiver" decisions constitute "adequate and independent state grounds" is that waiver, like estoppel, will often turn on state-court findings of *fact*, which the Court ordinarily — but not always — refuses to review. As Professor Hill explains:

> [t]he Supreme Court avoids resolution of conflicts in evidence. Nevertheless, it does not yield to the states absolute power to defeat federal rights by allowing them, in these circumstances, the final word as to the inferences, even of the 'factual' type, which may be drawn from undisputed facts or from the underlying facts as found after resolution of evidentiary conflict.

Hill, *supra* note 10, at 951 (citing, inter alia, *Knights of Pythias*, 225 U.S. at 261).

But Justice Holmes also stressed that the Supreme Court had already declared state statutes like Missouri's to constitute "unlawful interference with commerce among the States."[179] And even though that was *after* the Missouri court issued its own *Union Pacific* judgment,[180] Justice Holmes left the strong impression that the Court was, at bottom, determined to enforce its new constitutional rule against every state imposing financial burdens on interstate rail commerce, notwithstanding the Missouri court's use of state estoppel grounds to deny the railroad its constitutional win in this case.

b. Ward v. Love County.[181] The Court's determination to enforce a particular constitutional ruling against a possibly evasive state was more pronounced in this 1920 decision. In 1912, the Court had ruled that due process required certain Choctaw-held property to be free from Oklahoma state taxation, reversing three Oklahoma supreme court rulings to the contrary.[182] While that litigation was pending, tax officials of Love County, Oklahoma, demanded payments from Choctaw property holders, threatening to sell their land and impose an eighteen percent penalty if they refused. They paid, under protest, and then filed suit in state court against the Love County commissioners, seeking a refund on the grounds, again, that the tax was unconstitutional.[183]

The Oklahoma Supreme Court dismissed the Choctaw claim.[184] Even though the United States Supreme Court had by then already upheld the same due process claim,[185] the state court decided the claimants had paid the tax "voluntarily"; and because state law recognized no cause of action for refunding voluntarily paid taxes, the refund claim could not proceed.[186] In the United States Supreme Court,

179. *See Union Pacific*, 248 U.S. at 69 (citing Int'l Paper Co. v. Massachusetts, 246 U.S. 135 (1918), and Looney v. Crane, 245 U.S. 178, 188 (1917)).

180. *See* Union Pacific R.R. v. Pub. Serv. Comm'n, 187 S.W. 827 (Mo. 1916).

181. 253 U.S. 17 (1920).

182. Choate v. Trapp, 224 U.S. 665 (1912); English v. Richardson, 224 U.S. 680 (1912); Gleason v. Wood, 224 U.S. 679 (1912); *see also Love County*, 253 U.S. at 20. The Supreme Court held that an 1898 Act of Congress, which granted land allotments to members of the Choctaw tribe free from state taxation for twenty-one years, created a vested property right in those landholders which the Fifth Amendment protected from subsequent congressional efforts to repeal the tax exemption before twenty-one years had passed. *Id.*

183. *Love County*, 253 U.S. at 20.

184. *See* Bd. of County Comm'rs of Love County v. Ward, 173 P. 1050 (Okla. 1918).

185. *See Love County*, 253 U.S. at 20 (discussing cases).

186. *Id.* at 21. The Oklahoma court also ruled that no state law made the County liable for taxes collected and then paid over to the state and to other municipal bodies, as the Commissioners claimed to have done. *Id.*

Love County argued that this ruling provided an adequate nonfederal ground for the state court's judgment against the Choctaw claimants, precluding Supreme Court review.[187]

The Supreme Court disagreed.

> The right to the [tax] exemption was a federal right .... Whether the right was denied, or not given due recognition, by the Supreme Court is a question as to which the claimants were entitled to invoke our judgment .... It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. *Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.*[188]

Here, in other words, was exactly the kind of state defiance its appellate jurisdiction was intended to police, a jurisdiction "conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."[189] To the Court,[190] the County's threats to sell the Choctaw land and impose heavy penalties meant the claimants "plain[ly]" had paid the tax involuntarily, stripping "any fair or substantial support" from the Oklahoma court's contrary ruling.[191] Accordingly, the Court asserted jurisdiction and reversed.[192]

Love County's sharp tone broadcasts the Court's irritation that Oklahoma retained these taxes even after the Court had declared

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187. *Id.*

188. *Love County*, 253 U.S. at 22 (internal citations omitted) (emphasis added) (citing, inter alia, Union Pacific R.R. v. Pub. Serv. Comm'n, 248 U.S. 67 (1918); Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917); Creswell v. Knights of Pythias, 225 U.S. 246, 261 (1912); Leathe v. Thomas, 207 U.S. 93 (1907); Vandalia R.R. Co. v. Indiana *ex rel.* South Bend, 207 U.S. 359 (1907)); *see also* Cent. Union Tel. Co. v. City of Edwardsville, 269 U.S. 190, 195 (1925) (holding that the Court may not second-guess the Illinois supreme court's interpretation of a state waiver-of-claim rule to forfeit federal constitutional rights, unless the state court's interpretation was "so unfair or unreasonable in its application to those asserting a federal right as to obstruct it").

189. *Love County*, 253 U.S. at 23. This language echoes Justice Story's vehemently nationalist reading of Article III in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 338-52 (1816). *See supra* notes 105-109 and accompanying text.

190. *Love County*, 253 U.S. at 23. The Court cited only Supreme Court precedents. *See, e.g.*, *Union Pacific*, 248 U.S. 67 (rejecting a state court's view of what constitutes waiver of a constitutional claim).

191. *Love County*, 253 U.S. at 23. The Court then declared — in *Love County*'s more famous ruling — that due process requires a state to provide a remedy for refund of unlawful taxes where involuntarily paid. *Id.* at 24 (holding that the County could not avoid paying the refund by claiming to have paid some of the collected taxes over to the state itself); *see also* Reich v. Collins, 513 U.S. 106 (1994); McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18, 33-34 (1990); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). *But see* Alden v. Maine, 527 U.S. 706, 740 (1999) (suggesting the Court is qualifying constitutional remedial requirement).

192. *Love County*, 253 U.S. at 25.

them unconstitutional[193] on the merits.[194] But the Oklahoma court, ruling that the claimants had paid the tax "voluntarily" and so could not pursue a state-law refund action, had cited numerous precedents — including U.S. Supreme Court cases — which distinguished taxes paid *involuntarily* (a common-law term-of-art) from taxes simply paid under protest, for which no refund was available.[195] That was a technical, perhaps counter-intuitive distinction, but it had a genuine footing in the common law of Oklahoma and other states as well, as the Supreme Court itself had earlier acknowledged.[196] More to the point, it

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193. The Court stressed that Oklahoma officials, including its supreme court, continued to demand and then to hold the Choctaw claimants' taxes, paid under protest, for six years after the U.S. Supreme Court ruled those taxes unconstitutional.

> [I]t is certain that the lands were nontaxable. This was settled in Choate v. Trapp, 224 U.S. 665 (1912), and the other cases decided with it; and it also was settled in those cases that the exemption was a vested property right arising out of a law of Congress and protected by the Constitution of the United States. This being so, the State and all its agencies and political subdivisions were bound to give effect to the exemption. It operated as a direct restraint on Love County, no matter what was said in local statutes. The county did not respect it, but, on the contrary, assessed the lands allotted to the claimants, placed them on the county tax roll, and there charged them with taxes like other property.

Love County, 253 U.S. at 21-22. The Oklahoma supreme court issued its ruling against the Choctaw in 1918. Bd. of County Comm'rs of Love County v. Ward, 173 P. 1050 (Okla. 1918).

194. The Court also suggested, rather obliquely, that the status of these claimants should have made the state court more sympathetic to their claims. *See Love County*, 253 U.S. at 23:

> The claimants were Indians just emerging from a state of dependency and wardship. Through the pending suits and otherwise they were objecting and protesting that the taxation of their lands was forbidden by a law of Congress. But, notwithstanding this, the county demanded that the taxes be paid, and by threatening to sell the lands of these claimants and actually selling other lands similarly situated made it appear to the claimants that they must choose between paying the taxes and losing their lands . . . . The moneys thus collected were obtained by coercive means — by compulsion. The county and its officers reasonably could not have regarded it otherwise; much less the Indian claimants.

195. *See Bd. of County Comm'rs of Love County*, 173 P. at 1051-52. The Oklahoma Supreme Court quoted an 1878 United States Supreme Court ruling:

> Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary. . . . This, as we understand it, is a correct statement of the rule of the common law.

Id. at 1052 (quoting Union Pacific R.R. Co. v. Dodge County Comm'rs, 98 U.S. 541, 544 (1878) (quoting Wabaunsee County v. Walker, 8 Kan. 431 (1871)) and citing Lamborn v. Dickinson County Com'rs, 97 U.S. 181 (1877)). In *Love County*, however, the Supreme Court dismissed these precedents, and others like it, stating summarily, "[T]hose cases are quite distinguishable in their facts and some of the general observations therein . . . must be taken as modified by the later cases" on which the *Love County* Supreme Court relied to reverse the Oklahoma judgment, including *Union Pacific*. *See Love County*, 253 U.S. at 23-24. This hardly amounts to a finding that the Oklahoma supreme court's reading and application of that precedent was "plainly untenable." *Id.* at 22.

196. *See supra* note 195 (quoting the Supreme Court's 1878 *Dodge County* ruling adopting the common law's distinction of what was *involuntary*, as a legal matter, from what was merely done under protest). Interestingly, the Supreme Court claimed to have followed that common-law distinction in the *Lamborn* case because it was there compelled to follow

was not necessarily a fiction the Oklahoma court fabricated to thwart these claimants' federally-protected tax exemption and then evade Supreme Court review.[197] Thus, while the Oklahoma court's application of the voluntary payment case law might have been erroneous and, indeed, while it might have been invidious[198] — the Court's critique does not prove it "plainly untenable" and "without any fair or substantial support,"[199] making it inadequate to support the state judgment and preclude Supreme Court review.

Perhaps the best explanation for *Love County* is that the Supreme Court suspected the Oklahoma court had unearthed an old common

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Kansas law on that question. *See Dodge County*, 98 U.S. at 543. Similar to *Union Pacific*, *see supra* note 178, this does raise the question of whether *Love County* should be read less as a jurisdictional ruling than as a kind of federal common-law ruling declaring what constitutes a "voluntary" payment of allegedly unconstitutional taxes, precluding later refund claims raising that federal-law argument.

197. Professor Hill offered three ways to look at the *Love County* outcome. *See* Hill, *supra* note 10, at 950 n.25. First, the Oklahoma court appears to have rested on a "theory of constructive waiver," holding that property owners are "presumed to know the law, and accordingly cannot be coerced by an illegal tax; this is so even where the law provides penalties for nonpayment, since the penalties fall with the tax." *Id.* at 951 n.25. Professor Hill suggested that this ruling might have supplied an adequate state ground for the Oklahoma supreme court judgment, insofar as "the payment of the tax, except in special circumstances not present, constitute[d] a forfeiture of objections to the tax, irrespective of actual intent." *Id.* (distinguishing ruling from one finding *intentional* waiver of the federal due process claim, and asserting that a state court's decision of "intentional waiver of a federal right can hardly be deemed to rest on an independent state ground"). Second, the Oklahoma court might have meant that the claimants had failed to exhaust their state remedies for challenging the tax without paying it, which could have included litigation against one who bought the property at the tax sale threatened by the Love County tax officials, a state-law ground adequate to support the judgment so long as the remedies were deemed constitutionally sufficient. *Id.* (suggesting that the Supreme Court ruling reflected the view that Oklahoma's post-deprivation remedies were inadequate). Third, because the Oklahoma supreme court had relied on federal precedents in reaching its conclusion that the Choctaw had waived their federal claims, one could argue that that court's *waiver* judgment was not "independent" of federal law, and therefore appropriate for Supreme Court review. *Id; see also infra* note 269 (discussing the distinction between the twin requirements that state-law grounds be both "adequate" and "independent" to preclude Supreme Court review); *supra* note 178 (discussing the problem of how to characterize state-court "waiver" decisions in assessing whether they constitute "adequate and independent state grounds").

198. *See infra* notes 200-203 and accompanying text (discussing possible impact on *Love County* Court of states' historical animosity towards Indian tribes).

199. *See Love County*, 253 U.S. at 22 (adopting the "plainly untenable" and "without any fair or substantial support" standard for disregarding an asserted adequate state ground); *supra* text accompanying note 188 (quoting language adopting the standard). Only three years before, the Court had insisted its jurisdiction was "plain":

> where the non-federal ground is so certainly unfounded that it properly may be regarded as *essentially arbitrary* or a *mere device* to prevent a review of the decision upon the federal question. But, where the non-federal ground has *fair support*, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions.

Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917) (emphasis added) (citing, inter alia, Leathe v. Thomas, 207 U.S. 93 (1907); Vandalia R.R. Co. v. Indiana *ex rel.* South Bend, 207 U.S. 359 (1907); Eustis v. Bolles, 150 U.S. 361 (1893); and Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875)).

law trick just to deny the Choctaw their new federal due process rights.[200] Certainly, the history of state animosity towards Indian Tribes justified misgivings.[201] But the *Love County* Court did not admit any such suspicion, nor did it identify anything in or outside the record to suggest that the state court's ruling masked an improper prejudice.[202] Thus, as a jurisdictional precedent, *Love County* perhaps forfeited its most compelling reason for declaring the Oklahoma court's judgment inadequate to preclude Supreme Court review: outright state-court misconduct.[203]

c. Davis v. Wechsler.[204] In this 1923 decision — one of the most frequently cited authorities permitting state-ground reversals[205] — the Court gave even less reason for reversing a Missouri state-court judgment upholding a $5000 jury verdict in favor of a passenger injured in a derailment on the Chicago Great Western Railroad.[206] At the time of the accident, in 1920, the Great Western was operating under the control of a federal Director General of Railroads pursuant to the Federal Control Act of 1918, under which the Wilson Administration had taken over railroads, like the Great Western, involved in transporting

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200. *See* Rogers v. Alabama, 192 U.S. 226, 230 (1904) (Holmes, J.) (holding that the Court's jurisdiction to protect constitutional rights "cannot be declined when it is plain that the fair result of a [state-court] decision is to deny the rights"); *see also supra* note 27 and accompanying text (discussing Justice Ginsburg's assertion, dissenting in *Bush v. Gore*, 531 U.S. 98 (2000), that "historical contexts" best explain cases where the Court rejected a state court's interpretation of state law).

201. *See generally* RUSSELL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980); ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 245-68 (2d ed. 1961); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY (1987). For a recent case demonstrating the continued tensions between Indian Tribes and the states surrounding them, see Nevada v. Hicks, 533 U.S. 353 (2001) (holding that Tribes may not regulate, nor tribal courts adjudicate, claims arising from state officials' entry onto tribal land to enforce the state's criminal laws against a tribe member).

202. The closest the Court came was to observe that the Choctaw "claimants were Indians just emerging from a state of dependency and wardship." *Love County*, 253 U.S. at 23. *But cf.* cases discussed *supra* note 168 and accompanying text (where the Court identified factors that might indicate a state court had manipulated state law to disadvantage federal interests).

203. *Love County*'s silence about its special historical context may fit within a larger tendency in traditional "federal courts' jurisprudence" to ignore the particular "problems of the relationship between Indian tribes, the federal government, and the states." Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 676 (1989).

204. 263 U.S. 22 (1923) (Holmes, J.).

205. *See, e.g.*, Lee v. Kemna, 534 U.S. 362, 376 (2002); *see also* Hill, *supra* note 10, at 943-44 (noting *Davis*'s influence).

206. 263 U.S. at 23; *see also* Wechsler v. Davis, 239 S.W. 554, 555 (1922) (opinion of the Missouri Court of Appeals). The Missouri supreme court refused to review the case, *Davis*, 263 U.S. at 24, and so the U.S. Supreme Court reviewed the state court of appeals' judgment.

troops and supplies for the First World War.[207] The Director General, in turn, had issued two regulations important to the *Davis* dispute: General Order No. 50, which required state-law claims against federally-controlled railroads to be brought against the Director General instead of the railroad companies[208]; and General Order No. 18-A, which established venue rules permitting those lawsuits to be brought only where the plaintiff resided or where his cause of action arose — in *Davis*, where the derailment occurred.[209]

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207. In 1916, Congress authorized the President, "in time of war" to "take possession and assume control of any system . . . of transportation . . . and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." Act of August 29, 1916, ch. 418, 39 Stat. 619, 645. In December 1917, when the United States entered World War I, President Wilson established a Railroad Administration and authorized its Director General to take over railroads as needed for the war effort, severing the railroads "completely" from the control and management of their civilian owners and managers. *See* Missouri Pacific R.R. Co. v. Ault, 256 U.S. 554, 557 (1921) (recounting the appointment and role of the Director General of Railroads). President Wilson's actions were ratified by the Federal Control Act of 1918, ch. 25, 40 Stat. 451. *See Ault*, 256 U.S. at 557; Alabama & Vicksburg Ry. Co. v. Journey, 257 U.S. 111, 112-13 & n.1 (1921) (Brandeis, J.) (identifying Act to Provide for the Operation of Transportation Systems While Under Federal Control (Mar. 21, 1918)); *see also Davis*, 263 U.S. at 23.

208. General Order No. 50 provided:

> It is . . . ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, *which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against . . . [the] Director General of Railroads, and not otherwise* . . . . The pleadings in all such actions . . . may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

Ault, 256 U.S. at 562 n.1 (quoting General Order No. 50) (emphasis added).

209. General Order No. 18-A, amended, declared: "It is therefore ordered that all suits against carriers while under Federal control must be brought in the county of district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose." *Alabama & Vicksburg*, 257 U.S. at 113 n.1 (Brandeis, J.) (quoting General Order No. 18-A, issued by the Director General of Railroads on April 18, 1918); *see id.* at 113 (rejecting the Mississippi supreme court's challenge to Order 18 made on grounds that it "exceeded the powers conferred by Congress on the President and by him on the Director General"); *see also* Wechsler v. Davis, 239 S.W. 554, 556 (1922) (suggesting plaintiff's cause of action accrued at site of derailment). General Order No. 18-A explained the reason for this venue rule:

> [I]t appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions or supplies, are required to leave their trains and attend court as witnesses and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.

The injured plaintiff properly sued the Director General, who made three arguments in response: that the plaintiff had filed in the wrong venue under General Order 18-A,[210] that the court lacked personal jurisdiction over the Director General,[211] and that the plaintiff could not prevail on the merits.[212] Before trial, however, the first named Director General resigned; his successor entered a notice of appearance and then "adopted the [first Director's] *answer*."[213] After trial, a third Director General was substituted and entered his appearance in open court.[214]

The problem in *Davis* stemmed from these party substitutions. The Missouri court ruled under state law that, although the first Director General had properly preserved challenges to jurisdiction and venue while also raising a merits defense, the second and third defendants had waived their own jurisdiction and venue objections by making

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Alabama & Vicksburg, 257 U.S. at 113 n.1 (quoting General Order No. 18-A, issued by Director General of Railroads on April 9, 1918). In February of 1920 — two months after the *Davis* plaintiff was injured — Congress enacted The Transportation Act, which required all railroads to be released from federal control. Wechsler v. Davis, 239 S.W. 554, 574 (1922). The *Davis* Court declared the 1920 Transportation Act to have no effect on the issues in this case. *Davis*, 263 U.S. at 25.

210. There is some confusion, evident both in the state court and Supreme Court opinions, about whether General Order 18-A affected only venue, or whether it also somehow conditioned *jurisdiction* over Directors General — who, after all, would likely not have been residents of the states where railroad litigation took place — on satisfying the Order's venue requirements. It is unclear, for example, whether the Director General agreed to submit voluntarily to any court's jurisdiction where venue was proper. *See Wechsler*, 239 S.W. at 555 (acknowledging that state court "under General Order 18-A had no jurisdiction over the person of [the first Director defendant] . . . unless he choose to voluntarily submit to the jurisdiction of the court"); *id.* at 557 (noting that one of three Director General defendants was a citizen of New York "with his official residence" in Washington, D.C.). The Supreme Court criticized the state court for treating the Order as affecting only *venue*, but went on to conclude that even if the state court had treated the Order as affecting jurisdiction too, that court's conclusion would have been equally flawed. *See Davis*, 263 U.S. at 24.

211. *See Wechsler*, 203 S.W. at 555 (noting that first defendant's answer "contain[ed] a plea to the jurisdiction").

212. *See id.* at 555 (noting that Missouri practice permitted a defendant to join objections to personal jurisdiction and to venue with a defense on the merits). Plaintiff filed suit in Jackson County, Missouri. *Id.* Because plaintiff was undisputedly a resident of Illinois, *see id.*, then venue could only be proper under General Order 18-A if the train had derailed in Jackson County. *See supra* note 209 (quoting General Order 18-A's provisions making venue proper only where plaintiff resided or cause of action accrued). But there was disagreement on the question of in *which* Missouri county the accident had occurred: plaintiff alleged only that the train had derailed "near the town of Wyeth, in the State of Missouri;" but it is unclear from the pleadings whether that meant *within* Wyeth's limits and, furthermore, whether Wyeth itself was, under state law, an "incorporated place," which would evidently have placed it within Andrew County, or an unincorporated town, which would evidently have placed in within Jackson County. *Wechsler*, 239 S.W. at 556 (noting confusion on question of where derailment occurred, and observing a "great conflict of opinion as to whether the courts will take judicial notice of small towns not incorporated by public law").

213. *Wechsler*, 239 S.W. at 555 (emphasis added).

214. *Id.* at 576 (quoting record).

"general appearances"[215] first and only then adopting the original defendant's pleadings:[216] their general appearances thus waived any further challenge to the state court's venue or jurisdiction.[217] Accordingly, the Missouri court refused to consider the later defendants' assertions that venue was improper under General Order 18-A, and so upheld plaintiff's $5000 verdict on the merits.[218]

The Supreme Court disagreed, even though, as Justice Holmes made clear, the Missouri pleading rules did not violate federal law: the state remained free to apply its rule, in precisely the way it had done here, in cases involving only nonfederal interests.[219] Nonetheless, the Court concluded, Missouri's rule here was too "unreasonable" to block state-court litigants from claiming the benefit of federal law.[220]

But why "unreasonable"? The Court did not really say. As in *Love County*,[221] it spent essentially no time reviewing the Missouri law requiring defendants to be very explicit to preserve jurisdictional objections when making voluntary appearances.[222] Moreover, Justice

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215. Under Missouri practice, a "general appearance" was any appearance made without "expressly stat[ing] that the appearance is only for the purpose of excepting to the jurisdiction." *Id.*

216. *Id.* at 555-56 (announcing this holding as to first substituted defendant); *id.* at 556 (same, as to second substituted defendant).

217. *Id.* at 556 (citing, inter alia, an Illinois and a New York case each adopting the same rule). The state court reasoned that, by making general appearances first, the second and third defendants had nothing left to "adopt" from the first's pleadings except his merits defense. *Id.* at 575 ("Under the circumstances we must construe the entry [of the second defendant] to mean that [he] entered his general appearance and thereafter adopted that part of the answer containing a plea to the merits."). Under the Federal Rules of Civil Procedure, objections to venue and personal jurisdiction are also deemed waived if omitted from defendant's first responsive pleading. *See* FED. R. CIV. P. 12(h)(1).

218. *Wechsler*, 239 S.W. at 556 (noting difficulty of venue question and concluding "we prefer to place our decision on the ground that venue was waived by defendant entering his general appearance").

219. Justice Holmes declared, "The state courts may deal with that [the rules for preserving jurisdictional challenges on voluntary appearances] as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right." Davis v. Wechsler, 263 U.S. 22, 24 (1923).

220. "[L]ocal practice shall not be allowed to put unreasonable obstacles in the way." *Davis*, 263 U.S. at 25. This language prefigured the Court's contemporary rule that a state-law procedural default by a federal claimant in state court may not preclude Supreme Court appellate review of a federal question when the state has no "legitimate interest" in the rule's enforcement. *See* Osborne v. Ohio, 495 U.S. 103, 124 (1990); *see also* Lee v. Kemna, 534 U.S. 362, 380 (2002) (holding state procedural default does not preclude federal review where "unyielding application of the general rule would disserve any perceivable interest").

221. *See supra* notes 181-203 and accompanying text (discussing decision).

222. Justice Holmes emphasized the state court's recognition "that by Missouri practice the defendant had a right to unite a plea to the jurisdiction and a defence [sic] on the merits." *Davis*, 263 U.S. at 24; *see also Wechsler*, 239 S.W. at 555 (noting that first Director General defendant had successfully done just that). But he ignored altogether Missouri's rule demanding that a defendant wishing to do so *must* explicitly challenge jurisdiction before he could join that challenge to a plea on the merits. *Wechsler*, 239 S.W. at 555. Nor did Justice Holmes address the undisputed fact, stressed by the state court, that the second

Holmes ignored altogether the state court's common-sense view about why the second Director General might reasonably have chosen to waive his objections under General Order 18-A:[223] even if the plaintiff had filed his lawsuit in the wrong Missouri county,[224] he could simply have refiled immediately in the correct one,[225] simultaneously curing both venue and jurisdiction and so leaving the Director General's position essentially unchanged.[226] Moreover, by 1921, when the second defendant appeared, Congress had already directed the President to "wind up all business growing out of" wartime federal railroad control.[227] So to the Missouri court, it made perfect sense for that Director General to waive any nonmerits challenges that would only have delayed resolving this personal injury lawsuit.

Thus, although the Missouri court may well have erred in applying state practice rules to the Directors General here — and surely it applied them in a rigorous, technical way — it is not obvious why the

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Director General had not only failed to challenge jurisdiction properly, but he had not even conditioned his voluntary appearance on being allowed to adopt the first Director General's responsive pleading, which did explicitly challenge jurisdiction. *Id.*

223. The third Director General made his substituted appearance only after trial, in open court, and then immediately appealed the verdict to the court of appeals. *Wechsler*, 239 S.W. at 556. The Missouri court treated this latter appearance as a *general* appearance, like the second Director General's, and so concluded that that defendant, too, had waived venue and jurisdiction on appeal. *Id.*

224. This question was complicated by uncertainty in the record about exactly where the train had derailed, and about whether state law considered the nearest town to be in one county or another. *See supra* note 212.

225. Nothing in either the state court's opinion or in the Supreme Court's opinion indicates that this plaintiff would have faced a statute of limitations bar if forced to dismiss his first lawsuit and refile elsewhere. To the contrary, the state court relied on the fact that the plaintiff would have been able to refile easily. *See Wechsler*, 239 S.W. at 555.

226. This, of course, would not have been true had an ordinary defendant successfully challenged a state court's personal jurisdiction over him. Ordinary defendants challenge jurisdiction based on an entire *state*'s power to hold them answerable in any state court, and so when they win that challenge they cannot be sued on the same complaint anywhere in the state.

The Missouri court made this common-sense point in a slightly different way than I have done here. That court appeared to read the 1920 Transportation Act as somehow altering the venue rules in place under the 1918 Railroad Act — and so under General Order 18-A — making Jackson County, Missouri a proper venue for this lawsuit no matter what. *See Wechsler*, 239 S.W. at 555. Thus, even if the state court had accepted the second Director General's venue/jurisdiction challenge, the plaintiff could have refiled in the *same* state court. *See Id.* Justice Holmes replied to this view obliquely, declaring without elaboration, "The Transportation Act, 1920, in no way invalidates a defence [sic] good when it was passed." *Davis*, 263 U.S. at 25 (citation and enactment details omitted). But even if the state court had been wrong about *which* county would be proper for a refiled complaint, either Jackson or its neighbor, Andrew County, would have been the new venue, which would not appear to have altered the litigation materially. *See Wechsler*, 239 S.W. at 556.

227. *Wechsler*, 239 S.W. at 556.

state court's state-law ruling was "unreasonable"[228] too. And Justice Holmes gave no particular reason why it was,[229] other than suggesting that the second and third defendants had both stated their wish to challenge venue and jurisdiction through means that the state court should have accepted as a "plai[n] and reasonabl[e]" substitute for the state's ordinary practice.[230]

D. *Mistrusting States or Antecedence Alone?*

So what explains the Court's inadequacy rulings in these three pivotal cases? And what explains the opinions' harsh rhetoric in doing so? In *Davis*, for one, Justice Holmes suggested not only that the state court had applied state law incorrectly, but that it had applied state law *dishonestly*:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when *plainly and reasonably made*, is not to be defeated under the name of local practice . . . . [E]ach Director General in turn plainly indicated that he meant to adopt the position of his predecessor, and to insist that the suit was brought in the wrong county. His lawful insistence *cannot be evaded*

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228. *See Davis*, 263 U.S. at 25 ("[I]t is necessary to see that local practice shall not be allowed to put *unreasonable* obstacles in the way [of federal claims in state court].") (emphasis added).

229. The Court did not, for example, suggest that the state court had fabricated a *novel* rule to thwart the federal defendant. *Cf.* Lee v. Kemna, 534 U.S. 362, 382 (2002) (holding state procedural grounds inadequate because, inter alia, it was "novel" in its "application to the facts" there) (internal quotation omitted); Staub v. City of Baxley, 355 U.S. 313 (1958) (ruling that a state procedural rule invoked by the Georgia court to preclude a federal claim was inadequate to prohibit Supreme Court review because rule was novel under Georgia law); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (same, where state procedural rule held not to have been applied consistently in past Alabama cases). HART & WECHSLER characterizes *Davis* as holding the Missouri court of appeals judgment "inadequate" because it enforced the state's general appearance rules in an "unduly burdensome" way, though not so burdensome as to implicate due process concerns. *See* HART & WECHSLER, *supra* note 6, at 581 (noting that "[c]ases finding state grounds inadequate because burdensome are especially rare").

230. *Davis*, 263 U.S. at 24. In this, *Davis* prefigured the Court's controversial holding in *Henry v. Mississippi*, 379 U.S. 443 (1965), that a state procedural default may not preclude Supreme Court review of a federal claim where the claimant had substituted some other procedure that "substantially served" the state interest behind the defaulted rule itself. *Id.* at 448. For the first thirty-seven years after *Henry* was announced — and, indeed, in *Henry* itself — the Court never declared a state procedural default "inadequate" to preclude federal review because a claimant had followed an adequate alternative. *See* HART & WECHSLER, *supra* note 6, at 584-86 (describing *Henry* as "radical" and tracing its "demise"); *see* 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4020, at 291 (2d ed. 1996) (noting later decisions' failure to rely on *Henry*). But *Lee* came close: there, while disclaiming reliance on *Henry*, the Court held a state procedural default inadequate to preclude federal habeas review of a due process claim because (as the "most important" among other reasons) the claimant had "substantially complied" with the state's rule. *See* 534 U.S. at 382-86 & n.16; *see also id.* at 393-95 (Kennedy, J., dissenting) (charging that majority reasoning improperly resurrected *Henry* rule, notwithstanding majority's disclaimer).

> *by attempting a distinction* between his appearance and his substantially contemporaneous adoption of the [first defendant's] plea.[231]

Given the relatively trivial federal interest at stake in *Davis* — a federal defendant's ability to force a plaintiff to refile his state-law claim in a neighboring county[232] — the Court's suspicions feel disproportionate.[233] But Justice Holmes elevated the Director General's "federal right" to insist on his venue objection to the same level as the due process rights vindicated in *Love County*[234]; here, as there, the Court declared itself unwilling to permit a state court to use state law to "defea[t] a plain assertion of [a] federal right."[235]

One of three things might help explain the Court's stance. First, although the Court did not say so, it may have believed the Missouri court to be part of a larger multi-state resistance to federal wartime control of railroads — and to the ways in which federal control changed how state law could be enforced against those railroads — under the 1918 Federal Control Act.[236] That federal control was con-

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231. *Davis*, 263 U.S. at 24 (emphasis added). As strident as this language is, the Court now exaggerates it. In *Lee*, the majority cited this passage in *Davis* for the rule that "[t]here are . . . exceptional cases in which *exorbitant* application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." 534 U.S. at 376 (emphasis added).

232. *See supra* notes 225-226 (discussing state court's view — uncontradicted by the Supreme Court — that plaintiff could have refiled lawsuit immediately if defendant's venue or jurisdictional challenges had proven successful).

233. This has not made Justice Holmes' rhetoric any less influential. As Professor Hill observed a generation ago, *Davis*'s no-state-"springe" language has been "quoted more often than any other as expressive of the applicable principle" permitting the Court to reverse state-court state-law decisions despite its ordinary lack of jurisdiction over them. Hill, *supra* note 10, at 944; *see id.* at 943 (quoting *Davis* language reproduced in text accompanying note 218, *supra*). Indeed, as Professor Hill also noted, *Davis* — for all its curtness — "represents one of the fuller explications of the Supreme Court on the subject." Hill, *supra* note 10, at 944.

234. *See* Ward v. Love County, 253 U.S. 17, 21-22 (1920); *see also supra* notes 181-203 and accompanying text (discussing *Love County* reasoning). Justice Holmes cited only *Love County* and *Creswill v. Knights of Pythias*, 225 U.S. 246 (1912), to support the Court's conclusion that the Missouri court's state-law ground for decision was inadequate. *Davis*, 263 U.S. at 24-25; *see supra* notes 176-178 (discussing *Knights of Pythias*).

235. *Davis*, 263 U.S. at 24 (citing *Love County*, 253 U.S. at 22). Justice Holmes himself did not specify what "federal right" was at stake here. He might have meant to read General Order 18-A as vesting in the Director General a right to be free from the personal jurisdiction of state courts lacking proper venue in lawsuits against federally-controlled railroads, but he also insisted that the state court had evaded a federal right even if General Order 18-A were read simply to grant the Director General a pure venue objection. *Davis*, 263 U.S. at 24. With ordinary defendants, personal jurisdiction problems implicate the defendant's own due process rights, *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980), but venue problems do not.

236. *See also supra* notes 179-180 and accompanying text (suggesting that *Union Pacific* reversal may have reflected the Court's intention to enforce against resistant states its own decisions according railroads federal commerce-clause protection against state regulation); *supra* notes 200-203 and accompanying text (suggesting that *Love County* reversal may have reflected Court's intention to enforce against Oklahoma in particular its decision according Choctaw claimants federal due process protection against state taxation).

centrated in, and personified by, the Director General.[237] And while Congress had specified that railroads under federal control should remain subject to the same "laws and liabilities . . . under State or Federal laws or at common law"[238] in force during peacetime — like the *Davis* plaintiff's state-law personal injury claim — the Director General had declared that he must be substituted as defendant and the railroads dismissed in any lawsuit enforcing those civilian laws.[239] Moreover, it was the Director General who had unilaterally set the venue rules for those lawsuits — and, apparently, the terms under which he would make himself available for state-court lawsuits, under General Order 18-A.[240]

By the time the Supreme Court heard *Davis*, it had already decided a handful of other cases reversing state supreme courts for resisting the Director General's orders. In June, 1921 — just eight months before the Missouri court issued its *Davis* ruling — the Supreme Court had reversed the Arkansas Supreme Court for disobeying the Director General's order requiring state courts to dismiss railroad companies as defendants once the Director General entered a

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237. As the Court earlier had characterized this official's position:

> The Railroad Administration established by the President in December, 1917, did not exercise its control through supervision of the owner-companies, but by means of a Director General through "one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing."

Missouri Pacific R.R. Co. v. Ault, 256 U.S. 554, 557 (1921) (quoting Northern Pacific Ry. Co. v. North Dakota, 250 U.S. 135, 148 (1919)).

238. Federal Control Act, ch. 25 § 10 provided:

> That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President . . . . But no process, mesne or final, shall be levied against any property under such Federal control.

Federal Control Act, 40 Stat. 451, 456 (1918).

239. Recall that General Order No. 50 provided:

> It is . . . ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, bringing upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against . . . [the] Director General of Railroads, and not otherwise . . . . The pleadings in all such actions . . . may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

See Ault, 256 U.S. at 562 n.1 (quoting General Order No. 50).

240. *Davis*, 263 U.S. at 23; *see also supra* note 209 (quoting General Order 18-A). Again, both the Missouri court of appeals and the U.S. Supreme Court were unclear about whether and how General Order 18-A's venue rules intersect with a state court's personal jurisdiction over the Director General; both courts reached their conclusions based on venue principles alone. *See supra* notes 210-218 (discussing same).

lawsuit,[241] and for ignoring his order exempting federally-controlled railroads from "fines, penalties, and forfeitures" otherwise appropriate under state law.[242] And in November, 1921 — three months before the Missouri court ruled in *Davis* — the U.S. Court had reversed a Mississippi Supreme Court ruling that General Order 18-A's venue rules themselves exceeded the powers that the Control Act had granted President Wilson and the powers that the President had delegated to the Director General.[243] Given these other cases, perhaps *Davis*'s harsh language reflects the Court's accumulated impatience with states resisting the Director General's authority.

Or, as a second hypothesis, the *Davis* Court may have viewed Missouri and its courts with particular suspicion during this period, just as it may have suspected the Oklahoma court of anti-Indian animus in *Love County*. Five years before *Davis*, in *Union Pacific*,[244] Justice Holmes had declared that another Missouri court had used an "inadequate" state-law estoppel ruling to shield state interference with the railroads' federally-protected interstate commercial activities.[245] Although it is beyond the scope of this Article to undertake a thorough inquiry into the tensions between states like Missouri and the federal government's role, especially the federal courts', in the century's early decades,[246] it is certainly possible that the Court's impa-

241. *Ault*, 256 U.S. at 555, 558 (holding that Director General correctly read the Federal Control Act § 10, *see supra* note 238, as prohibiting lawsuits against railroad companies themselves while under federal control). The *Ault* Court acknowledged that "[t]he cases in the state courts show a considerable diversity of view" on the question whether the railroads must be dismissed altogether from lawsuits arising during their federal control. *See Ault*, 256 U.S. at 562, 563 n.2 (citing decisions by the Mississippi and Minnesota supreme courts rejecting the *Ault* Court's conclusion that suits might proceed only against the Director General alone).

242. *Ault*, 256 U.S. at 564 (quoting Director Generals' order No. 50). The *Ault* Court reversed the Arkansas court's decision, enforcing a state statute requiring railroads to pay discharged employees their "full wages" within seven days or face a penalty, to impose a $390 penalty on the Director General on top of $50 in awarded backpay; the Court upheld an order of the Director General prohibiting claims against federally-controlled railroads for "fines, penalties, and forfeitures." *See id.* at 555, 563-65 (upholding Director General's Order No. 50 as consistent with Federal Control Act § 10); *see also supra* note 239 (quoting General Order No. 50).

243. Alabama & Vicksburg R.R. Co. v. Journey, 257 U.S. 111, 113-14 (1921).

244. Union Pacific R.R. v. Pub. Serv. Comm'n, 248 U.S. 67 (1918).

245. *See id.*; *see also supra* notes 176-178 and accompanying text (discussing *Union Pacific* ruling that state-law estoppel judgment was inadequate to shield state-court decision from reversal by the Supreme Court on finding that state commission's high fee for authorizing railroad to issue bonds secured by railroad's few in-state assets interfered with interstate commerce, in violation of U.S. CONST. art. I, § 8).

246. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 11-16 (2000) (discussing the development of Populist-Progressive political opposition to "big business" of national corporations like railroads by groups including midwestern farmers); *id.* at 14 (noting that as Congress began to enact reform legislation regulating business, "the federal courts gradually became the principal tar-

tience in *Davis* — so out of proportion to the actual issue there — sprang from the larger political environment in which the dispute arose.[247]

Third, apart from any external political or historical reason why the Court might have tended to mistrust these particular states during this particular time, perhaps the Court's harsh treatment of the Missouri court of appeals in *Davis* — like its treatment of the Missouri Supreme Court in *Union Pacific* and the Oklahoma Supreme Court in *Love County* — reflected, more fundamentally, the Court's evolving claim to a special constitutional prerogative to vindicate federally-protected interests wherever the Court finds them lurking.[248] That impulse might explain why in these three opinions — which say little to suggest that the state courts were deliberately cheating federal inter-

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get of Progressive criticism"); *id.* at 21-22 (recounting how the Court in the early 1920s became "more actively anti-Progressive" in decisions "favor[ing] the interests of private business," spurring Progressives to join with states' rights advocates in opposition to the Court); Friedman, *supra* note 40, at 1391-96 (discussing Populist-Progressive political opposition to Supreme Court decisions invoking federal constitutional rights to strike down state commercial regulation, as in *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating, on due process grounds, a New York statute setting maximum working hours for bakers)); *see also* Friedman, *supra* note 40, at 1427-27 (discussing Populist-Progressive criticism of federal judges' use of Sherman Act to enjoin labor strikes while refusing to use same Act to "combat monopolization" by big business).

247. *See supra* note 246 (citing sources discussing tensions between pro-national-business Court and Populist-Progressive political movements in the early twentieth century); *see also* Bush v. Gore, 531 U.S. 98, 139-41 (2000) (Ginsburg, J., dissenting) (arguing that "historical contexts" external to and unmentioned by the Court best explain "rare" cases where the Court has rejected a state high court's interpretation of state law); *supra* note 27 and accompanying text (discussing Justice Ginsburg's assertion and citing commentators' reactions to her "candid" assessment); Friedman, *supra* note 40, at 1388, 1448-55 (arguing that the Court's legitimacy depends substantially on its responsiveness to social and economic realities surrounding legal controversies).

248. *See, e.g.*, Home Tel. & Teleg. Co. v. Los Angeles, 227 U.S. 278, 285 (1913) (declaring federal courts "the primary source for applying and enforcing the Constitution of the United States"); Deposit Bank v. Frankfort, 191 U.S. 499, 518 (1903) (declaring federal courts' "ultimate right . . . to protect the citizens of the United States, and of every State, in the enjoyment of rights and privileges guaranteed by the Federal Constitution"); *see* PURCELL, *supra* note 246, at 45-46 (discussing the Court's efforts to expand its own authority over Congress and states during pre-World War I period; citing *Home Telephone* and *Deposit Bank* as proof of the Court's goal of judicial supremacy in enforcing the Constitution). For the Court's more recent claims to the last word on constitutional rights, see United States v. Morrison, 529 U.S. 598 (2000) (declaring that the Court and not Congress has final say on the scope of equal protection guarantees); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (declaring that the Court and not Congress has final say on what property interests the Constitution's due process and takings clauses protect); City of Boerne v. Flores, 521 U.S. 507, 530-31, 536 (1997) (holding that once the Court defines the scope of the First Amendment's Religion Clauses, Congress may not grant greater protections); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (holding that the Court alone may define which "fundamental rights" are protected by the Constitution's due process guarantees); *see also* Cooper v. Aaron, 358 U.S. 1, 17-19 (1958) (declaring the federal judiciary "supreme in the exposition of the law of the Constitution" guaranteeing equal protection). *See generally* Larry D. Kramer, *The Supreme Court 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4 (2001) (discussing judicial supremacy).

ests[249] — the Court reintroduced the strong supremacy rhetoric it stressed in *Martin v. Hunter's Lessee* but then undercut in *Murdock v. City of Memphis*. *Davis* declared:

> If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.[250]

Likewise in *Love County*, even as the Court acknowledged the rule that "a judgment of a state court, which is put on independent non-federal grounds broad enough to sustain it, cannot be reviewed by us,"[251] it also worried that that bar permitted state courts to frustrate what the Court viewed as its own special role. To give state courts the last word, where state-law shuts out federal claims, would be to "renounc[e]" the Court's prerogative "to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."[252]

In fact, each of these three pivotal cases raised exactly that problem: some state-law issue rose up to block a federal claim's path through state court and into the Supreme Court. In *Union Pacific*, the claimant's estoppel by conduct blocked it from raising its commerce-clause claim; in *Love County*, the claimants' waiver by voluntary tax payment blocked them from raising their due process claim; and in *Davis*, the defendant's waiver by general appearance blocked him from raising his federal venue claim. In all three cases, the Court's refusal to find the state courts' judgments "adequate" simply removed state-law debris from a federal claimant's path.

Put bluntly, then, perhaps Justice Holmes in *Union Pacific* and *Davis*, and Justice Van Devanter in *Love County*, sounded irritated and impatient because state law had simply gotten in the way of federal law, and thus in the Court's way, too. And despite the black letter

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249. The one possible exception is *Love County*, where the Court noted that Oklahoma officials, including its supreme court, continued to invoke state law to demand and then to hold the Choctaw claimants' taxes, paid under protest, for six years after the U.S. Supreme Court ruled those taxes unconstitutional. *See* Ward v. Love County, 253 U.S. 17, 21-22 (1920); *see also supra* notes 181-203 and accompanying text.

250. Davis v. Wechsler, 263 U.S. 22, 24 (1923) (citing Creswill v. Knights of Pythias, 225 U.S. 246 (1912) (discussed *supra* notes 176-178)).

251. *Love County*, 253 U.S. at 22-23.

252. *Love County*, 253 U.S. at 23; *see also Union Pacific*, 248 U.S. at 69-70 ("[I]t is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived."). As Professor Purcell has observed about other decisions during this period declaring state grounds "inadequate" in order "to prevent an evasion of real issues": "The 'real issues,' of course, were federal rights, and the feared evaders were state courts that might minimize, avoid, or deny them." *See* PURCELL, *supra* note 246, at 45; *see also id.* at 323 n.44 (noting that "[a]lthough the Court sometimes suspected state court decisions, it seldom acknowledged the fact").

rule barring Supreme Court appellate review of state-court state-law decisions, the Court could not resist reversing those state grounds in order to reach the federal interests lurking behind. The state grounds were not inadequate because dishonest, "untenable,"[253] "unreasonable,"[254] or "without fair or substantial support."[255] They were inadequate because they blocked the view.

III. DIVORCING MISTRUST FROM SUPREMACY: JURISDICTION FROM ANTECEDENCE

In *Union Pacific*, *Love County*, and *Davis*, the Court's impulse to enforce federal-law supremacy outright coexisted awkwardly alongside the Court's own reservation that it lacked power to disturb state courts' state-law judgments absent some palpable reason to suspect them of cheating federal law. That tension might have forced the Court to go through the motions of intimating some actual state-court misbehavior in these transitional cases when, without that constraint, it might have claimed a straightforward supremacy-based appellate jurisdiction from the simple fact that state law stood in front of — or logically anteceded — a federal issue.[256] This very premise, in fact, had

253. *Love County*, 253 U.S. at 22 ("Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review [federal questions] easily may be avoided.").

254. *Davis*, 263 U.S. at 25 ("[L]ocal practice shall not be allowed to put unreasonable obstacles in the way [of enforcing federal rights].").

255. *Love County*, 253 U.S. at 22 ("It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support.") (citing, inter alia, *Knights of Pythias*, 225 U.S. at 246, and Union Pacific R.R. v. Pub. Serv. Comm'n., 248 U.S. 67 (1918)).

256. In *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540-41 (1930), for example, the Court sent a mixed message on what would forfeit a state court's right to utter the last word on what an antecedent state law meant. While the Court suggested that it might always reverse a state ground simply because it lacked "a fair or substantial basis" in state law, it also suggested, to the contrary, that the lack of such state-law foundation could only justify reversal to the extent it proved the state court had "eva[ded]" its "constitutional obligations." *See id.* The Court declared:

> Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus *evaded*. [citing, inter alia, *Love County* and *Enterprise Irrigation*] . . . . But if there is no *evasion* of the constitutional issue, [citing, inter alia, *Vandalia R.R.*] . . . and the non-federal ground of decision has fair support, [citing *Enterprise Irrigation*, *Leathe v. Thomas*, and *Vandalia R.R.*] . . . this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.

Broad River Power Co., 281 U.S. at 540-41 (emphasis added); *accord Knights of Pythias*, 225 U.S. at 263 (Holmes, J., dissenting) (arguing that "[w]hen a Federal right is held by a state court to have been lost by subsequent conduct that of itself involves no Federal question

driven *Martin v. Hunter's Lessee*'s[257] assertion of jurisdiction over the nonfederal question whether Virginia had successfully confiscated Lord Fairfax's Northern Neck property before federal treaties prohibiting confiscation went into effect.[258] Justice Story demanded,

> How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide, that the title was bad, and, therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty?[259]

Otherwise, Justice Story reasoned, the Supreme Court's power to review federal questions "may be evaded at pleasure" by any calculating state court.[260] Thus, the Court must have jurisdiction to review and reverse any state-law judgment that blocks the path of a federally-protected interest, whether or not that state court demonstrably deserved to be mistrusted.[261]

A. *After* Davis: *Antecedence Becomes Central*

In the years since *Davis*, the Court has returned to *Martin*'s supremacy-oriented jurisdictional view: it has increasingly exercised an antecedence-based power to reverse state grounds divorced from any particularized state suspicion. For example, where federal law steps in to protect substantive interests originally created by state law

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[like laches, estoppel, or statute of limitations] I think we are not at liberty to re-examine the decision unless we can say that the state court in substance is denying the right").

257. 14 U.S. (1 Wheat.) 304, 357-59 (1816).

258. *See supra* notes 89-113 and accompanying text (discussing *Martin* in detail).

259. *Martin*, 14 U.S. (1 Wheat.) at 358. Justice Story, assuming that the Court's appellate jurisdiction should reach every question that a state court had power to decide, ignored what we now recognize as a fundamental, and fundamentally constitutional, asymmetry between state and federal courts: although state courts are ordinarily courts of general jurisdiction competent to decide all questions of state *and* federal law (where neither Congress nor the Constitution has explicitly excluded state courts from hearing federal-law questions), federal courts are courts of limited jurisdiction competent to decide only those federal or state-law questions falling within an affirmative jurisdictional grant from Congress.

260. *Martin*, 14 U.S. (1 Wheat.) at 357. Hamilton, by contrast, suggested that granting state courts concurrent jurisdiction over Article III questions without federal appellate review would tempt *parties* to evade the federal judicial power. THE FEDERALIST NO. 82, at 556 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (worrying that "every plaintiff or prosecutor" could evade federal authority "at [their] pleasure" absent federal appellate review).

261. *See* Currie, *supra* note 103, at 681-87. Professor Currie has argued that Article III's purposes of uniformity and protection of federal rights are served, as *Martin* suggested, by Court review of state-court state-law findings that are "precondition[ed] to upholding a federal right." *Id.* at 686 n.356.

— like contract or property rights — the Court has routinely claimed jurisdiction to reverse a state court's decision denying those rights. So, although state and not federal law ordinarily governs whether and what kind of contract rights exist,[262] the Court will review and reverse a state court's rulings on those questions to reach the federal claim that the state's legislature violated the Constitution by impairing the obligation of contracts.[263] Likewise, although state and not federal law ordinarily governs whether and what kind of property rights exist,[264] the Court will review and reverse a state court's ruling on those questions in order to reach the federal-law claim that the state violated the Constitution by depriving an owner of that property without due process or by taking it without just compensation.[265]

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262. *See* Hill, *supra* note 10, at 948

> [W]hether a contractual obligation has been created in the first instance, and questions having to do with the construction and scope of the contract, are all questions of state law. The constitutional provision forbidding impairment has not been deemed to give rise to a federal power to shape the law involved in the creation of contractual obligations as an incident to the federal power to prevent impairment of an obligation once it has been created.

Id. at 948; *see also id.* at 959-61 (discussing cases where the Supreme Court nonetheless reversed state-court ruling that no contract existed, in order to reach claim that state legislature had impaired the obligation of contract in violation of U.S. CONST. art. I, § 10; noting that the Court has refused to permit states the final say on state-law questions in contract-clause cases); *id.* at 963 (discussing further the Court's contract-clause cases on direct review from state courts). *But see* General Motors v. Romein, 503 U.S. 181, 187 (1992) (declaring that "[t]he question whether a contract was made is a federal question for purposes of Contract Clause analysis," even though that question should be decided giving " 'respectful consideration and great weight to the views of the State's highest court.' ") (quoting Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938)). For discussion of how the more limited proven mistrust rule would have forced a different outcome in *Brand*, see *infra* Section IV.A.1.

263. U.S. CONST. art. I, § 10 ("No State shall... pass any... Law impairing the Obligation of Contracts...."). *See, e.g.*, *Romein*, 503 U.S. at 187 (declaring the Court may "not surrender the duty to exercise our own judgment" in deciding whether contract was made and what the terms were) (quoting Appleby v. City of New York, 271 U.S. 364, 380 (1926)); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938) (same, but also noting that questions about a contract's formation and terms are "primarily of state law").

264. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-41 (1985); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9-12 (1978). *See generally* HART & WECHSLER, *supra* note 6, at 558-59 ("The cases generally take the view that the question whether a 'property' interest exists is governed by state law."). Some property interests, of course, arise under federal law. *But see, e.g.*, Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (holding that Congress exceeded its authority under § 5 of the Fourteenth Amendment in treating interests created by federal patent and unfair competition laws as property entitled to constitutional due process protection against infringement by states).

265. U.S. CONST. amends. V & XIV. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1032 n.18 (1992); Bishop v. Wood, 426 U.S. 341, 344-45 (1976). *See generally* HART & WECHSLER, *supra* note 6, at 557-59 (discussing cases involving Supreme Court review of state-court decisions determining creation or dimension of property rights); *id.* at 559-62 (discussing related question of how the Court treats claims that state-law created liberty interests are entitled to federal due process protection).

And the Court has asserted an antecedence-based jurisdiction even where there is no such tight substantive link between state and federal law.[266] For example, in *Fox Film Corp. v. Muller*,[267] while reciting the "settled rule" that "our jurisdiction fails if the non-federal ground is independent of the federal ground" and has "fair support" in state law,[268] the Court also acknowledged another — and potentially more expansive — "rule": the Court may claim jurisdiction to review a state-court state-law ruling that "constitute[d] a preliminary step which simply had the effect of bringing forward for determination the federal question."[269] Moreover, the Court frequently has reversed

266. Justice Holmes's 1904 opinion for the Court in *Rogers v. Alabama* made this very leap: "It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. *But that is merely an illustration of a more general rule.*" 192 U.S. 226, 230 (1904) (emphasis added) (citation omitted) (asserting, with contract-clause example as support, "a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights").

267. 296 U.S. 207 (1935).

268. *Id.* at 209, 210 (citing, inter alia, Enter. Irrigation Dist. v. Canal Co., 243 U.S. 157 (1917); Eustis v. Bolles, 150 U.S. 361 (1893); and Klinger v. Missouri, 80 U.S. (13 Wall.) 257 (1871)). In *Fox Film*, the Court disclaimed jurisdiction to review a Minnesota Supreme Court decision, in an action to enforce a contract, that a clause held to violate federal antitrust law in an earlier federal-court case was inseverable from the rest of the contract, so making the whole agreement unenforceable. 296 U.S. at 210. The *Fox Film* opinion did not reflect any searching review of that state-law ruling, but simply recorded the fact that the state court had considered both state and federal precedent on the question and then reached its decision "upon what it conceived to be the weight of authority." *Id.* at 209. Based on that, the Court concluded the state-court ruling was "not without fair support." *Id.*

269. *Fox Film*, 296 U.S. at 211. *Fox Film* is written in a fairly confusing way, so a full quotation is useful here:

> The rule announced in *Enterprise Irrigation District v. Canal Co.* . . . and other cases, to the effect that our jurisdiction attaches where the non-federal ground is so interwoven with the other as not to be an independent matter, does not apply. *The construction put upon the contracts did not constitute a preliminary step which simply had the effect of bringing forward for determination the federal question* [which, apparently, would have triggered appellate review], but was a decision which automatically took the federal question out of the case if otherwise it would be there [and thus precluded appellate review]. The non-federal question in respect of the construction of the contracts, and the federal question in respect of their validity under the Anti-trust Act, *were clearly independent of one another.* The case, in effect, was disposed of before the federal question said to be involved was reached. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear.

Id. at 210-11 (citations omitted) (emphasis added). By its own terms, this passage appears to address a problem related to but still different from the question actually decided in *Fox Film*, which was whether the state-law grounds for decision were "adequate" to preclude Supreme Court review. *See id.* at 210 ("[T]he non-federal ground is adequate to sustain the judgment."). This passage seems to ask, instead, whether the state-law severability issue was "independent" of the federal antitrust issue — a distinct question that ordinarily seeks to determine whether state law incorporated or otherwise relied upon federal law so that the state court's ruling cannot be said to have been reached "independently" of those federal-law sources. *See* Michigan v. Long, 463 U.S. 1032, 1038 n.4 & 1039 (1983) (discussing ways in which state-law grounds may be dependent on federal law). *See generally* HART & WECHSLER, *supra* note 6, at 546-51 (discussing special jurisdictional problems that arise where state-law grounds appear dependent on federal law); *id.* at 528 (distinguishing "adequacy" of state-law grounds from their "independence" from federal law). The Court did not

state-court decisions enforcing state *procedural* rules that block the path of a federal claim or other federal interest, even though they do not actually violate federal due process standards or other federal law.[270] These special "procedural default" cases come closest to ar-

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treat *Fox Film* itself as involving an "independence" problem, but only an "adequacy" problem. *See Fox Film*, 296 U.S. at 209-10. *But see id.* at 209 (noting, without further comment, that the Minnesota supreme court cited both state and federal authorities in evaluating whether tainted contract clause was severable).

Fox Film's use of *Enterprise Irrigation* furthers the confusion. In the earlier case, the Court drew a clear distinction between the twin requirements that state-law grounds be both "adequate and independent" to preclude Supreme Court review. *See Enter. Irrigation*, 243 U.S. at 164; *see also supra* notes 162-168 and accompanying text (discussing *Enterprise Irrigation*). *Enterprise Irrigation* described cases where state and federal grounds are "interwoven" only when discussing the need to determine whether state grounds are "independent." 243 U.S. at 164. But the quoted *Fox Film* passage, purporting to elaborate on *Enterprise Irrigation*, suggests something different: that appellate review is appropriate wherever state-law "constitute[s] a preliminary step which simply [has] the effect of bringing forward for determination the federal question." *Fox Film*, 296 U.S. at 211. This passage describes a jurisdiction that depends on antecedence alone, derived from a relationship between state and federal law that has nothing, apparently, to do with state law's *dependence* on federal law.

I read *Fox Film*, thus, as encouraging the Court and commentators alike to move towards an antecedence-based jurisdiction wherever a state-law issue crops up to block the path of a federal interest — that is, where the state-law issue "constitute[s] a preliminary step" that "bring[s] forward . . . the federal question." *Fox Film*, 296 U.S. at 211. HART & WECHSLER, for example, suggests this *Fox Film* passage means to distinguish "antecedent" state grounds — which the Court should be able to review so that state courts may not improperly block federal claims and then evade Supreme Court review — from those situations where "answering the state law question was not a necessary antecedent to any question of federal law." *See* HART & WECHSLER, *supra* note 6, at 520; *id.* at 525 (discussing *Fox Film* passage as emphasizing special situation where state grounds are "antecedent" to federal claim). Although HART & WECHSLER elsewhere describes the separate "independent state grounds" question as focusing on whether state law incorporated federal law, in discussing *Fox Film*, it uses the term "independent state grounds" to describe those that are not "antecedent" in this particular sense. *Id.* at 520, 525.

270. *E.g.* Lee v. Kemna, 534 U.S. 362, 375-76 (2002); Coleman v. Thompson, 501 U.S. 722, 729 (1991). *See, e.g.*, Ford v. Georgia, 498 U.S. 411, 424 (1991) (explaining that for state procedural ground to be "adequate" to preclude appellate review of constitutional claims, the rule must have been followed consistently); James v. Kentucky, 466 U.S. 341, 345-48 (1984) (holding "inadequate" Kentucky state-law ruling that criminal defendant could not pursue federal-law challenge to trial court's failure to adopt proposed jury charge because he labeled request one for jury "instruction" rather than "admonition" as state rule required; the Court concluded Kentucky had not applied that procedural rule consistently in prior cases); Hathorn v. Lovern, 457 U.S. 255, 262-63 (1982) (holding state procedural rule "inadequate" unless applied evenhandedly to all similar claims); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (explaining that "state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review" federal claims); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 456-58 (1958) (holding "inadequate" Alabama state-law ruling that those raising federal constitutional challenges to state-court document subpoena could only do so by seeking writ of mandamus against issuing trial judge, and not by writ of certiorari seeking review of trial judge's contempt citation against claimants for failure to comply with order; the Court concluded the Alabama ruling, while "consistent" with prior state cases, was too "novel" to bar consideration of federal claim because it ignored the parallel practice of permitting similar claims through certiorari); Staub v. City of Baxley, 355 U.S. 313 (1958) (holding "inadequate" Georgia state-law ruling that criminal defendant could not raise federal constitutional challenges to prosecution under local permit ordinance because she failed to comply with state rules requiring special particularity in such attacks; the Court concluded Georgia ruling was not adequately supported by Georgia

ticulating a jurisdictional basis for their state-grounds reversals: although the Court lacks jurisdiction over state-court judgments that rest on adequate and independent state procedural grounds,[271] the "adequacy" of those procedural rulings — even absent an outright federal-law violation — " 'is itself a federal question,' "[272] and thus solidly within the Court's appellate jurisdiction.[273] Even more compelling, to some, is the simple fact that the state procedural rule stands up to block — it antecedes — a federal interest.[274]

Commentators have endorsed antecedence-based jurisdiction more explicitly than the Court. *Hart & Wechsler*, for example, contends:

> where a state law ruling serves as an antecedent for determining whether a federal right has been violated, some [Supreme Court] review of the basis for the state court's determination of the state-law question is es-

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precedents and as applied here the rule resorted to an "arid ritual of meaningless form"). This is only a representative sampling: for more comprehensive analysis of cases in which the Court has found state-court procedural rulings blocking federal interests inadequate to preclude Supreme Court review, see Meltzer, *supra* note 12, at 1137-45; Wechsler, *supra* note 11, at 1053-56; Hill, *supra* note 10, at 966-80. For a more recent summary of these cases, see HART & WECHSLER, *supra* note 6; Fountaine, *supra* note 10, at 1064-66.

271. *See Lee*, 534 U.S. at 375 (quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991)).

272. *Lee*, 534 U.S. at 375 (quoting Douglas v. Alabama, 380 U.S. 415, 422 (1965)).

273. *See* 28 U.S.C. § 1257 (2000) (granting appellate jurisdiction over federal questions involved in state-court judgments); Hill, *supra* note 10, at 943; *accord* Fay v. Noia, 372 U.S. 391, 465 (1963) (Harlan, J., dissenting) (suggesting that although the Supreme Court ordinarily lacks jurisdiction on direct review to reverse state-court decisions resting on independent state grounds, federal courts may review state-court rulings that "raise[] federal as well as state questions," even if they do not "discriminat[e] against or evad[e] the assertion" of federal claims). For one theory justifying the Court's state-grounds reversals in procedural default cases as an appropriate use of the Court's federal common lawmaking authority, see *infra* Part IV.

Although *Lee* stated that the adequate and independent grounds rule "applies with equal force whether the state-law ground is substantive or procedural," 534 U.S. at 375, the Court has never held that the adequacy of state *substantive* grounds is a federal question automatically triggering Supreme Court jurisdiction. There is another significant difference in the Court's treatment of the two categories: when considering the adequacy of a state procedural rule, the Court asks whether the state has a "legitimate interest in the rule's enforcement." Osborne v. Ohio, 495 U.S. 103, 124 (1990); *see also Lee*, 534 U.S. at 386 n.16. The Court has not performed state-interest evaluations when considering the adequacy, on direct review, of a substantive state ground.

274. As HART & WECHSLER puts the point: "Are not all state procedural rulings that determine whether a federal question has been seasonably raised in the state courts 'antecedent' in the relevant sense?" HART & WECHSLER, *supra* note 6, at 582 (referring to own suggestion, *id.* at 521, that "where a state law ruling serves as an antecedent for determining whether a federal right has been violated, some review of the basis for the state court's determination of the state-law question is essential if the federal right is to be protected against evasion and discrimination . . . ."). Stated another way, Professor Wechsler argued that the Court's practice makes sense because "where the state ruling found procedural default . . . the existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law." Wechsler, *supra* note 11, at 1054.

> sential if the federal right is to be protected against evasion and discrimination . . . .[275]

Or, as Professor Hill put it a generation ago, if a state-law issue should arise "as a threshold question,"

> it is plain that allowing the state courts the last word on the threshold question, however arbitrary[276] or wrong the particular decision may seem to be, would mean that . . . [federal law] would have only as much force as the state courts are willing to accord it.[277]

Articulated so, the antecedence-based jurisdiction both Court and commentators appear now to favor represents an enormous exception to the black-letter rule prohibiting Supreme Court appellate review of state-court state-law judgments. For it permits the Court to reverse any state grounds that disposed of a case before the federal issue's logical turn came up, without having to identify or substantiate any reason at all to hold the state court's own ruling untrustworthy.

B. *Antecedence and Deference in* Bush v. Gore

Bush v. Gore exemplifies the Court's shift away from a formally limited appellate jurisdiction over state-court state-law judgments.[278] Indeed, by *Bush v. Gore*'s time, so ingrained was the assumption that

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275. HART & WECHSLER, *supra* note 6, at 521. Professor Wechsler stated the point as a jurisdictional given, discussing cases where "the existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law[:] Because of that relationship the state court does not speak the final word on the state question . . . ." Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1054 (1977).

276. Remember that Professor Hill meant the word "arbitrary" here to describe a perceived state-court fault falling short of an actual due process violation. In this passage, he carefully excluded from discussion those state-court rulings that so lack foundation in existing state law as to violate due process. *Cf.* Hill, *supra* note 10, at 959-61 (discussing the very few cases where the Court declared a state-law ruling "inadequate" because it actually violated due process); *id.* at 961 (characterizing one of these cases, Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930), as holding that the "posture adopted by the state court [was] *arbitrary* in the light of prior indications of the governing law"; that is the Court's reversal there turned on its finding that there had been "a retroactive overruling of the . . . law in substance if not in form" thus violating due process) (emphasis added).

277. Hill, *supra* note 10, at 948-49. Notwithstanding the breadth of Professor Hill's language in this passage, he followed it with a discussion of cases involving a more specific relationship between state and federal issues in state court, where federal law steps in to protect state-created interests, as in contract clause cases. LOW & JEFFRIES, *supra* note 26, at 82 (noting that, in some cases, "if there were no limits" on state courts' "freedom" to decide antecedent state-law questions, federal rights and obligations standing next in line "might be easily evaded").

278. Again, most commentators have minimized *Bush v. Gore*'s jurisdictional problems, proffering a post-hoc federal question foundation and then concentrating on the case's merits questions. *See supra* note 22 (discussing commentary). But the Justices' own debate over how to apply the Court's jurisdictional precedents reveals much about how they view their power to reverse on state grounds, and I consider their arguments for that purpose here.

the Court's power to reverse state grounds derives from the simple fact of antecedence — the fact that a state-law judgment blocked consideration of a federal interest — that both Chief Justice Rehnquist, in a concurrence advocating a highly aggressive appellate review of the Florida supreme court's interpretation of Florida election law, and Justice Ginsburg, in a dissent harshly criticizing that stance, could essentially agree that "No doubt there are cases in which the proper application of federal law may hinge on interpretations of state law. Unavoidably, this Court must sometimes examine state law in order to protect federal rights."[279]

Moreover, not only did these two share a jurisdictional starting point, but they also invoked largely the same precedents to advocate their two radically different views about what the Court should do in *Bush v. Gore.* And both used these shared precedents without distinguishing the straightforward *jurisdictional* cases among them,[280] and procedural default cases decided under "adequate and independent state grounds" rules,[281] from other cases where jurisdiction was not

279. Bush v. Gore, 531 U.S. 98, 137 (2000) (Ginsburg, J., dissenting).

280. *Id*; *see also id.* at 114-15 & n.1 (Rehnquist, C.J., concurring) (citing precedents to support the assertion that the Court may reverse state-court state-law judgments not only where state law is itself unconstitutional, but also where the Court deems it necessary in order to vindicate the Constitution's protections for state-created contract and property rights). Of the five precedents Justice Ginsburg cited, three involved property or contract-clause claims. *See infra* note 282. *See Bush*, 531 U.S. at 137 & n.1 (Ginsburg, J., dissenting); *see also id.* at 115 n.1 (Rehnquist, C.J., concurring) (also citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)). But not all of the property-claim precedents raised jurisdictional questions. *See infra* note 282 (discussing *Lucas*). Chief Justice Rehnquist and Justice Ginsburg both cite the Court's state-law reversal in *Fairfax's Devisee v. Hunter's Lessee*, jurisdictionally justified in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *See Bush*, 531 U.S. at 115 n.1 (Rehnquist, C.J. concurring) (citing Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813)); *id.* at 139-40. Chief Justice Rehnquist described the Court's state-law reversal in *Fairfax's Devisee* as "simila[r]" to those in contract and property cases, where the Constitution steps in specifically to provide federal protection to state-created rights. *See Bush*, 531 U.S. at 115 n.1 (characterizing *Fairfax's Devisee* merits decision as following from "independent evaluation of state law in order to protect federal treaty guarantees"); HART & WECHSLER, *supra* note 6, at 520-21 (including *Martin v. Hunter's Lessee* among cases where "the state law question . . . was an essential antecedent to the application of the federal treaty provisions giving protection to then-existing land titles"); Wechsler, *supra* note 11, at 1054 (likening *Martin*'s "title issue" to issues in the contract-clause and property, all examples where "state court rulings on substantive state questions obviously may prevent 'the implementation' of a federal right").

281. Chief Justice Rehnquist and Justice Ginsburg both cited *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456-58 (1958), where the Court held "inadequate" a state-court procedural ruling that state law permitted appellate review of federal constitutional challenges to a trial-court discovery order only where those claims had been appealed through a petition for writ of mandamus to review the discovery order itself, rather than through a petition for writ of certiorari seeking review of the trial court's contempt judgment for disobeying that order, even though that practice was "consistent" with the state court's earlier precedents. *Patterson*, 357 U.S. at 457-58; *see also Bush*, 531 U.S. at 114-15 (Rehnquist, C.J. concurring); *id.* at 139 (Ginsburg, J., dissenting). *But see Bush*, 531 U.S. at 114-15 (Rehnquist, C.J., concurring) (suggesting, without explicitly stating, that the procedural ground in *Patterson* was so "novel" as to be unforeseeable, thus raising an actual due process problem; using *Patterson* as an example where "*the Constitution* requires this Court to un-

disputed at all, as where the Court struck down a South Carolina supreme court's reading of state trespass laws against civil rights sit-in participants because that reading was "unforeseeable" in light of past practice and thus violated due process when applied retroactively against the demonstrators.[282]

That the *Bush v. Gore* debaters can depart in such radically different directions from their shared starting point[283] may reveal something

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dertake an independent, if still deferential, analysis of state law") (emphasis added).

Justice Ginsburg also cited *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190 (1925), where the Court refused to reverse an Illinois Supreme Court decision, under a state procedural rule, that litigants attempting to raise federal contract-clause and due process challenges against a state tax had waived those claims by appealing them from the trial court first to an intermediate appellate court, which lacked jurisdiction to hear constitutional claims, rather than to the state supreme court. *See Bush*, 531 U.S. at 137-38 (citing *Central Union Telephone Co.*, 269 U.S. at 193-95) The *Central Union Telephone* Court explicitly rejected the argument that a federal question, necessarily reviewable by the Supreme Court, was *always* raised where state law declared a federal constitutional claim to have been waived. 269 U.S. at 194-95; *see also id.* at 190-91 (reporting counsel's argument that "[t]his Court is not bound by the determination of a state court that a federal constitutional question has been waived .... Where there is a plain assertion of a federal constitutional right in a lower court, local rules as to how far it will be reviewed on appeal do not prevail." (citing, inter alia, Davis v. Wechsler, 263 U.S. 22 (1923); Ward v. Love County, 253 U.S. 17, 22 (1920); and Union Pacific R.R. v. Pub. Serv. Comm'n, 248 U.S. 67 (1918)). Since the Court decided *Central Union Telephone*, of course, it has found some state procedural rulings "inadequate" to shield a state-court decision from Supreme Court review even where they do not violate any federal constitutional standard. *See, e.g.*, Henry v. Mississippi, 379 U.S. 443 (1965); Staub v. City of Baxley, 355 U.S. 313 (1958). *See generally* HART & WECHSLER, *supra* note 6, at 579-83 (discussing cases holding state grounds "inadequate" even where not constitutionally flawed); Wells, *supra* note 11, at 411-12 (discussing Court's approaches when considering adequacy of state procedural grounds). *See also* Meltzer, *supra* note 12, at 1137-45 (same).

282. *See Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *id.* at 139 (Ginsburg, J., dissenting) (both citing Bouie v. City of Columbia, 378 U.S. 347 (1964), where, absent a jurisdictional challenge, the Court rejected on the merits South Carolina supreme court's interpretation of state trespass laws against civil rights "sit-in" demonstrators because that interpretation was "unforeseeable" in light of past trespass rulings, and therefore violated due process when applied retroactively to demonstrators). Similarly, both Chief Justice Rehnquist and Justice Ginsburg cite *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), to support their shared view that the Court is free to reverse state-court state-law decisions, even though that case also raised no jurisdictional problem, but simply presented a straightforward federal question, on the merits, of whether the state could constitutionally regulate an undisputed state-created property interest despite Fifth Amendment's takings clause. For a thorough discussion of how the *Bush* Justices used due process and ex post facto doctrines — described as doctrines prohibiting "excessive retroactivity" — as a way to frame their analysis of the Florida supreme court's state-law reading, see Krent, *supra* note 22, at 495-96, *passim.*

283. Professor Wells has argued that Chief Justice Rehnquist's citation of all these precedents reveals something different: "an analytic error and a strategic blunder." Wells, *supra* note 11, at 416. He contends that the question the Rehnquist concurrence meant to and did answer — whether the Florida Court properly observed Article II constraints in reading Florida election statutes — was a federal constitutional question that, straightforwardly, gave the Court appellate jurisdiction to review the state-court judgment de novo, and on the merits. *Id.* at 419-20; *see also id.* at 420 n.68 (noting author's "premise that [A]rticle II is a source of judicially enforceable rules regulating state presidential election practices," while acknowledging a "serious constitutional argument" that Article II may only be enforced by Congress). Thus Rehnquist, by agreeing with the *Bush* dissenters that the

fundamental about the Court's modern shift towards an antecedence-based appellate power over state courts. Remember, in cases like *Murdock* and *Love County* the Court once declared itself without jurisdiction to supplant a state court's reading of state law absent grounds for declaring it "inadequate" — even where that state law effectively blocked the path of a federally-protected interest.[284] But now that the Court feels free to reverse a state ground wherever it simply antecedes a federal interest, jurisdiction no longer presents the difficult threshold question it once did. Instead, the Court now assumes its jurisdiction[285] and then asks only how much deference it owes a state court's judgment on the meaning of state law.[286] Thus the stiff "adequacy" standards confounding the Court in *Union Pacific*, *Love County*, and *Davis* have given way to indeterminate, shifting, and discretionary guidelines to govern reversals on the merits.

So, in *Bush v. Gore*, Chief Justice Rehnquist and Justice Ginsburg can essentially agree that the Court has the power (that is, jurisdiction) to reverse any state-court state-law judgment that blocks a federal claim, but disagree vociferously over how searching the Court's review of that state grounds, on the merits, should be. Indeed, Justice Ginsburg's central criticism of the Chief Justice — like that of fellow dissenters Breyer and Souter — was that he was insufficiently "mindful of the full measure of respect we owe to interpretations of state law by a State's highest court."[287]

"task" was to determine whether the state-law grounds were "adequate" to support the Florida court's judgment, *id.* at 416, unnecessarily saddled himself with the need to show deference to the state-court's state-law ruling, instead of freeing himself to conduct the kind of de novo merits review the Court conducts in the ordinary case challenging state law under federal constitutional standards. *Id.* at 417.

284. *See, e.g.*, *Love County*, 253 U.S. at 22-23; Johnson v. Risk, 137 U.S. 300 (1890).

285. Even so, the Court continues to declare that the rule prohibiting it from reviewing federal questions in the face of an adequate and independent state ground is "jurisdictional." Sochor v. Florida, 504 U.S. 527, 534 (1992); Michigan v. Long, 463 U.S. 1032, 1037-44 (1983).

286. *See supra* notes 34-35 (discussing various deference guidelines).

287. *Bush*, 531 U.S. at 137; *see also id.* at 138 ("In deferring to state courts on matters of state law, we appropriately recognize that this Court acts as an ' "outside[r]" lacking the common exposure to local law which comes from sitting in the jurisdiction.' ") (quoting Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974)) (alteration in original). Chief Justice Rehnquist, by contrast, while acknowledging that "we generally defer to state courts on the interpretation of state law," *id.* at 114, suggested that a more searching "independent, if still deferential, analysis of state law" was called for wherever state law had an effect on the pursuit of constitutional interests. *Id. But see id.* at 114-15 & n.1 (citing, as examples of this level of review, both NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), and Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813), even though neither raised constitutional questions). For one view that it was unnecessary for Chief Justice Rehnquist to give *any* deference to the Florida court decision, and that his doing so weakened his concurrence and laid him open to the dissenters' criticism, see Wells, *supra* note 11, at 417 ("*Bush* is actually a simple case of federal law constraining state authority .... No deference toward the state court's interpretation of state law is called for in such a case."). *See also id.* at 420-21 ("While the exact content of [Article II] limits on state courts remain uncertain after *Bush*, we know that [A]rticle II may demand scrutiny of the state court's reasoning and a

And what about the jurisdictional discipline, driving the "adequacy" cases decided under *Murdock*'s influence, that state-court state-law rulings remain untouchable unless there is some palpable reason to suspect a state court of manipulating state law to thwart federal interests and then evade Supreme Court review?[288] Antecedence-based jurisdiction makes suspicion largely irrelevant, for the Court's power depends on the sequence in which state and federal issues arise, and not on any particular reason to mistrust one state or all states. The *Bush v. Gore* opinions treat that kind of suspicion as irrelevant to the Court's jurisdiction; rather, it affects only the task of choosing among the Court's discretionary guidelines for how much deference the Court will give a state court's reading of state law on the merits.[289] Justice Ginsburg argued, for one, that there must be some extraordinary reason to mistrust a state court before the Court should conduct more than a highly deferential review of its reading of state law. Indeed, she demanded that there be shown something "close to the kind of recalcitrance by a state high court" which, in her view, explained why the Court reversed state-court state-law decisions during the civil rights struggles of the 1950s and 1960s[290] and, long before that, during the era

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comparison between Florida's election law before and after the Florida Court's intervention. . . . George W. Bush did not need to show that the Florida Court 'impermissibly distorted' state law in order to win; nor does the state ruling survive scrutiny merely because it may be a 'reasonable' construction of the Florida election statute.") (citations omitted); *see also* Tribe, *supra* note 20, at 193 (advocating highly deferential review permitting reversal only where state court reached "manifestly unreasonable" reading of state law).

288. *See supra* note 160 and accompanying text (discussing, inter alia, *Johnson v. Risk* and *Leathe v. Thomas*). Recall that in these post-*Murdock* cases, the Court asked whether state-law rulings were "unfounded" to help determine whether the state court had reached its judgment in good faith, or had, contrarily, used state law in a way that was "essentially arbitrary or a mere device to prevent a review of the decision upon the federal question." Enter. Irrigation Dist. v. Farmer Mut. Canal Co., 243 U.S. 157, 164 (1917). It was not enough, otherwise, to show that the state court had gotten state law wrong, even if very wrong. *See* Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 635 (1874) (holding that the Court may look at the record to determine whether adequate and independent state grounds may support state-court judgment, but may not determine whether the nonfederal grounds "were correctly or erroneously decided"); *accord* Leathe v. Thomas, 207 U.S. 93, 99 (1907) (Holmes, J.) (holding that where the state court decides a case on "palpably unfounded" nonfederal grounds, the Court may conclude that the state court was "seeking to evade the jurisdiction of this [Supreme] court"); Vandalia R.R. Co. v. Indiana *ex rel.* South Bend, 207 U.S. 359, 367 (1907) ("A case may arise in which it is apparent that a Federal question is sought to be avoided or is avoided by giving an unreasonable construction to pleadings . . . ."; where state court read pleading reasonably, "there is nothing to justify a suspicion that there was any intent to avoid the Federal questions.").

289. *See* Wells, *supra* note 11, at 414 (noting that in antecedent state-law cases, the Court has reviewed state grounds' adequacy under various levels of deference, ranging from what is essentially de novo review to an intermediate scrutiny that asks whether the state-law judgment " 'rests upon a fair or substantial basis[]' " to an even less searching review of that judgment) (quoting Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944)).

290. *Bush*, 531 U.S. at 141 (Ginsburg, J., dissenting) (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), and emphasizing that it was decided "in the face of Southern resistance to the civil rights movement" and only three months after the Court claimed judicial supremacy over constitutional meaning in Cooper v. Aaron, 358 U.S. 1 (1958)).

of "vociferous States' rights attacks on the Marshall Court" that produced *Martin v. Hunter's Lessee*.[291] She saw no such extraordinary circumstances in *Bush v. Gore*.[292]

By contrast, although Chief Justice Rehnquist admitted that Florida's election law "may well admit to more than one interpretation," and although he described his scrutiny of the Florida supreme court's reading of that law as "deferential,"[293] he conducted what amounted to a de novo review of that court's state-law analysis. Without identifying any particular reason to suspect the Florida supreme court of cheating here, Chief Justice Rehnquist nonetheless used the language of mistrust to declare that that court should be reversed for "impermissibly distort[ing]" the Florida election laws "beyond what a fair reading required."[294] His suspicion of the Florida court colored — indeed, it appeared to drive — his entire opinion.[295]

Thus, in the century and a quarter between *Murdock v. Memphis* and *Bush v. Gore*, the Court shifted significantly from the notion that having a reason to mistrust a state's particular reading of state law justifies an exception to the ordinary black-letter rule denying the Court jurisdiction to reverse state-court state-law decisions, to the modern assumption that the Court may always reverse on state grounds where state-law antecedes a federal interest in state court. While applying this view was nearly effortless, justifying this modern view has proven more difficult.

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291. *See Bush*, 531 U.S. at 140 (Ginsburg, J., dissenting) (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)).

292. *Bush*, 531 U.S. at 136 ("There is no cause here to believe that the members of Florida's high court have done less than 'their mortal best to discharge their oath of office.' ") (quoting Sumner v. Mata, 449 U.S. 539, 549 (1981)). The three other dissenters all agreed that there was no reason to conclude that Florida court's state-law ruling, even if erroneous, was so far out of line as to warrant the extraordinary step of Supreme Court reversal. *See id.* at 127-28 (Stevens, J., dissenting); *id.* at 131 (Souter, J., dissenting); *id.* at 147-52 (Breyer, J., dissenting).

293. *Id.* at 114 (Rehnquist, C.J., concurring). For one argument that Chief Justice Rehnquist committed an analytic and strategic error by admitting the need for *any* deference at all to the Florida supreme court's reading of state law, see Wells, *supra* note 11, at 416-19. *See also id.* at 405 ("The proper rule for Bush is that the state court's reasoning deserves no deference.").

294. *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring) (contending that, on the basis of that distortion, the Court should have declared the Florida court to have violated the Constitution's Article II); *see also id.* at 119 (declaring further that "no reasonable person" would agree with the Florida court's state-law reading of one provision, and that its reading of another was "of course absurd").

295. Tushnet, *supra* note 20, at 115 & n.21 (noting that the concurrence's reliance on 1960s cases using "innovative doctrines to control the excesses of anti-civil rights Southern supreme courts support[s]" the view that "[t]he Justices in the majority sincerely believed that they were observing a process in which a highly partisan state supreme court had simply gotten out of control and was attempting to steal the election from the rightful victor").

IV. THEORIES OF POWER

Theories justifying the Court's state-ground reversals fall into three categories: the *federal common law* theory, the *whole case* theory, and the *supremacy/due process* theory. All three raise problems, some made more pronounced by recent cases developing the Court's doctrines on supremacy, due process, and federalism. Because I consider the first two least satisfying, I critique them first. The third — taking supremacy as a starting point — is the most promising. While rejecting the direction that others have taken from there, the proven mistrust proposal shares some of their basic premises.

A. *The Federal Common-Law Theory*

Some argue that state-ground reversals represent an appropriate exercise of the Court's federal common-law making power.[296] Building on the premise that it is always a federal question whether a state ground is "adequate and independent,"[297] this theory maintains that the Court may therefore craft federal common-law standards to police state-law "adequacy" claims, just as the Court may make federal common law to decide the claim-preclusive effect of a diversity court's dismissal on statute of limitations grounds.[298] As Professor Field has explained:

> state procedural rules applied to block a federal right accord with federal purposes only when insistence on them in the particular case serves a legitimate state interest;[[299]] otherwise the state rules will be rejected as

296. *See generally* Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Henry J. Friendly, *In Praise of* Erie — *and of the new Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

297. *See* Lee v. Kemna, 534 U.S. 362, 375 (2002) ("The adequacy of state procedural bars to the assertion of federal questions . . . is itself a federal question.") (internal quotations omitted); Henry v. Mississippi, 379 U.S. 443, 447 (1965) ("[T]he question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question."); *see also* Meltzer, *supra* note 12, at 1160.

298. Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001) (declaring that "federal common law governs the claim preclusive effect of a dismissal by a federal court sitting in diversity"); *accord* Boyle v. United Techs. Corp., 487 U.S. 500 (1988) (invoking federal judicial common-law making power to formulate special tort defense for military contractors sued for injuries caused by design defects); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (creating federal common-law rule recognizing laches defense against United States' action to recover on fraudulently endorsed federal paycheck); *see also* Field, *supra* note 296, at 967 & n.379 (noting *Henry*'s power "theory does not explain why state rules cannot stand as long as they are constitutional").

299. *See, e.g.*, *Lee*, 534 U.S. at 391 (Kennedy, J., dissenting) ("A defendant's failure to comply with a firmly established and regularly followed rule has been deemed an inadequate state ground only when the State has no legitimate interest in the rule's enforcement.") (citing Osborne v. Ohio, 495 U.S. 103, 124 (1990)).

aberrant, or contrary to United States policy, despite the general federal commitment to allowing state procedures to operate.[300]

But even its advocates recognize that this theory only justifies the Court's practice of reversing on state *procedural* grounds. According to Professor Field, "When a state substantive rule is broad enough to support a state-court result, the Supreme Court cannot review the ruling without holding the state law unconstitutional."[301] Thus, the federal common-law theory cannot justify the Court's decisions — including *Fairfax's Devisee*, *Union Pacific*, *Love County*, *Davis*, and the *Bush v. Gore* concurrence — reversing state courts' last words on what state substantive law means.

B. *The Whole-Case Theory*

Some commentators build on the early Court's broad supplemental jurisdiction claims in *Martin* and *Osborn*[302] to justify state-grounds reversals: "Article III, § 2 of the Constitution gives the Supreme Court appellate jurisdiction over all federal question *cases*. Such 'cases' in-

300. Field, *supra* note 296, at 969; *see also Lee*, 534 U.S. at 387 (declaring state procedural default inadequate to bar the Court's review of due process claim because, inter alia, "formally perfect compliance" with rule in case's particular circumstances did not serve a "legitimate state interest").

301. Field, *supra* note 296, at 967 (footnotes omitted). Professor Field's argument builds on the post-*Erie* notion that there are "two kinds of state law: state law operating 'of its own force,' and state law applying 'by federal choice.' " Field, *supra* note 296, at 968. Whereas *Erie* requires all federal courts to honor state-court decisions on state law that fall in the first category — those that operate "of [their] own force" — post-*Erie* federal common law decisions recognize that when a "uniquely federal interest" is implicated by enforcement of state law, then that state law may be put into the second category — state law applying only "by federal choice" — thus freeing federal courts to supplant it through a federal common-law rule. *See Boyle*, 487 U.S. 500; *accord* Field, *supra* note 296, at 973-74 (describing "conventional analysis" that distinguishes between two kinds of state law, for purposes of deciding whether *Erie* applies or whether, instead, federal court may create common law rule to supplant state law; concluding that it is "difficult to understand the distinction" between two categories of state law). *But see* Wechsler, *supra* note 11, at 1054 (arguing that the Court's power to reverse "inadequate" state grounds should be the same whether "the antecedent state law issue is substantive or procedural": "It is difficult to understand . . . why there should be a difference in the nature or the scope of the Supreme Court's examination of the state determination"). In *Lee v. Kemna*, the Court explained that the rule barring federal review of adequate and independent state grounds "applies with equal force whether the state-law ground is substantive or procedural." 534 U.S. at 375 (citing Coleman v. Thompson, 501 U.S. 722, 729 (1991)). But the Court then suggested, obliquely, that there might be one important difference between substantive and procedural state grounds, specifying that " '[t]he adequacy of state *procedural* bars to the assertion of federal questions . . . is itself a federal question.' " *Id.* (emphasis added) (quoting Douglas v. Alabama, 380 U.S. 415, 422 (1965)). If the Court meant to signal that the adequacy of state *substantive* grounds was not a federal question, or was somehow less of a federal question, then it would lend force to Professor Field's argument. Even if the Court did not mean to draw this distinction, *Lee* left unanswered Professor Field's question why, even under a federal adequacy review, "state rules cannot stand as long as they are constitutional." Field, *supra* note 296, at 967 n.379.

302. *See supra* Section II.A.

clude issues of both federal and state law."[303] This theory reads Article III as building into the Court's appellate powers an automatic supplemental jurisdiction that always extends the federal judicial power to nonfederal issues arising alongside federal ones in state-court cases. And thus the adequate and independent state grounds doctrine enforces what is at most a nonconstitutional, prudential constraint[304] on the Court's Article III-based power to decide each and every issue in a state-court case so long as at least one federal question arises there as well.[305]

But while superficially tidy, this theory grows more unsatisfying when probed more deeply. For one thing, while the "whole case" approach may well explain why the Court may exercise a kind of supplemental subject matter jurisdiction over state-law issues joined with federal ones, it does not obviously explain why the Court is free to contradict state law as declared by the state's highest court, as the Court necessarily does when it reverses a state ground. By contrast, when inferior federal courts decide state-law questions in the exercise of their statutory supplemental jurisdiction,[306] they are ordinarily compelled to apply state law *as they find it* to whatever state-law questions

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303. Matasar & Bruch, *supra* note 10, at 1292 n.1; *see also id.* at 1311 n.77 ("The Supreme Court's power to reach state issues of law is found only inferentially in the Constitution. In other than diversity controversies, the power is founded solely on article III's definition of a 'case' or 'controversy.' "). A more recent commentary takes the same starting point. *See* Fountaine, *supra* note 10, at 1054 n.1. HART & WECHSLER expresses less confidence that the question is beyond dispute. *See* HART & WECHSLER, *supra* note 6, at 519-21 (asking, but not answering, the question of whether a statute requiring the Supreme Court to review state-court decisions on state law would be constitutional, positing contrary result in *Murdock*).

304. *See* Matasar & Bruch, *supra* note 10, at 1293 n.2 (arguing that the Court's restraint in reviewing state-court judgments expresses values of comity and federalism, but is not itself constitutionally or statutorily required). Contrast Fay v. Noia, 372 U.S. 391, 430 n.40 (1963), where the Court declared:

> We need not decide whether the adequate state-ground is constitutionally compelled or merely a matter of the construction of the statutes defining this Court's appellate review. *Murdock* itself was predicated on statutory construction, and the present statute governing our review of state court decisions . . . limited as it is to '*judgments or decrees* rendered by the highest court of a State in which a decision could be had' (italics supplied), provides ample statutory warrant for our continued adherence to the principles laid down in *Murdock*.

Id.

305. *See* Matasar & Bruch, *supra* note 10, at 1293 n.2 (arguing that the "whole case" theory of judicial power means that the adequate and independent state grounds doctrine reflects only the Court's "refus[al] to exercise the full breadth of its appellate jurisdiction over all federal question 'cases' "; concluding that the doctrine's bar against reaching state *or* federal issues in such cases "is not compelled by any enacted law," including the Constitution).

306. *See* 28 U.S.C. § 1367 (1993) (defining terms under which district courts may exercise supplemental jurisdiction over state issues in cases that cannot satisfy federal diversity jurisdiction). This statute appears to encourage federal district courts to avoid decisions that might alter the course of state law in a way that the state's own decisionmakers would not. *See* 28 U.S.C. § 1367 (c)(1) (1993) (specifying that a court may decline to exercise supplemental jurisdiction if the state-law claim "raises a novel or complex issue of State law").

they encounter. Thus supplemental jurisdiction is ordinarily just that — jurisdiction — and it does not automatically convey the distinct choice-of-law power to displace state law,[307] as *Erie* itself makes clear.[308]

Second, the "whole case" theory's main pillar — *Osborn v. United States*[309] — cannot really support it. For one thing, *Murdock* later specifically rejected the "whole case" reading of the Court's statutory appellate jurisdiction, declaring that that statute denied the Court power to reverse on questions other than those triggering its jurisdiction in the first place,[310] a repudiation "whole case" advocates ignore.

For another thing, even on its own terms, *Osborn* provides only weak, rhetorical support for any modern "whole case" argument for state-ground reversals. *Osborn* was a case about the *original* jurisdiction of inferior federal courts, and its more sweeping statements depended on the Court's unexamined assumption that everything true about the inferior federal courts' exercise of original jurisdiction must also be true about the Supreme Court's exercise of appellate jurisdiction, and vice versa.[311] That is, to borrow from Professor Caminker,

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307. When an inferior federal court asserts supplemental jurisdiction over state-law claims within the same "case" as federal ones, that court must follow state law in answering those state-law questions; moreover, its reading of state law has no precedential force in later cases in state courts. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966); *see also* Matasar, *supra* note 116.

308. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). As the Supreme Court itself more recently observed, "a federal court [may] not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress," constitutional provision or other non-judicial source of federal law." Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (explaining *Erie*); *see also* Matasar & Bruch, *supra* note 10, at 1299 n.25 (noting that "[t]oday, of course, lower federal courts' decisions on state law issues are constrained by *Erie*'s choice of law rules" when exercising either diversity or supplemental jurisdiction over them).

309. 22 U.S. (9 Wheat.) 738 (1824) (Marshall, C.J.). *See supra* Part II (discussing *Osborn*).

310. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630 (1874) (rejecting the argument that by repealing explicit limitation to appellate review only of federal-law questions Congress meant to free the Court to review as well state-court decisions on state-law questions, since even without the statutory limitation, "on general principles the [Court's appellate jurisdiction] extended no further" than "the correction of errors relating solely to Federal law"); *see also id.* (concluding that statutory limitation "may well be held to have been superfluous, or nearly so"). Indeed, the *Murdock* majority did so over strong dissenting opinions from two Justices urging the very "whole case" view of the Court's appellate jurisdiction that *Osborn* is now argued to have institutionalized. *See id.* at 638-42.

311. *Osborn* involved an inferior federal court's original jurisdiction to entertain a non-federal claim — not the Court's appellate jurisdiction over state-court judgments — but Marshall saw no difference between original and appellate jurisdiction in reasoning that federal courts may decide questions beyond their formally granted subject matter jurisdiction. Having declared that Article III made "[o]riginal jurisdiction . . . coextensive with the judicial power," *Osborn*, 22 U.S. at 821, Marshall reasoned that any constitutional limit on federal supplemental jurisdiction would necessarily apply equally whether federal courts were exercising original jurisdiction or appellate jurisdiction, like the Supreme Court reviewing state-court judgments. He maintained:

Osborn assumes that the Article III judicial power has a "one-size-fits-all quality" to it, so that "the power of any one federal court is identical to the power of any other."[312]

But while *Osborn* may be right that no court, federal or otherwise, could effectively exercise original jurisdiction over a case without the power to decide each and every question that might arise (whether governed by state or federal law),[313] it does not follow that effective appellate jurisdiction likewise requires the same. Unlike a court with original jurisdiction, which must necessarily predict what the authoritative state court would say state law means in a case's particular circumstances, the Supreme Court exercising appellate jurisdiction over a state-court judgment (usually) already knows,[314] making it functionally unnecessary for the Court to re-visit state grounds — a distinction *Murdock* itself drew, further undercutting *Osborn*'s "whole case" rhetoric.[315] Indeed, even when *Osborn* was decided, cases entered into

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> [I]f the circumstance that other points are involved in it [the "whole case"], shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause . . . .

Id. at 822. Marshall concluded that so limiting federal courts' supplemental jurisdiction would frustrate Article III, which "obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts." *Id.* at 822. Instead, federal claimants would "be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will." *Id.* at 822-23.

312. Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary,"* 78 TEXAS L. REV. 1513, 1515 (2000) (describing this view as "discrete-vesting postulate"); *see also* HART & WECHSLER, *supra* note 6, at 520 (identifying this distinction as one ignored by former-Justice Curtis in his brief in *Murdock*, but not also citing *Osborn*).

313. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 504 (1954) ("Jurisdiction in the first instance, unlike appellate jurisdiction, is unavoidably jurisdiction to decide whole cases and not merely questions in cases."). Almost by definition, when a case comes within the original jurisdiction of a federal court, no state court has first adjudicated any questions that case might raise, whether under federal or state law. Even under federal statutes that permit cases to be removed from state to federal court, a party must petition for removal within thirty days of the initial filing indicating the case's removability. *See* 28 U.S.C. § 1446 (2002) (in diversity case, barring removal on grounds of diversity of citizenship within one year after the action commenced, even if filing revealing removability introduced thereafter). This makes it unlikely that the state court where the action was first filed would have ruled on any or many issues in the case, absent an early motion in the nature of a temporary restraining order. *See* HART & WECHSLER, *supra* note 6, at 1623-34. Absent supplemental original jurisdiction, state claims would have to be split off from federal ones and pursued separately in parallel state proceedings, a significant inefficiency wasting both state and federal judicial resources. *See* Matasar, *supra* note 116. *See generally supra* notes 113-116 (discussing cases and commentary discussing supplemental original jurisdiction).

314. HART & WECHSLER uses this distinction to explain why the Court's appellate jurisdiction over federal questions is broader that inferior federal courts' original jurisdiction over federal questions, which must satisfy the well-pled complaint rule. HART & WECHSLER, *supra* note 6, at 900 (observing that original jurisdiction must "be based on conjecture," while appellate jurisdiction "can be tailored to the case as it has actually developed").

315. To the contrary, *Murdock* observed, Congress had consistently recognized a crucial

the Supreme Court's appellate jurisdiction, either from inferior federal courts or from state courts, primarily by writ of error,[316] under which review was strictly limited to questions of law and not of fact, a restriction that would have been nonsensical in any grant of original jurisdiction. It is far less likely that the Court could have its appellate proceedings "arrested" by its inability to reach nonfederal questions. Accordingly, while *Osborn* might help explain why any Article III-based original jurisdiction over a "case" must necessarily also convey the supplemental jurisdiction to decide nonfederal questions, *Osborn* does not persuasively resolve the very different question whether the Supreme Court's appellate jurisdiction should be understood in the same way.

Finally, the *Osborn*-based "whole case" explanation takes no serious account of *Erie Railroad Co. v. Tompkins*,[317] or of the massive reordering of assumptions about the Article III judicial power that decision compelled.[318] While contemporary scholars have admitted that the "whole case" view of the Supreme Court's appellate jurisdiction over state-court decisions "may appear strange from a twentieth century perspective" refigured by *Erie*,[319] no one has asked seriously

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difference between the two by granting original jurisdiction over "whole cases," while limiting appellate jurisdiction to particular, well-defined questions within cases. *Murdock*, 87 U.S. (20 Wall.) at 630-31. Citing various examples, *Murdock* concluded:

> [They] show very clearly that when Congress desired a case to be tried on all the issues involved in it because one of those issues was to be controlled by the Constitution, laws, or treaties of the United States, it was their policy to vest its cognizance in a court of original jurisdiction, and not in an appellate tribunal.
>
> And we think it equally clear that is has been the counterpart of the same policy to vest in the Supreme Court, as a court of *appeal* from the State courts, a jurisdiction limited to the questions of a Federal character which might be involved in such cases.

Id. at 631.

316. *See* RITZ, *supra* note 79, at 68-69, 87-89 (explaining how the 1789 Judiciary Act used "writ of error" device to limit the Supreme Court's reviewing inferior court judgments on questions of law only, denying the Court power to retry facts *de novo*).

317. 304 U.S. 64 (1938).

318. Again, this Article does not purport to resolve the question — itself the subject of considerate debate — of whether *Erie* formally governs the Supreme Court's appellate jurisdiction to review state-court judgments. *See supra* note 47 (citing scholarship addressing *Erie*'s scope). Nonetheless, *Erie* remains a potential problem for "whole case" proponents, who routinely cite *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), and its companion, *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813), for the continuing proposition that the Court may indeed constitutionally review and reverse state-court judgments on state-law questions. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 115 n.1 (2000) (Rehnquist, C.J., concurring); Matasar & Bruch, *supra* note 10. These "whole case" citations essentially overlook the fact that *Martin*'s author — Justice Story — also wrote *Swift v. Tyson*, which *Erie* of course overruled. *See* Matasar & Bruch, *supra* note 10, at 1298 n.22 (admitting that this connection between *Martin* and *Swift* may make the former another example of federal court efforts to discern an overarching natural law, an endeavor *Erie* declared obsolete).

319. Matasar & Bruch, *supra* note 10, at 1298 n.22. Other scholars have explored more carefully the inconsistencies between a broad Supreme Court power to reverse state-court

whether *Erie*'s constitutional limits on all Article III judicial power should not also affect the Court's appellate authority to reverse state-court decisions on state-law questions.[320] That is, even if *Osborn*'s pre-*Erie* "whole case" theory could explain why the Supreme Court could then claim a broad supplemental jurisdiction to decide state-law questions, it does little to answer why *Erie* should not now compel the Court to accept state law as definitively governing those state-law questions, despite the Court's own views of what a more reasonable state-law reading would be.[321]

C. *Supremacy Clause and Due Process Theories*

Others have justified the Court's state-ground reversals using either due process principles or the intuition that constitutional supremacy requires some federal judicial mechanism to police state courts

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decisions on state-law grounds and the limits on federal judicial power to supplant state law that *Erie* and *Murdock* erect. *See, e.g.*, Field, *supra* note 296, at 974 & n.396 (observing that federal common lawmaking practice, with its distinction between state law that operates by its own force and state law that may be displaced by federal courts, "undercuts both *Erie* and *Murdock*"); *id.* ("It undercuts the importance of *Murdock* because federal courts can alter or depart from state law chosen as a matter of federal judicial discretion.").

320. Indeed, in *Bush* Chief Justice Rehnquist made only a "*cf.*" citation to *Erie* before launching into his wholesale critique of the Florida Supreme Court's reading of Florida election law. *Bush*, 531 U.S. at 116-20. Professor Meltzer makes slightly more of *Erie*, drawing a parallel between it and *Murdock*:

> Just as *Erie* . . . held that federal courts must follow state decisions on matters governed by state law, so *Murdock* ruled that the Supreme Court, in exercising its appellate jurisdiction, must honor the state law reflected in the judgment under review. . . . *Murdock*, like *Erie*, averts federal decisions on matters governed by state law that have no precedential value in a state court. As a consequence, the governing law does not depend upon the forum — state or federal — hearing the case.

Meltzer, *supra* note 12, at 1134 (citations omitted).

321. Professor Hill argued that the Court's reversal of a state-law decision on nonconstitutional "adequacy" grounds represents only a "minimum of interference with matters within the province of the states, in pursuance of a course giving meaningful protection to federal rights." Hill, *supra* note 10, at 969-70. He reasoned:

> In assuming such a role [in reversing state-court state-law rulings] the Supreme Court does not interfere with the law-making function of the state courts, for the latter remain free to change the decisional law of the state, by the overruling of old decisions or otherwise, as long as there is no violation of federal law. The effect of proclaiming the decision on the state question to be "wrong" in the particular case affects only the particular litigants, and the purpose is to ensure consideration by federal judicial authority of the federal claims in the case.

Id. at 969.

But when an inferior federal court asserts supplemental jurisdiction over state-law claims within the same "case" as federal ones, *Erie* principles require the federal court to follow state law in answering those state-law questions; moreover, its reading of state law has no precedential force in later cases in state courts. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966); *see also* Matasar, *supra* note 116; Matasar & Bruch, *supra* note 10, at 1299 n.25 (noting that "today, of course, lower federal courts' decisions on state law issues are constrained by *Erie*'s choice of law rules" when exercising either diversity or supplemental jurisdiction over them).

that cheat federal law and then hide behind a superficially "adequate" state ground.[322] These advocates use the Constitution's supremacy and due process principles in two ways, one strong and one modulated. The strong version, which appears to drive some who advocate appellate jurisdiction wherever a state-law question antecedes a federal-law issue, builds on the basic premise that the Court's central role in enforcing federal-law supremacy gives it a standing jurisdiction to vindicate any federal right or other interest,[323] even (or, perhaps, especially) if it is lurking behind a state-law question.[324] Thus, whenever a state court's decision on state law somehow blocks a federal-law interest, the Court may review it to make sure the state-law ruling is worth denying that federal interest a hearing in federal court. And the state-law need not actually violate federal law to be held unworthy — remember, the Court has only very rarely ruled a state grounds "inadequate" because unconstitutional[325] — but it can be held unworthy because, al-

322. *See supra* notes 276, 286-287, 326 and accompanying text.

323. Professor Fallon described this presumption as intrinsic to a "nationalist" model of judicial federalism, which works from the "premises that state sovereignty interests must yield to the vindication of federal rights and that, because state courts should not be presumed as competent as federal courts to enforce constitutional liberties, rights to have federal issues adjudicated in a federal forum should be construed broadly." Fallon, *supra* note 136, at 1145 (citations omitted). Accordingly, the Nationalist insists, federal jurisdictional statutes should be interpreted to make that federal forum available:

> Absent clear evidence to the contrary, federal judges should assume that federal courts are likely to be more prompt and effective than state courts in protecting federal constitutional rights, and they should craft doctrines of judge-made law that permit the federal courts to act as the presumptively available enforcers of constitutional norms.

Id. at 1160-61 (noting that those holding this view also tend to assume that Congress, "in enacting much of the remedial and jurisdictional legislation that is most controverted in federal courts jurisprudence, acted out of suspicion, if not antipathy toward state courts and wholly rejected notions of practical parity"). Or, as Professor Wells put it in discussing the Court's appellate jurisdiction in *Bush*:

> The Supreme Court's role is to see that federal law receives the respect it deserves from the state courts, no more and no less. Consequently, the availability of Supreme Court review of a state court decision depends on whether the state ruling *in some way implicates* federal law. . . . Because the Supreme Court may intervene only insofar as necessary to defend the federal interest and no further, review is ordinarily limited to the federal issues.

Wells, *supra* note 11, at 408 (emphasis added).

324. As Professor Wechsler argued, Supreme Court direct review of state-court decisions is always appropriate where "existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law. Because of that relationship the state court does not speak the final word on the state question . . . ." Wechsler, *supra* note 11, at 1054; *see also id.* at 1056 (advocating direct review wherever "necess[ary] to maintain the effectiveness and uniformity of the federal law").

325. *See, e.g.*, Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) (ruling state-law procedural default inadequate to preclude Supreme Court consideration of equal protection claim because state rule was "unforeseeable" and therefore violated due process). *See generally* HART & WECHSLER, *supra* note 6, at 577-79 (discussing the few cases in which the Court actually held state procedural grounds inadequate because unconstitutional); Hill, *supra* note 10, at 944-45 (same); *id.* at 959-60 (observing that "the Court, in disallowing the state ground . . . almost never invokes the due process clause in support of its holding"; citing *Brinkerhoff-Faris* as "a striking exception").

though entirely constitutional, it is too "erroneous," "burdensome," "unreasonable," or "arbitrary" to justify silencing a federal interest.[326] The Court, in a sense, simply concludes that the lurking federal interest outweighs the value of the state law blocking its path.[327]

The modulated version starts with the same basic premise — that the Court may always enforce the Constitution's due process and supremacy principles — but builds on it a narrower claim to appellate jurisdiction: even where the Court finds no actual constitutional flaw in a state-law ruling, the Court may nonetheless seek to enforce related, sub-constitutional preferences for reasonable, nonarbitrary state-court decisionmaking wherever supremacy-protected federal interests are at stake.[328]

This is the version Professor Hill advanced in 1965[329] when — lamenting the Court's own failure to articulate a doctrinal justification for its practice of reversing state-court state-law decisions[330] — he canvassed the Court's various nonconstitutional "inadequacy" reversals to that point and offered two "doctrinal" bases for Supreme Court power to review state-court decisions on state law. First, Hill argued, due process should discourage states from blocking federal claims "arbi-

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326. *But see* Hill, *supra* note 10, at 962 (arguing that the Court should always declare a state-law ruling to violate due process when it departs substantially from prior state precedent, or when the state court "overlooked or misread a point in the record, or characterized something in the record in a way that seemingly is arbitrary"); *id.* at 959-60 (acknowledging that the Court has not followed this path, and only rarely holds a state-ground inadequate because actually violating due process).

327. *See* Wells, *supra* note 11, at 414 (observing that "antecedence" cases raise the "underlying problem of balancing state and federal issues," and "the federal interest cannot be vindicated without paying some attention to the state ground"). The Court adopted this approach most overtly in *Henry v. Mississippi*, 379 U.S. 443 (1965), which held that failure to comply with a state's procedural rule would not preclude a criminal defendant from raising federal constitutional challenges on direct appeal to the Supreme Court where the Court found the state rule did not substantially serve a "legitimate state interest," or where that state interest had been adequately met by defendant's actual conduct in case. *Id.* at 447. Although *Henry* was received as marking out a radical new direction in the Court's state-grounds adequacy review, *see, e.g.*, Hill, *supra* note 10, at 944, the Court has not pursued *Henry*'s potential. *See* HART & WECHSLER, *supra* note 6, at 585 ("[T]he *Henry* decision has had little effect on the standards applied on direct review in judging the adequacy of state procedural grounds."); Wechsler, *supra* note 11, at 1055 (writing in 1977, and observing "whether the *Henry* principle has really been established may still be an open question. The decisions of the last twelve years do not dispel the possibility that it is merely being treated with intelligent neglect").

328. For analysis of how the Court uses common-law methods to craft sub-constitutional rules that further constitutional principles on the merits, see Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 28-29 (1975).

329. Hill, *supra* note 10, at 943.

330. Hill, *supra* note 10, at 943 (noting that "[t]he Court has . . . reserved to itself the right to determine whether the state ground is 'adequate' or 'tenable' . . . . The doctrinal basis for this type of review has seldom been explored — least of all by the Court itself"); *see id.* at 944 (remarking on "[t]he general insufficiency of doctrinal development" on this jurisdictional question).

trar[ily]" or as the result of "reversible [state-law] error," even where no actual due process violation has occurred.[331] On this view, the Court appropriately reverses state-court state-law rulings that fail to meet those sub-constitutional standards, so that it may reach the federal interests standing behind.

Second, "quite simply," the Court has "jurisdiction to determine whether the state court has given federal law its due under the supremacy clause."[332] But even though the *structural* concern underlying supremacy-based jurisdiction is that states may manipulate state law to disfavor federal interests and evade review[333] — that is, one just can't trust states not to cheat[334] — Professor Hill argued that the Court's reversal power in any particular case does not and ought not depend on any particular finding that a state "willfully evaded" federal law.[335] Indeed, Professor Hill considered this one of the chief virtues of his proposal: it permitted the Court to reverse state-court state-law rulings that blocked federal interests without having to attribute "bad faith to state officers sworn to uphold federal law."[336]

This reading brings Professor Hill's more modulated theory close to the stronger claim that the existence of a federal interest always

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331. Hill, *supra* note 10, at 962 (including both substantive and procedural due process standards in this discussion); *see also id.* at 957-59 (noting that the Court rarely explicitly characterizes inadequate state grounds as "arbitrary"). Professor Hill argued that the Court should characterize more of its "inadequacy" rulings as constitutional rulings, given their basis in the Court's conclusion that the state-law decision was somehow "arbitrary." *But see id.* at 971 (arguing that the Court should not rule state grounds to be "inadequate" because they may be unduly "burdensome . . . although not so burdensome as to be violative of due process").

332. Hill, *supra* note 10, at 959.

333. *See* HART & WECHSLER, *supra* note 6, at 520 (arguing that "where a state law ruling serves as an antecedent for determining whether a federal right has been violated, some [Supreme Court] review of the basis for the state court's determination of the state-law question is essential *if the federal right is to be protected against evasion and discrimination* . . . .") (emphasis added).

334. *But cf.* Meltzer, *supra* note 12, at 1162. He read the supremacy clause not as creating "a substantive rule of federal law" prohibiting state discrimination against federal claims, but only as establishing a rule of priority to govern where state and federal law conflict. *Id.* Accordingly, Professor Meltzer concluded that the supremacy clause could offer little justification for inadequate state ground reversals. *Id.*

335. *See* Hill, *supra* note 10, at 957-59 (observing that the Court tends to use "willful evasion" language in cases where it finds state grounds adequate) (citing, inter alia, Vandalia R.R. Co. v. Indiana *ex rel.* South Bend, 207 U.S. 359 (1907), and Leathe v. Thomas, 207 U.S. 93 (1907), both discussed *supra* notes 160-168 and accompanying text), but avoids "excoriat[ing]" state courts for "purposive error or misconduct" when finding state grounds inadequate).

336. Hill, *supra* note 10, at 970. Professor Hill emphasized that a state's actual animosity should be irrelevant:

> It is not contended that it is proper to review the state ground for egregious error (or arbitrariness) every time the state decision on the point is hostile to the federal claimant, but only when the state ground *stands in the way of his federal claim.*

Id. at 970 n.106 (emphasis added).

triggers jurisdiction in the Court to reach it, even if it must reverse a state-law ruling to get there. As a practical matter, both strong and modulated claims dispense with the need to identify any actual state wrongdoing — whether by affirmatively violating federal law or by shirking supremacy cause obligations; both endorse state-ground reversals no matter how little reason the Court has to suspect that a state court, or many state courts, have cheated federal law.

Both the strong and the modulated supremacy/due process theories face the same problems. First, they share an unexamined yet arguable assumption: that the Court has an automatic subject matter jurisdiction to decide questions affecting federal interests wherever those interests lurk, even if it means ignoring formal jurisdictional limits like the bar on state-ground reversals. If one rejects this premise,[337] the theories collapse.

For example, Professor Hill identified the problem of inadequacy reversals as "jurisdictional,"[338] and then assumed this problem would be solved by identifying a "doctrinal" — that is, substantive — constitutional benefit from "this type of review."[339] But unless one already believes that the Court's prerogative to enforce substantive constitutional norms in cases falling within its subject matter jurisdiction[340] also automatically creates jurisdiction to answer any question even a state-law question that implicates those norms, those constitutional benefits

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337. *See supra* Part I (adopting contrary premise requiring affirmative jurisdictional grant). I have elsewhere critiqued this automatic equation between identifying a federal interest, on the merits, and assuming federal subject matter jurisdiction to enforce it. *See* Fitzgerald, *Is Jurisdiction Jurisdictional?*, *supra* note 46, at 1273-78 (arguing that serious separation of powers concerns undercut the Court's tendency to dispense federal jurisdiction based on the substantive federal interests at stake in a dispute, and on the perceived need for a federal remedy).

338. He observed, "The Supreme Court has traditionally been thought to be without jurisdiction to review a state judgment, or at least without authority to reverse it . . . ." Hill, *supra* note 10, at 943.

339. *See* Hill, *supra* note 10, at 970 ("The doctrinal basis for overruling the state ground for [nonconstitutional] egregious error is . . . ensuring that federal claims are given their due under the supremacy clause — which is probably the command of the due process clause as well."). Alternatively, Professor Hill may have been indirectly making an argument about how to read the federal statute granting the Court appellate jurisdiction to review only federal questions decided by state courts, now codified in 28 U.S.C. § 1257, although he never mentioned that statute at all. As applied to the Supreme Court, this would be a natural extension of a view Professor Fallon has associated with the "nationalist" approach to federal-court power:

> Absent clear evidence of contrary legislative intent, there should be a presumption in the construction of jurisdictional statutes that Congress generally legislates sympathetically to federal rights by authorizing easy access, as of right, to the lower federal courts.

Fallon, *supra* note 136, at 1160; *see id.* at 1160-61 (adding that Nationalists urge federal judges to "craft doctrines of judge-made law that permit the federal courts to act as the presumptively available enforcers of constitutional norms").

340. *See supra* note 248 (citing decisions where the Court has asserted judicial supremacy in defining and enforcing constitutional rights).

will not confer *jurisdiction.* Thus, while Professor Hill captured the intuition that the Court has pursued constitutional or sub-constitutional values when reversing state courts on state-law questions, he did not explain where the Court gets the power to do so.

Second, although these proposals argue that the Court's special role in enforcing federal-law supremacy should free it to catch state courts that cheat, they offer few real limits on the Court's exercise of that power: they advocate a suspicion-based jurisdiction that lacks suspicion-based constraints. The only arguable constraint on the Court's reversal power derives from the Court's own indeterminate and discretionary guidelines suggesting how much *deference* a state judgment deserves in any particular case[341] — a constraint, I have already argued, that is no constraint, not least because the Court does not recognize it as one.[342] Given the premise that federal judicial power should always be exercised within clear limits,[343] this is a serious flaw.

Third, in the nearly four decades since Professor Hill wrote, the Court has significantly altered both its due process and supremacy doctrines. The Court has sharply contracted the scope of the Constitution's due process protections, not only limiting what Congress may do to enforce due process principles against the states,[344] but also declaring more and more state procedures to satisfy the federal due process standard.[345] These changes have opened a much wider spread between what due process formally requires and what flaws the Court has criticized in its nonconstitutional inadequacy

341. For one effort to summarize the Court's various degrees of deference when reviewing state-court judgments on antecedent state-law questions, see Wells, *supra* note 11, at 414 (identifying three different approaches: de novo review, deferential review, and an "intermediate scrutiny" that asks whether the state-court decision " 'rests upon a fair or substantial basis' " (quoting Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944)); *see also* Hill, *supra* note 10, at 963-65 (canvassing cases in which the Court claimed to be granting state courts different degrees of deference when reviewing state-law grounds). In his *Bush* concurrence, Chief Justice Rehnquist claimed to conduct "an independent, if still deferential, analysis of state law." 531 U.S. 98, 114 (2000). Commentators have not yet agreed on how to characterize the degree of deference Chief Justice Rehnquist accorded the Florida supreme court's reasoning in *Bush. Compare* Wells, *supra* note 11, at 416-17 (describing concurrence's review as "deferential," though arguing that "no deference . . . [was] called for"), *with* Klarman, *supra* note 27, at 1734-35 (observing that "concurring opinion argues for reduced deference").

342. *See supra* notes 33-35 and accompanying text.

343. *See supra* notes 48-49 and accompanying text.

344. *See, e.g.*, Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999).

345. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 740 (1999) (reading *Reich v. Collins*, which had been understood to hold that the Constitution's due process principle compels states to make available a "clear and certain" remedy for state taxes collected in violation of federal law, as announcing the more limited principle that a state that *promises* taxpayers a post-deprivation remedy violates due process by then reneging on its promise); Parratt v. Taylor, 451 U.S. 527 (1981).

reversals, making it far more difficult now to justify those reversals on quasi-due process grounds.

Fourth, and finally, any supremacy-based justification for the Court's state-ground reversals must face *Alden v. Maine*,[346] and the Court's other recent decisions erecting a presumption of state trustworthiness.[347] Absent a good reason to exempt the Court from that presumption, these decisions suggest that *no* federal institution should be interfering with states under the banner of "supremacy" absent concrete proof that states are cheating.

Some background is necessary to make the point. To the extent its state ground reversals rest on the Court's intuition that somehow a state has manipulated its law to thwart a particular federal interest, they pursue a principle of federal supremacy as interpreted in a line of decisions associated with 1947's *Testa v. Katt*.[348] There, the Court held that the supremacy clause — which specifically directs the "Judges in every State" to recognize and enforce federal law as "the supreme Law of the Land"[349] — prohibits state courts from discriminating against federal claims by refusing to adjudicate them, so long as state courts hear similar claims under state law.[350] Although the Court itself

346. *Alden*, 527 U.S. at 758. For an extremely thorough analysis of *Alden* and its doctrinal significance, see Louise Weinberg, *Of Sovereignty and Union: The Legends of* Alden, 76 NOTRE DAME L. REV. 1113 (2001).

347. *See, e.g.*, Bd. of Trustees v. Garrett, 531 U.S. 356, 367-70 (2001) (holding that congressional record showing states' irrational discrimination against the disabled was too scanty to support provisions permitting the disabled to sue states for violations of the Americans with Disabilities Act); *id.* at 369 (criticizing Congress for relying on "general finding" that " 'historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem' "); *see* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 89-91 (2000) (holding that Congress failed to compile a factual record sufficient to show a "pattern" of state discrimination on the basis of age to justify permitting individuals to enforce the Age Discrimination in Employment Act against states); City of Boerne v. Flores, 521 U.S. 507, 530-31 (1997) (holding that Congress failed to compile a factual record sufficient to show a "pattern" of state violation of religious free exercise rights to justify the Religious Freedom Restoration Act); *see also* Williams v. Taylor, 529 U.S. 362 (2000); Teague v. Lane, 489 U.S. 288 (1989); *accord* O'Dell v. Netherland, 521 U.S. 151, 156 (1997) ("The *Teague* doctrine validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.").

348. 330 U.S. 386 (1947).

349. The supremacy clause provides, in full:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 1, cl. 2.

350. In *Testa*, the Court held that Rhode Island state courts could not refuse jurisdiction over a treble-damage claim under the federal Emergency Price Control Act so long as they could entertain state-law claims arising out of analogous state laws. Testa v. Katt, 330 U.S. 386, 391-94 (1947) (noting that state courts had jurisdiction to hear similar double-damage claims arising under state law). *Accord* Althouse, *supra* note 6, at 728 (discussing *Testa*'s

has not invoked *Testa*[351] to explain its practice of reversing state courts for resting on inadequate state grounds, the parallel is clear: the Court has intervened to prohibit a state court from evading its supremacy clause obligations either by directly refusing to honor a federal claim, as in *Testa*, or indirectly refusing to do so by invoking a state-law reason for decision, as in the inadequacy reversals.[352]

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nondiscrimination principle); Weinberg, *supra* note 346, at 1162-63 (same); *see also* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 965 & nn.41-43 (2000) (describing *Testa* as holding that "a state may not, in its courts, discriminate against hearing claims over which [they]... otherwise have 'jurisdiction adequate and appropriate under established local law' based upon the federal character of the law whose enforcement is sought.") (footnotes omitted). For a thorough analysis of the development and scope of *Testa*'s "nondiscrimination" principle, see Collins, *supra* note 3, at 49-52, 161-70.

Not everyone reads *Testa* as establishing a firm, *constitutional* nondiscrimination obligation. Professor Meltzer, for example, has pointed out that *Testa*'s nondiscrimination principle was not articulated in the section of the Court's opinion that explicitly discussed the supremacy clause; he asserts that *Testa* "simply assumes that discrimination is prohibited without identifying why." Meltzer, *supra* note 12, at 1162. Others have argued that *Testa* raises more of a statutory than a constitutional bar against state-court discrimination against federal claims, focusing less on the supremacy clause itself and more on federal legislation granting state courts concurrent jurisdiction with federal courts over federal claims. *See* HART & WECHSLER, *supra* note 6, at 472-73 (discussing the question whether Congress may impose outright an obligation on states to open state courts to federal claims, absent existing state-court jurisdiction over analogous claims). *But see* Collins, *supra* note 3, at 166 (describing *Testa* as holding that "a state court would be obligated to hear a suit for treble damages under wartime, federal price-control legislation, even without an explicit congressional command to do so."). *See generally id.* at 145-94 (describing nineteenth century Supreme Court cases that expressed doubts about Congress's power to impose jurisdiction on state courts directly).

351. The cases associated with *Testa* include some decided both before and after *Testa* itself. *See, e.g.*, Howlett v. Rose, 496 U.S. 356 (1990) (Florida courts may not refuse to hear federal civil rights claim under § 1983 against local school board on grounds of state-law state sovereign immunity where state had waived its immunity for comparable actions under state law); Felder v. Casey, 487 U.S. 131 (1988) (State may not discriminate against federal civil rights claims in enforcing state notice-of-claim precondition on filing in state court); McKnett v. St. Louis & San Francisco Ry., 292 U.S. 230 (1934) (Alabama courts may not refuse to hear FELA claim based on rule that permitted state courts to decide claims against foreign corporations based on law of sister states, but not on federal law); Mondou v. New York, New Haven & Hartford R.R., 223 U.S. 1 (1912) (Connecticut courts must entertain FELA claim because it had jurisdiction over analogous state-law claims; state disagreement with policy in federal statute could not excuse state courts from supremacy clause obligations). For decisions recognizing "valid excuses" for state courts to refuse to hear federal claims, see Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1 (1950) (Missouri's doctrine of forum non conveniens may excuse state courts from *Testa* obligations, so long as doctrine applied without discrimination based on the federal or state source of their claims); Herb v. Pitcairn, 324 U.S. 117 (1945) (where federal claimant filed in Illinois city court, which under state law lacked jurisdiction over claims, like plaintiff's, arising outside the city limits, and then failed to transfer to state court adequate jurisdiction before the statute of limitations had expired, that state court is not required to hear federal claim under *Testa*). For a thorough discussion of how the *Testa* decision both advanced and also significantly altered then-prevailing views about what kind of obligation the supremacy clause imposed on states, see Collins, *supra* note 3, at 166-69 (analyzing Justice Black's majority opinion in *Testa*).

352. *See* Hill, *supra* note 10, at 959, 970 (inadequate state ground reversals rest in part on "doctrinal basis" of "ensuring that federal claims are given their due under the supremacy clause ...."). *But see* Meltzer, *supra* note 12, at 1162 (acknowledging parallel between *Testa* and inadequate state grounds reversals, but concluding that "it is hard to view the inade-

But in 1999's *Alden v. Maine*,[353] the Court appeared to narrow the nondiscrimination principle that *Testa* read in the supremacy clause. *Alden*'s main holding was that the Constitution's state sovereign immunity principle — before then understood to protect states from unconsented private lawsuits in *federal* court — also prohibits Congress from requiring *state* courts to hear private claims against unconsenting states, at least where those claims arise under Article I legislation, like the Fair Labor Standards Act backpay claims pursued by Maine state probation officers there. The Court rejected the argument that Maine had violated *Testa*'s nondiscrimination principle by waiving its sovereign immunity to permit analogous state-law claims to proceed against it in state court, while refusing to waive its immunity as to the similar federal claims plaintiffs pursued.[354] Without even citing *Testa*, the Court declared:

> Although petitioners contend the State has discriminated against federal rights by claiming sovereign immunity from this FLSA suit, there is no evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action.[355]

Earlier in its opinion, the *Alden* majority had reaffirmed the basic supremacy clause principle that "[t]he States and their officers are bound by obligations imposed by the Constitution and by federal statutes with the constitutional design," which means that "[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law."[356] Taken with its later declaration that only a state's "systematic" discrimination against federal claims would cross the constitutional line, the Court's meaning becomes clear: neither Congress nor the Supreme Court may enforce the supremacy clause against the states except in relatively extraordinary circumstances, as on facts showing some widespread cheating by a state to disfavor federal claims. *Alden* prefers self-enforcement by the states themselves:

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quate state ground doctrine simply as an interpretation of a constitutional provision barring discrimination"); *id.* at 1185 (arguing instead that the Court exercises the power to make federal common law when declaring state *procedural* grounds inadequate to preclude Court review of federal claim).

353. 527 U.S. 706 (1999).

354. *See* Brief for Petitioners at 34-47, *Alden* (No. 98-436); *see also* HART & WECHSLER Supp. 2000, *supra* note 3, at 149.

355. *Alden*, 527 U.S. at 758. The *Alden* majority cited *Testa* only twice, and never for its nondiscrimination principle. Instead, the Court cited *Testa* once for its discussion of "early Congresses" that "enacted various statutes authorizing federal suits in state court," *id.* at 744; and then again, for the point that Congress may "require state courts of 'adequate and appropriate' jurisdiction" (quote from *Testa*) to enforce only federal law that is "appropriate for the judicial power." *Id.* at 752 (latter quote from *Printz v. United States*, 521 U.S. 898, 907 (1997)).

356. *Alden*, 527 U.S. at 754-55.

> We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[357]

Thus, *Alden* suggests, a state is free to use state laws — like those determining when the state will or won't invoke sovereign immunity to prohibit state courts from entertaining a lawsuit against it — in ways that overtly favor state-law over federal-law claims, so long as that practice does not rise to the level of a "systematic" effort to discriminate against federal law. If this is what the Court meant to suggest — and it is difficult to read *Alden* otherwise, given the close similarity between the state-law claims to which Maine consented and the FLSA claims to which Maine objected — then it may represent a significant narrowing of *Testa*'s nondiscrimination principle.[358] In no other case before *Alden* (including *Testa*) had the Court excused a state's discrimination against a particular federal claim on the ground that the state had not been proven to disfavor federal claims "systematically" in other cases. Indeed, it is difficult to imagine what kind of evidence would satisfy this new supremacy clause standard,[359] although

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357. *Id.* at 755 (quoting U.S. CONST. art. VI.). This confidence in the states — and the concomitant reluctance to craft constitutional rules that permit federal-law enforcement against states in the ordinary case — operated again in the Court's *Kimel* decision, in which the Court declared that Congress lacked the Fourteenth Amendment authority to abrogate state sovereign immunity against private suits in federal court to enforce federal age anti-discrimination laws. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000). Similarly, in both *Alden* and its predecessor, *Seminole Tribe*, the Court stressed that recalcitrant states could be adequately policed through enforcement actions brought by the United States Executive, against which the states may not raise sovereign immunity. *See Alden*, 527 U.S. at 756-57; Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73-76 (1996) (noting also that *Ex parte Young* actions might be available for individual lawsuits against state officials for prospective relief ordering compliance with federal law in the future).

358. *See* Jackson, *supra* note 350, at 966:

> As I understood *Testa* before this case, it would then have been clear that, since Maine had waived its immunity for analogous claims in the state courts, the State was not free to discriminate against the federal claims by barring its courts from hearing them. But now, absent "evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action," a state may limit its consent to suit to exclude certain claims based on federal law because doing so is "no more than [an] exercise [of] a privilege of sovereignty." (quoting *Alden*, 527 U.S. at 758).

As Professor Jackson has put it:

> [O]n the facts of *Testa* — in which the state courts did entertain double damage actions arising out of similar laws and were held to have a Supremacy Clause obligation to entertain the federal causes of action for treble damages — it is hard to understand how the *Alden* Court could have so casually dismissed the argument that a similar principle required the courts of Maine, which had jurisdiction to entertain state law "straight-time" back pay claims against the state, to entertain this federal claim [for back pay under the FLSA].

Jackson, *supra* note 53, at 728 (footnotes omitted).

359. *See* HART & WECHSLER Supp. 2000, *supra* note 3, at 149 ("[I]f the only significant distinction between the two classes of suits [one permitted and one not] is the source of law on which the plaintiff relies, what more needs to be shown to demonstrate discrimination?").

the *Alden* Court's language does bring to mind other cases requiring plaintiffs to prove a "pattern or practice" of constitutional violation before a state can be called to account.[360]

Given the close conceptual parallel between *Testa* and the inadequate state grounds doctrine, *Alden*'s apparent narrowing of *Testa* raises questions about the Court's continued practice of reversing state-court decisions on questions of state law. If *Alden* did read the supremacy clause as allowing states a broader freedom to enforce state law in state courts — even where state law, though not itself violating federal law, nonetheless has an adverse effect on a federal claim or a federal claimant — then it is difficult to see why the states could not also demand that (new) leniency from the Supreme Court as well in exercising its appellate jurisdiction over state-court judgments. That is, if the supremacy clause stands both at the root of the Court's power, in *Testa*, to declare that a state must entertain a particular federal claim, and at the root of the Court's power to declare a state-court judgment on state-law "inadequate" and so reverse it, then a shift in interpretation that relieves a state from the first exercise of federal judicial power must also, one would think, relieve it from the second, absent proof of the same kind of "systematic" cheating of federal law.

I recognize the argument that the *Alden* Court may simply have announced a special rule that permits states to discriminate against federal claims only in exercising what *Alden* described as its "privilege of sovereignty concomitant to its constitutional immunity from suit" which the Court had just announced.[361] But if that were the case — if state sovereign immunity were a sui generis constitutional value that just weighed more than the supremacy clause's nondiscrimination principle — then it would not make sense for the Court to suggest that using sovereign immunity to discriminate "systematic[ally]" against federal claims might somehow cross a constitutional line: if sovereign immunity outweighs supremacy when invoked against one federal claim, it would still outweigh it when invoked systematically against every federal claim. Thus, I proceed on the view that *Alden* appears to have narrowed the supremacy clause as it had applied generally, under *Testa*, to prohibit state courts from wielding state law to disfavor federal interests.

I also recognize the possibility that *Alden* did not so much authorize states to raise sovereign immunity selectively (if not systematically) against federal claims, as it prohibited Congress from creating those particular federal claims in the first place.[362] This argument carries

360. *See, e.g.*, Bd. of Trustees v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997).

361. *See* Alden v. Maine, 527 U.S. 706, 758 (1999).

362. I am indebted to both Michael Collins and Jim Pfander for raising this point to me.

force, so long as two things are true. First, a "claim" must necessarily comprise both the substantive federal obligation that the FLSA imposes on states — which *Alden* carefully preserved as within Congress's power to enact — *and* the permit licensing some entity (here, a private individual) to seek that obligation's enforcement from a court.[363] That is, to read *Alden* in this way, one may well need to conclude that there is no such thing as a federal "obligation" or "right" detached from the particular mechanism chosen for its enforcement.[364]

Second, reading *Alden* this way portrays the supremacy clause, and the case law developing a supremacy-based nondiscrimination princi-

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363. Quoting Blackstone, Chief Justice Marshall defined a "suit" for 11th Amendment purposes as a demand for one's lawful rights in a court of justice, in a form also prescribed by law:

> The remedy for every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived." "The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror to be" the lawful demand of one's right." . . . Blackstone then proceeds to describe every species of remedy by suit; and they are all cases were (sic) the party suing claims to obtain something to which he has a right. To commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 407-08 (1821).

364. This rather upends another federal-courts truism — a presumption serving as the basis for significant claims to federal judicial power — that every substantive right or obligation requires a judicial remedy for its violation. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); *Ex parte* Young, 209 U.S. 123 (1908). But the Court's recent major sovereign immunity decisions suggest that it will not extend the same presumption — that a remedy follows a lawful right — to Congress as it extends to itself. In *Seminole Tribe*, as in *Alden*, the Court carefully reaffirmed Congress's power to impose on states the substantive obligations contained in the FLSA, declining to accept federalist arguments that the obligations themselves exceeded Congress's power to act under Article I. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding that Congress exceeded Article I power in abrogating states' sovereign immunity from private suits to enforce the Indian Gaming Regulatory Act). Both *Seminole Tribe* and *Alden* thus conclude that the Constitution simply prohibited Congress from choosing private causes of action as the mechanism for enforcing those otherwise permissible obligation. Interestingly, when the Court has shifted its sovereign immunity focus from Article I legislation to Fourteenth Amendment legislation — to enforce which Congress may choose the mechanism of the private action — the Court has shifted its critical attention to the substantive obligations that Congress imposed on states, concluding in every such case that those obligations exceeded Congress's Fourteenth Amendment powers. *See Garrett*, 531 U.S. 356 (holding that Congress exceeded its authority under section five of the Fourteenth Amendment in imposing Americans with Disabilities Act obligations on states); United States v. Morrison, 529 U.S. 598 (2000) (declaring the Violence Against Women Act unconstitutional as beyond both Congress's Article I authority to regulate interstate commerce and its Fourteenth Amendment authority to enforce equal protection guarantees); *Kimel*, 528 U.S. 62 (holding that Congress exceeded its authority under section five of the Fourteenth Amendment in imposing Age Discrimination in Employment Act obligations on states); Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627 (1999) (holding Congress exceeded its authority under section five of the Fourteenth Amendment in permitting private federal-court lawsuit against states for violating federal patent and unfair competition laws); *see also City of Boerne*, 521 U.S. 507 (holding, in case where sovereign immunity not at issue, that Congress exceeded its authority under section five of the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993).

ple, as caring less whether states comply with their substantive federal-law obligations than whether states recognize a particular enforcement mechanism — a particular procedural permit — in their own courts. This would seem to undercut that part of supremacy doctrine which has enforced the anti-discrimination principle by asking not whether the state recognized a state claim procedurally identical to a federal claim, but, rather, whether state courts entertained claims "analogous" to that federal claim.[365] Moreover, to focus the supremacy clause's mandate on procedural enforcement mechanisms, and away from states' substantive federal obligations, disregards the fact that for most of our early history, federal law did not typically create both substantive rights and also procedural enforcement mechanisms; rather, federal law provided rights and obligations that were enforced through remedies borrowed from equity and the common law.[366] It might well be anomalous, therefore, to re-orient the supremacy clause's mandate away from federal substance and towards procedural enforcement.

Despite these alternative readings, *Alden v. Maine* raises a real question about what proof of state disobedience must be established before the Court will intervene to enforce the supremacy clause. And when read alongside recent decisions in which the Court has prohibited Congress from making any state accountable to individuals for violating their constitutional rights without proving a broad "pattern" of transgressions by many states,[367] *Alden* suggests that the Court in-

365. *See, e.g.*, Howlett v. Rose, 496 U.S. 356, 369 (1990) (the supremacy clause compels a state to hear federal claims similar to entertained state claims); Testa v. Katt, 330 U.S. 386, 394 (1947) (state courts had a duty to hear a federal claim when it was the "same type of claim" as the recognized state claim); Claflin v. Houseman, 93 U.S. 130, 136-37 (1876) ("[R]ights . . . acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class. . . ."). For a thorough analysis of how comparisons between "like" state and federal claims figure in the Court's supremacy clause doctrine, see Collins, *supra* note 3, at 49-52; *see also id.* at 50 nn.29 & 30 (noting that *Claflin*'s focus on "like" federal and state claims was meaningful even though it left room for manipulation, since "likeness" would vary with comparison's level of generality).

366. *See, e.g.*, Collins, *supra* note 3, at 50-51; *see also id.* at 51 n.33 (noting that while "express, federal created causes of action were absent in the nineteenth century," the federal statutes creating them "did little more than incorporate the general law forms of action by giving the litigant an action in law or equity to redress a particular injury." (citing, for example, 42 U.S.C. § 1983 and *Ex parte* Young, 209 U.S. 123 (1908)).

367. *See, e.g.*, *Garrett*, 531 U.S. at 367-70 (holding that congressional record showing states' irrational discrimination against the disabled was too scanty to support provisions permitting the disabled to sue states for violations of the Americans with Disabilities Act); *id.* at 369-70 (criticizing Congress for relying on "general finding" that " 'historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem' "); *see also Kimel*, 528 U.S. at 89-91 (holding that Congress failed to compile a factual record sufficient to show a "pattern" of state discrimination on the basis of age to justify permitting individuals to enforce the Age Discrimination in Employment Act against states); *City of Boerne*, 521 U.S. at 530-31 (holding that Congress failed to compile a factual record sufficient to show a "pattern" of state violation of religious free exercise rights to justify the Religious Freedom Restoration Act).

tends to enforce a general presumption of state trustworthiness unless there is proof to the contrary. To the extent the Court's practice of reversing state-court state-law decisions rests on the goal of federal-law supremacy, there is little obvious reason to exempt the Court from the same constraint.

V. PROVEN MISTRUST: THE CONSEQUENCES

The proven mistrust alternative would recognize appellate jurisdiction in the Court to reverse a state court's state-law judgment only[368] where it can identify and substantiate some concrete indication that the state court deliberately manipulated state law to thwart federal law and then evade Supreme Court review.[369] This rule preserves the most compelling insight from other theories offered to justify state-ground reversals: federal-law supremacy requires some mechanism permitting the Court to police state courts that exploit state law to disfavor federal interests and then evade federal review. But, unlike the alternatives, the proven mistrust rule finds in that intuition a limiting principle as well: where the Court can articulate no reason to suspect a particular court of cheating in a particular case, a state-ground reversal advances supremacy values only indirectly and diffusely, justifying neither the encroachment on state-court prerogatives nor the erosion of the Court's own jurisdictional boundaries that those reversals represent. The proven mistrust alternative thus satisfies the criteria I have proposed: it treats the Court as a court of limited jurisdiction subject to clear constraints, and it places the Court within limits at least comparable to those the Court increasingly imposes on Congress in its own dealings with the states.

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368. Again, assuming no outright federal-law violation, which would always justify reversal.

369. *See supra* Part I. I draw no distinction between substantive state grounds and those that involve rules of procedure in state court. Absent articulable reason to mistrust a state court, its state-law procedural rulings should also be final unless the Supreme Court is willing to declare a procedural rule unconstitutional in itself. *See, e.g.*, Exxon Corp. v. Eagerton, 462 U.S. 176 (1983); Central Union Tel. Co. v. City of Edwardsville, 269 U.S. 190, 194-95 (1925) (declaring state ordinarily free to enforce its own rules of procedure against those claiming federal or state rights in state court where those rules comply with due process by giving "the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by . . . [state] court"); *see also* Lee v. Kemna, 534 U.S. 362 (2002) (reaffirming that state-law procedural default may raise adequate and independent state grounds precluding Supreme Court review). And if this sounds too restrictive — if even fully constitutional state procedural rules offer an unacceptably rich opportunity for state courts to block federal claims behind disingenuous state grounds — then it is Congress's job (if any federal institution's) to federalize those procedures, just as it was to provide for uniform procedural rules for federal courts. Sibbach v. Wilson, 312 U.S. 1, 9-10 (1941). So widespread a mistrust of state-court practice should not be left for the Court to address case-by case. Contrast the work of commentators who have argued that the Court may reject state procedural rules on nonconstitutional grounds in the exercise of the Court's federal common-law making authority. *See generally supra* Section IV.A (discussing federal common law theory to justify reversing state court judgments on state procedural issues).

A proven mistrust rule might produce different results in paradigm cases now usually considered beyond serious debate, including *Indiana ex rel. Anderson v. Brand*[370] and *NAACP v. Alabama ex rel. Patterson.*[371]

A. *Anderson v. Brand*

In this venerable chestnut, an Indiana public school teacher challenged her firing as a breach of her state statutory right to tenure; she alleged, further, that state legislation abolishing tenure in schools like hers after she had earned it violated the Constitution's rule against state laws impairing the obligation of contract. The Indiana supreme court rejected the teacher's claim on purely state-law grounds: it held that she had never had a contractual tenure right under state law; therefore there was no "contract" for the later legislation to impair.[372]

The Supreme Court reversed. While acknowledging that state and not federal law ordinarily governed not only the formation of contracts, but also the construction of their terms and thus what would constitute their "impairment" by later state legislation,[373] the Court nonetheless refused to honor the state court's own reading of Indiana's contract law here. And why not? Because, the Court declared, "unless we decide for ourselves" these state-law contract questions "the constitutional mandate may . . . become a dead letter."[374]

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370. 303 U.S. 95 (1938).

371. 357 U.S. 449 (1958).

372. The state court held that Indiana teachers enjoy tenure-like job security not under *contract* but by "grant of a repealable statute." *Brand*, 303 U.S. at 113 (Black, J., dissenting).

373. *Brand* does use qualifying language to make this point: these antecedent contract questions are "one[s] *primarily* of state law." *Brand*, 303 U.S. at 100 (emphasis added). *But see* HART & WECHSLER, *supra* note 6, at 556 (noting the Court's qualification, but asking "Isn't the existence of the contractual obligation in fact a question primarily, *and usually exclusively*, one of state law?" (citing, inter alia, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 256-59, 326 (1827)).

374. *Brand*, 303 U.S. at 95. The Court did insist that its state-law review should proceed with "respectful consideration and great weight to the views of the state's highest court," *id.*, but, as I have already suggested, this kind of discretionary *deference* standard is no substitute for a real limit on the Court's power to reverse state courts — not least because the Court itself recognizes it as *no* limit. See, for example, *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), in which the Court, notwithstanding *Brand*'s deferential language about the state-law nature of antecedent contract questions underlying contract-clause claim, declared: "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*.' " *Id.* (emphasis added) (nonetheless claiming to give "great weight" to state court's views). Consider also HART & WECHSLER's observation that, before *Brand*, the Court had declared it would accept a state court's judgment as to the " 'effect and meaning of the contract as well as its existence . . . unless manifestly wrong.' " HART & WECHSLER, *supra* note 6, at 556 (quoting Hale v. State Bd. of Assessment & Review, 302 U.S. 95, 101 (1937)). But, as HART & WECHSLER intimates, there is little in *Brand* to suggest the Court found the state high court's reading of state law "manifestly wrong." *Id.* (noting that the *Brand* Court might have been operating on a differ-

But the *Brand* Court offered no reason, either in or outside the record, to suspect the Indiana supreme court had manipulated state contract law in order to cheat the putative federal claimant out of her federal-law rights. Indeed, as Justice Black argued in dissent, there was ample basis to conclude that the state court, before this dispute, had "consistently" and "uniformly" read state law in the same way it had here.[375] Thus *Brand* may only rest on the broad assumption that the simple fact of antecedence — the very opportunity that antecedence would give a "recalcitrant" state court to thwart federal rights despite the supremacy clause — was enough to justify the Court's state-ground reversal.[376]

But under the proven mistrust rule the *Brand* Court would have had only two choices. It could have identified and substantiated some reason why the Indiana supreme court should not be trusted to show the appropriate fealty to supreme federal law in applying state law to this teacher's case. Or it could have claimed and defended the power, as in its federal common-law cases of roughly the same era, to declare the antecedent contract questions federal questions, and then articulated substantive rules to govern the tenure question *Brand* raised.[377] Even without advocating the Court's resort to federal common-law

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ent standard altogether, substituting an "independent" review that nonetheless gives "great weight" to state judgment for *Hale*'s standard limiting review of the state grounds for "obvious error." *Id.* (asking whether two standards differ).

375. *Brand*, 303 U.S. at 112-13 (Black, J., dissenting).

376. HART & WECHSLER raises — but does not answer — this question: "Can the Supreme Court's willingness in the Brand case to review a state court's determination of an issue of state law be squared with Murdock v. Memphis?" HART & WECHSLER, *supra* note 6, at 556-57; *see also id.* (noting that where, as in *Brand* and *Martin v. Hunter's Lessee*, "state law is antecedent to federal law" there may be "a much stronger argument for some federal review of state law").

377. *Brand*'s own casual claim to the power to reverse the Indiana Supreme Court on what it acknowledged was a state-law contract question might be partially explained by the fact that *Brand* was decided before *Erie* made it *constitutionally* suspect for a federal court to countermand a state high court's reading of federal law. *See* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938); Erie R.R. v. Tompkins, 304 U.S. 64 (1938). But after *Erie*, the Court nonetheless claimed to retain the power, where it felt federal interests warranted it, to create federal substantive rules to displace state law on some or all questions arising in the course of a dispute not governed by federal constitutional or statutory provisions. *See, e.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (adopting federal common-law rule that one who seeks to raise laches as a defense against the United States in a suit to recover payment on forged commercial paper must prove actual damage resulting from the United States' delay in notifying of forgery); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) (adopting federal common-law rule that one who makes a fraudulent note to a bank later insured by FDIC may not raise a claim of lack of consideration in an FDIC action to enforce the note); *see also* Semtek Int'l v. Lockheed Martin Corp., 531 U.S. 497, 507-08 (2001) (adopting federal common law rule to govern claim preclusive effect of a dismissal by a federal court sitting in diversity); Boyle v. United Tech. Corp., 487 U.S. 500 (1988) (adopting federal common-law defense for federal military contractors to state products liability action). For a suggestion that the Court was making federal common law in *Union Pacific* when it declared the Missouri supreme court's state law estoppel ruling "inadequate" to preclude Supreme Court review of commerce clause claim, see *supra* note 178.

making power in *Brand* or elsewhere,[378] an *overt* claim to lawmaking power is preferable to the more indirect claims like the *Brand* Court's. At the very least, the Court's lawmaking aspirations would be flushed out into the open from behind the screens of "adequacy" and "degrees of deference" its modern state-ground reversals erect. And an open power claim increases the chances that the Court will be held institutionally accountable — by the Congress, by individual Justices, and by the political and legal community — when it goes too far.[379]

Thus, under the proven mistrust rule, if the *Brand* Court could neither name a concrete reason to mistrust the Indiana high court's ruling, nor convert the substantive contract questions into federal questions, then it would have had to declare itself powerless to reverse that state-law judgment.

B. *NAACP v. Patterson*

By contrast, the proven mistrust rule might have produced the same result — but on different reasoning — in another bedrock precedent, *NAACP v. Patterson*.[380] There, the Court ruled that the NAACP's failure to follow Alabama's rules of appellate procedure, as construed by the Alabama supreme court, could not bar it from raising a First Amendment challenge to a state court's subpoena of its membership lists.[381] The Alabama procedural default was "inadequate" to preclude Supreme Court review of the federal constitutional question, the Court declared, because — given numerous Alabama supreme court decisions rejecting the procedural distinction invoked to default the NAACP[382] — it was so "novel" a reading of state law that "petitioner could not fairly be deemed to have been apprised of its existence."[383]

And yet the *Patterson* Court did not go the next step and declare the Alabama procedural rule, as applied, to violate federal due proc-

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378. *Cf.* Friendly, *supra* note 296.

379. *See, e.g.*, Kevin McNamee, *Do as I Say and Not as I Do:* Dickerson, *Constitutional Common Law and the Imperial Supreme Court*, 28 FORDHAM URB. L.J. 1239 (2001).

380. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); *see supra* note 270 and *infra* note 381-389 and accompanying text (discussing *Patterson* dispute). *Patterson* was one of the cases used by the *Bush* Justices debating when the Court might reverse on state grounds. *See supra* notes 281-295 and accompanying text (discussing debate); *see also* Klarman, *supra* note 27, at 1738-40.

381. Recall that the Alabama Supreme Court had held that the NAACP's claim had to be raised by petition for writ of mandamus, and not by petition for writ of certiorari. *See supra* note 270 (discussing dispute).

382. *Patterson*, 357 U.S. at 456 (declaring that "[w]e are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings . . . .").

383. *Patterson*, 357 U.S. at 457.

ess standards,[384] or any other federal-law rules governing the retroactive application of new rules.[385] From this remove, it is unclear why not.[386] Had the Court done so overtly — and thus been willing then to embrace and integrate that addition to its overall due process jurisprudence — then *Patterson* would easily have satisfied the proven mistrust rule, for state grounds that violate federal law outright always fall within the Court's appellate jurisdiction over state courts.

Moreover, and more controversially, the *Patterson* Court might have admitted outright that, given southern resistance to the civil rights movement, the Court simply could not trust the Alabama supreme court to treat the NAACP fairly under state law even absent an outright federal-law violation. Commentators readily assert that this is the real reason the Court decided *Patterson* as it did. As Professor Klarman has recently observed,

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384. *See* Hill, *supra* note 10, at 976 (describing the *Patterson* Court as rejecting Alabama procedural default because although "consistent" with pre-existing state law, it was "hypertechnical and surprising in the light of then available indications of the governing law "and to that extent unfair. But unfairness at this level is not the kind of gross unfairness that has been thought to be an indispensable basis for condemnation under the due process clause. A decision 'consistent' with earlier precedents is neither irrational nor arbitrary."); *id.* at 949 (including *Patterson* among cases where the "state ground would not be subject to review [as itself violating federal law] in the absence of a separate federal question"); HART & WECHSLER, *supra* note 6, at 580 (characterizing the *Patterson* ruling as one where the Court found the state procedural ground inadequate because "novel" or "inconsistently applied," although not itself violating due process). The *Patterson* Court itself hedges on the question whether the flaw it detected in the Alabama court's judgment had a constitutional dimension: after holding that judgment inadequate because "novel" in light of prior Alabama rulings, the Court included a "*cf.*" citation to *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673 (1930), one of the very few cases in which the Court has ever declared a state ground "inadequate" because it actually violates due process. *See Brinkerhoff-Faris*, 281 U.S. at 678-79 (state court denied litigant due process by enforcing an "unforeseeable" rule requiring administrative exhaustion of an equal protection claim when prior decisions had held that the administrative body lacked the power to award relief). *But cf.*, Bouie v. City of Columbia, 378 U.S. 347, 350 (1964) (holding that the South Carolina supreme court violated due process by retroactively applying a state trespass statute in a way that "did not give them fair warning, at the time of their conduct [that makes it a crime]").

385. *See, e.g. Bouie*, 378 U.S. at 350 (retroactive application of novel state-law reading constitutes due process violation). *See generally* Krent, *supra* note 22, at 495, *passim* (discussing various Supreme Court doctrines — like ex post facto rules — that govern when the Court will reverse a state court for applying state law in a way that deprives litigants of "settled expectations" under state law; describing the problem as one of "excessive retroactivity").

386. The Court has, since *Patterson*, cited it to support more straightforward due process rulings. *See, e.g.*, Reich v. Collins, 513 U.S. 106, 111 (1994) (holding state court violated due process through remedial "bait and switch" that first held out prospect of post-collection refund procedures by which taxpayers could challenge state tax, and then later refusing to provide refunds on grounds that state law permitted only *pre*-payment challenge). And in his *Bush* concurrence, Chief Justice Rehnquist used *Patterson* as an example of a case where "the *Constitution* requires this Court to undertake an independent, if still deferential, analysis of state law." Bush v. Gore, 531 U.S. 98, 114-15 (2000) (Rehnquist, C.J., concurring). *See* Tushnet, *supra* note 20, at 115-16 (noting that Rehnquist's citation of *Patterson* and other 1960s civil rights cases supports the view that he considered the Florida supreme court to have acted illegitimately to "steal the election from the rightful victor").

> It is inconceivable that the Justices' view of the [*Patterson*] case, both on the merits and on the alleged state procedural default, was uninfluenced by their knowledge that the state of Alabama, including its jurists, were engaged in a project of massive resistance toward *Brown v. Board of Education*, a fundamental part of which involved shutting down the NAACP's operations in the state.[387]

But if that suspicion really drove the *Patterson* Court's reversal on an Alabama-law ground, why should the Court not have to say so and substantiate its mistrust *in that case*? Historians and other commentators argue that the Court could readily have done so in *Patterson* and elsewhere.[388] Thus, under the proven mistrust rule, the *Patterson* Court might still have reversed the Alabama state grounds, but only if it had been willing either to own up to its *due process* concerns about the state procedural rules, or to admit its *political* concerns about Alabama's resistance to civil rights enforcement, despite that state's own supremacy clause obligations.[389]

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387. Klarman, *supra* note 27, at 1738-39. Justice Ginsburg thinks so, too. In her *Bush v. Gore* dissent, she criticized Chief Justice Rehnquist for ignoring that *Patterson* was "embedded in [the] historical context" of "Southern resistance to the civil rights movement," *Bush*, 531 U.S. at 140; she rebukes the concurrence for failing to distinguish the Florida supreme court's conduct from the state high court "recalcitrance" — as in *Patterson* — "that warrants extraordinary action by this Court." *Id.* at 141 (concluding that the Florida court "surely should not be bracketed with state high courts of the Jim Crow South"). *But see* Tushnet, *supra* note 20, at 115-16 (suggesting Rehnquist's citation to *Patterson* suggests he harbored similar suspicions about the good faith of the Florida supreme court in *Bush*).

388. *See, e.g.*, *Bush*, 531 U.S. at 140-41 (Ginsburg, J., dissenting) (noting that southern civil rights recalcitrance explains *Patterson*). *See generally supra* note 27 and accompanying text (discussing Justice Ginsburg's more general assertion that "historical context" best explained cases where the Court rejected state courts' reading of state law). Professor Klarman has collected a number of scholarly sources developing this point as well as his observation that, like *Patterson*, "most of the other leading cases rejecting the adequacy of state procedural grounds for denying federal rights also involve southern states obstructing the civil rights movement." Klarman, *supra* note 27, at 1739 & n.84. I borrow and reproduce his own research here. *See* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1969); LOW & JEFFRIES, *supra* note 26, at 109 ("It is no coincidence that many such cases arose in the civil rights litigation in the 1960s."); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936-1961, at 284-89 (1994); Walter F. Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371 (1959). For other similar discussions, see Glennon, *supra* note 27, at 887-900; *see also* Solimine, *supra* note 10, at 348 (noting that "considerable evidence also supports [Justice Ginsburg's] view of the recalcitrance of at least some of the state courts in the deep South during the Civil Rights Era . . . .") (citing MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 4-9 (1999) (citing sources)).

389. *Cf. Bush*, 531 U.S. at 128 (Stevens, J., dissenting) (noting that the concurrence's argument must have rested on "an *unstated* lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed") (emphasis added).

C. *Benefits, Consequences, and One Lingering Puzzle*

The proven mistrust rule offers one especially important advantage over the Court's and commentators' alternatives: it seeks to place discernible limits on the Court's jurisdiction over state courts, which, if breached, could open the Court to meaningful criticism, thus accountability, from its observers, political and otherwise. That discipline will never come from the Court's own indeterminate, shifting, and — above all — discretionary guidelines for how much deference it owes a state high court's "last word" on state law.[390] Thus, the proven mistrust rule would bring the Court closer to the Constitution's fundamental goal of having all federal institutions — and not just Congress and the inferior federal courts — wield their power only within discernible boundaries.[391]

There is also a real benefit in the practical constraints this rule would impose on the Court's use of judicial power. For, just as the Court has prohibited Congress from acting on unsubstantiated suspicions (and prejudices) that states, or a particular state, cannot be trusted to handle federal law honestly,[392] so should the Court be forced to confront and prove its own suspicions and prejudices about state courts before reversing state grounds that do not themselves violate federal law.

I can imagine two possible consequences if the Court were to accept a discipline for itself comparable to what it now imposes on Congress. First, Justices might discover that they can indeed substantiate the kind of "suspicion in the air" that might have troubled the Court in some key state-ground reversal cases like *Ward v. Love County*, *Davis v. Wechsler*, and *Bush v. Gore*.[393] That candor would strengthen the Court's claim to jurisdiction in a particular case: no one seriously questions the Court's prerogative to enforce federal law's supremacy against states that cheat.[394] And such candid state grounds

390. *See supra* notes 34-35; *see also* Printz v. United States, 521 U.S. 898, 928 (1997) (declaring "imprecise barrier[s] against federal intrusion upon state autonomy" likely to be ineffective).

391. *See generally* Pushaw, *supra* note 37, at 739, 823-34 (discussing the "limited" nature of federal institutions' power as a "principle[] of constitutional structure").

392. *See supra* notes 1-8 (discussing cases); *supra* notes 29-32 and accompanying text (elaborating scope and justification for the Court's constraints on Congress.

393. *See supra* Part II, at notes 181-203 and accompanying text (discussing *Love County*); *supra* Part II, at notes 204-230 (discussing *Davis v. Wescheler*); *supra* note 40 and accompanying text (discussing "political" interpretation of *Bush v. Gore*).

394. *See, e.g., supra* notes 201-203 and accompanying text (discussing the Court's failure to invoke a compelling history of state animosity to Indian tribes — relying instead on unpersuasive and cursory analysis of state common law — in *Ward v. Love County*, 253 U.S. 17 (1920)).

reversals would carry the unmistakable message — both to a particular misbehaving state court and to others tempted by the opportunity for cheating federal law that antecedent state grounds present — that the Court's authority over them cannot be subverted by the improper use of state law.

Alternatively, the Court might find that it cannot substantiate its suspicion about a particular state court's judgment.[395] In those cases, there would unavoidably be less Court oversight of state high courts, even where state grounds block the path of very important federal interests. While this result would counter the modern assumption that the Court has a roving prerogative to vindicate federal interests wherever they lurk,[396] it is the natural and necessary consequence of the basic constitutional principle that *all* federal courts — like all federal institutions — face real jurisdictional constraints while pursuing the federal good.

Finally, I raise (but do not answer) one last question. If the Court cannot bring itself to name and substantiate a reason to suspect a state court either of violating federal law outright or of cheating it through disingenuous use of an antecedent state ground, should the Court require Congress to prove widespread state misbehavior before *it* can act against the presumption that a state will self-enforce its supremacy-clause obligations? If, that is, the proven mistrust rule sets an unrealistic and insurmountably distasteful task for the Court, why is the task not equally unrealistic and distasteful for Congress? The Court's recent decisions imposing a presumption of state trustworthiness pose real questions about how to enforce the Constitution's formal limits on all exercises of public power — federal or state. The Court's own long practice of reversing state grounds, despite its black-letter limit to federal questions, inevitably carries those questions home to the Court itself.

395. *See* Strauss, *supra* note 40, at 746 (suggesting that the *Bush* majority was spurred by an "inchoate" sense that the Florida supreme court had misbehaved).

396. I have discussed this tendency of thought in some detail elsewhere. Fitzgerald, *Is Jurisdiction Jurisdictional?*, *supra* note 46 (documenting the Court's tendency to claim judicial power to act whenever important federal interests are at stake, even when formal jurisdiction is compromised).