BOOK REVIEWS

The Puzzle of State Constitutions

INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM. By James A. Gardner. *Chicago: University of Chicago Press*, 2005. Pp. xii, 311. $45.00.

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A constitution must be judged not by its name, but by the function which it has to perform.[1]

State constitutions present a challenge for courts within the system of American federalism. The federal constitution defines the scope of federal power, along with many protections for individual liberty. To the extent that federal authorities may be able to override subnational

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1. Walter F. Dodd, *The Function of a State Constitution*, 2 POL. SCI. Q. 201, 215 (1915).

constitutions, as they do in many instances,[2] state constitutions seem subsidiary. State constitutions rarely speak to who is to interpret them, or to how state actors are to solve conflicts between state and federal power. Where state courts interpret state constitutions, the practice has been questioned as pallidly mimicking other jurisdictions,[3] mindlessly following in "lockstep" the federal constitution,[4] or, when a state does go at it alone, frequently unprincipled and incoherent—a "failed discourse."[5] Just as some have questioned whether affording states any independent legal status is really necessary to afford adequate representation in national politics,[6] at some level one might even question whether subnational constitutions really matter at all in a federal system of government. This presents a bit of a puzzle for both federal and state courts in interpreting state constitutions. Why should federal or state courts afford state constitutions any special legal status—beyond other positive legal texts as, say, statutes—in a system where the national government possesses sufficient power to do most of the things it wishes anyway?

In a series of groundbreaking articles published over the past fifteen years,[7] James Gardner has led the charge to

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2. For example, even if a state constitution provides for stronger privacy protections than the U.S. Constitution, the U.S. Congress could preempt the state constitution by passing a statute that authorizes federal officials to invade the privacy of individuals (under more expansive protection of privacy recognized by state constitutions) during a time of war or to respond to a terrorist crisis.

3. *See* John P. Frank, *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1339, 1340 (1985) (book review) (describing state constitutional law as "a sort of pallid me-tooism").

4. *See generally* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984) (criticizing "lockstep" approach).

5. *See generally* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

6. *See, e.g*, Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (arguing that political parties have evolved into the most important mechanism by which state influence national officials, thus calling into question the legal significance of states for federalism).

7. *See, e.g.*, Gardner, *supra* note 5; James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219 (1998); James A.

make state constitutionalism a part of the constitutional law discussion more generally. His new book, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System*,[8] steps beyond his study of specific issues in state constitutionalism to lay out an ambitious theory about how state constitutions should be interpreted based on their function within a federal system. Gardner's book is a significant scholarly effort to take state constitutions seriously, in a way that transcends any one jurisdiction or constitutional provision. Gardner's effort solves the puzzle of state constitutions by positioning them within federalism, in contrast to others who see state constitutions as largely independent of the federal constitution or as meriting primacy as their own interpretive texts. He gives "an account of state constitutional interpretation that takes into consideration the way that state power is actually allocated and exercised within the American federal system."[9]

In this review, I will summarize Gardner's argument, positioning it within the larger debate about state constitutional interpretation and federalism. As Gardner suggests, understanding state constitutions within the larger national system challenges theorists to focus on the function that state constitutions, and subnational constitutions more generally, perform within a national system. Gardner argues that a functional approach licenses courts to interpret state constitutions instrumentally to facilitate state resistance to national power. His concluding chapter endorses a rebuttable presumption that state judicial power to resist federal authority ought to be construed broadly, envisioning a bolder role than alternative theories for state courts in promoting federalism.

After summarizing Gardner's approach, I will discuss two possible objections to it. First, his account is based on the primary goal of federalism as protecting liberty (broadly defined) against intrusion by national authorities. This

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Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003 (2003); James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245 (2005).

8. JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005).

9. *Id.* at 180.

classical, liberty-based understanding of federalism, however, ignores or downplays that federalism may be understood in ways that are agnostic towards national authority. A broader understanding of federalism would give state courts clearer direction in implementing the goals of federalism and also would allow Gardner to extend his interpretive theory to subnational constitutional interpretation contexts outside of the United States, where the protection of liberty may not have claim to being a primary historical rationale for the recognition of state power.

Second, even if we accept Gardner's account of federalism, his approach sees the core interpretive problems of state constitutionalism as centered around judicial power to resist the reach of national power. This court-centered approach downplays other important features of state constitutionalism. For example, as the recent disputes over same-sex marriage in California and Oregon remind us, other branches of government, such as the legislature or executive, could have a superior claim to interpreting a state constitution. Further, in some contexts there are strong reasons for understanding state constitutions as being focused on facilitating, not resisting, federal power. To the extent Gardner's approach views courts as "resistors" rather than "facilitators" of national authority, his interpretive tools may be limited in their ability to serve the goals of state constitutions—as where a state branch other than a court resists federal power and courts support it. Gardner's interpretive account does little to help courts solve such conflicts, thus inviting courts and scholars to do further interpretational groundwork.

I will conclude the review by suggesting that, notwithstanding the concerns I raise, the broader framework Gardner lays out is the strongest starting place for a theory of state constitutional interpretation. His innovations for state constitutionalism allow scholars and courts to conceptualize a state constitution as something more than a positivist text in a jurisdictional vacuum without rendering state constitutions irrelevant given the existence of national power in a federalist system. Gardner's functionalist approach and presumptions should be taken as a challenge for state courts, even though I believe that a mature enterprise of state constitutional interpretation must do more than adhere to a classical

liberty-based notion of federalism or focus exclusively (or necessarily even primarily) on judicial interpretation.

I. GARDNER'S FUNCTIONALIST ACCOUNT OF STATE CONSTITUTIONAL INTERPRETATION

Rather than viewing state constitutions as existing within independent jurisdictional islands, Gardner positions them within a dialogic model of federalism. This is one of the most significant implications of Gardner's book. Gardner's move beyond a positivist account of state constitutions, informed by a robust notion of federalism,[10] has dual agent implications for both federal and state constitutional law. As Gardner suggests,

> [F]ederalism is not at all a system in which two distinct agents pursue distinct and nonoverlapping goals in distinct spheres of authority, but rather a system in which two agents pursue the same set of largely overlapping goals, each exercising independent authority within what is for many if not most purposes essentially the same sphere of activity.[11]

In such a dual scheme, Gardner suggests that one agent—the federal government—be given narrow discretion, while another agent—the subnational unit of the state—be given broader discretion to pursue overlapping goals.

By positioning state constitutionalism in the space of overlapping authority and affording state courts a central role in the dialogue about the exercise of such authority, Gardner's book has shined a light on an important new area of inquiry for state constitutionalism. His approach draws from a well-accepted notion of federalism as restraining national power for purposes of understanding state power and state constitutions. He concludes his book with a practical recommendation for a functional set of presump-

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10. Robert Schapiro refers to the notion as "polyphonic federalism," which "achieves its goals not through the separation of state and national power, but through their interaction." Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 316 (2005). While Gardner focuses on increasing the authority of state courts to address such problems, Schapiro also emphasizes the importance of eliminating formal restrictions on federal law.

11. GARDNER, *supra* note 8, at 234-35.

tions focused on a state judicial power to resist national authority.

A. *The Turn Away from a Positivism of State Constitutional Interpretation*

The conventional response to any puzzle presented by state constitutions is positivism. If a state constitution is understood within its sovereign jurisdiction as possessing the same legal status as the U.S. Constitution within its sovereign jurisdiction, state constitutional interpretation is an enterprise with substantial similarity to interpretation of the U.S. Constitution. The same tools and techniques would inform constitutional interpretation in both settings.

Gardner begins his book by criticizing the positivist turn in state constitutionalism, an approach that tends to see constitutional issues in a vacuum. One temptation among state courts is to interpret state constitutions in a manner similar to the federal constitution—just as any legal authority would interpret the positive laws enacted by the people of a subnational sovereign. At first glance, this view—which Gardner describes as "the Lockean model"[12]—seems attractive. Much like the federal constitution serves as a controlling document for the United States, a state constitution controls its relevant jurisdiction. To say that a constitution has legal force within a jurisdiction, however, does not mean that its interpretation will necessarily draw on the same tools or principles. The "universalist" approach to state constitutionalism—in which federal courts expected state constitutions to follow similar precedents—was common in the early Republic, but modern courts have recognized a jurisprudential basis for an independent state constitutionalism. Given this independent interpretive task faced by state courts, Gardner positions state constitutions in between two popular extremes. He suggests that they are neither in "lockstep" with the federal constitution, nor are they purely the reflection of a state's character.

Gardner acknowledges that a jurisprudence of state constitutions that see state constitutional law as existing in "lockstep" with the federal constitution is impoverished. Some constitutions endorse this view in their texts. For

12. *Id.* at 59-60.

example, the provision of Florida's Constitution dealing with unreasonable searches and seizures states, "This right shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court."[13] In distancing himself from "lockstep" interpretation, Gardner does not claim that such textual provisions should be ignored. Where state constitutional text fails to speak as to the relevance of federal constitutional provisions, Justice Brennan's classic position was that state constitutional law should not follow federal law in "lockstep."[14] Similarly, Gardner argues that in using "lockstep" methods, "state courts improperly respond to federal constitutional doctrine when they should be engaging the state constitution on its own terms, as an independent object of legal interpretation."[15] One approach to such independent legal interpretation, associated with (former Oregon Supreme Court Justice) Hans Linde,[16] would treat a state constitution as an independent text. Linde's approach draws on the same interpretive tools to federal constitutional interpretation—text, history, structure, precedent, character, and values—but applies them to different texts, inviting state supreme courts to adopt more or less the same basic methods in interpreting state constitutions as the U.S. Supreme Court uses to interpret the U.S. Constitution.

In contrast to many advocates of independent state constitutionalism, Gardner does not envision state constitutions as reflecting what he calls "romantic subnationalism."[17] Endorsed by leading state supreme court judges and scholars writing in the tradition of the New

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13. FLA. CONST. art. I §12.

14. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (rulings of the U.S. Supreme Court "are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them").

15. GARDNER, *supra* note 8, at 43.

16. *See generally* Hans Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984). As Gardner suggests, Linde relied heavily on the interpretive model presented by PHILLIP BOBBITT, CONSTITUTIONAL FATE: A THEORY OF THE CONSTITUTION (1982). GARDNER, *supra* note 8, at 48 n.70.

17. GARDNER, *supra* note 8, at 21; *see also id.* at 53-79.

Judicial Federalism,[18] romantic subnationalism sees state constitutions as reflecting the unique character and value of a state's populace. For example, Judge Judith Kaye, now chief judge of the New York Court of Appeals, has argued that "[m]any states today espouse cultural values distinctively their own."[19] The political scientist Daniel Elazar has argued that there are "six constitutional patterns among the American states" reflecting two variables, "original constitutional conceptions of the founding era plus differences among the types and goals of pioneers who first settled the Northern, Middle, and Southern colonies of the New World."[20] Others, such as Robert Williams, a leading legal scholar of state constitutions, have approvingly relied on this romantic, character-based approach.[21]

In chapter two of his book, Gardner delivers a devastating critique of romantic subnationalism, which he sees as a dead end for state constitutional interpretation. The problems he identifies are important ones to keep in mind as he works towards building an account of state constitutional interpretation.

First, Gardner suggests, romantic subnationalism relies on a "naturalized view of geographic boundaries as demarcating significantly different peoples with significantly

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18. This is the view frequently associated with Justice Brennan's call for state courts to "step into the breach" caused left by a conservative turn in the U.S. Supreme Court's rights jurisprudence. Brennan, *supra* note 14, at 503.

19. Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 423 (1987). Other state supreme court justices have also endorsed this view. *See* Shirley Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 965 (1982) (Wisconsin Supreme Court Justice, noting that a state's constitution must be interpreted in light of a state's "peculiarities" including "its land, its industry, its people, its history."); Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 244 (Bradley D. McGraw ed., 1985) (Washington Supreme Court Justice, noting that the state constitution must be interpreted in view of "the vast differences in culture, politics, experience, education and economic status" between the state and national founding generations).

20. Daniel Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11, 18 (1982).

21. *See* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169 (1983).

different characteristics and traditions."[22] As Gardner acknowledges, this view finds root in the work of Frederick Jackson Turner, a historian of the American West who articulated the "'frontier thesis' . . . that the essence of the American experience . . . [is the] encounter with the constantly receding frontier."[23] Turner identified distinctive areas of the United States—New England, the middle region, and the South—and argues that these "different colonizing peoples" had "distinctive psychological traits."[24] Dan Elazar made similar suggestions, when he identified exactly "six constitutional patterns among the American states."[25] Gardner illustrates how this approach is naturalistic and essentialist, as well as how it is anachronistic for a modern America in which interstate mobility prevails.[26] Today, the media and consumerism provide common experiences regardless of geography and urban problems comprise common themes that tie together Americans as a people. Gardner also argues that this may have never been accurate: "To the extent that southern state constitutions restricted the rights of slaves and free blacks, they did not differ materially from many northern and western state constitutions of the same period."[27]

Second, in contrast to other elected officials, state judges lack the political accountability to accurately identify and implement character-based values. For example, in *Ravin v. State*,[28] the Alaska Supreme Court relied on that state's privacy provisions to find unconstitutional a law that criminalized marijuana use in the home. The court relied on the unique character of Alaskan citizens, "who prize their individuality."[29] Not long after, through an initiative the Alaskan people legalized the criminal prosecution of recreational marijuana use within

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22. GARDNER, *supra* note 8, at 66.

23. *Id.* at 62.

24. FREDERICK JACKSON TURNER, *Geographic Sectionalism in American History*, *in* THE SIGNIFICANCE OF SECTIONS IN AMERICAN HISTORY 193, 195 (1932).

25. Elazar, *supra* note 20, at 18.

26. GARDNER, *supra* note 8, at 69.

27. *Id.* at 74.

28. 537 P.2d 494 (Alaska 1975).

29. *Id.* at 503-04.

the home.[30] As *Ravin* illustrates, courts may lack the political accountability to consistently and effectively integrate character-based concerns into constitutional interpretation. State legislatures or other elected officials are more likely to accurately read state cultural norms.

As an alternative to romantic subnationalism, Garder urges a "more nuanced" understanding of state identity.[31] At the time of the Founding, Americans may have identified more with their states, but emphasis in political self-understanding has shifted over time. Gardner thus argues that "state constitutional interpretation, if it is to be persuasive, should always rest on a contextually plausible account of state identity that comports with socially and empirically sustainable descriptions of contemporary American life."[32]

B. *Positioning State Constitutions in a Federalist System*

According to Gardner, state constitutions are documents that serve to facilitate dialogue between states and the federal government. Federalism provides a theory of state power, but Gardner's book takes a different path by providing an account of state constitutionalism. The significance of Gardner's view is to disentangle subnational constitutions from a positivist model—which sees them as primarily legal documents of a jurisdictional sovereign—instead positioning them in a shared jurisdictional space of federalism.

As Gardner argues in chapter three of his book, state power exists not only for the benefit of the people of a state, but also for the benefit of the people of the nation. Particularly, Gardner argues, state power plays a significant role in securing the liberty of people against federal intrusion: "to check and counteract abuses of power on the national level—particularly abuses by federal courts of national judicial power."[33] His view understands federalism as a structural system that divides governmental power to

30. GARDNER, *supra* note 8, at 67.

31. *Id.* at 78.

32. *Id.* at 79.

33. *Id.* at 99.

protect liberty. Gardner provides several well-recognized examples of how state courts, in their constitutional rulings interpreting state law, have recognized levels of protection for rights that exceed parallel provisions under the U.S. Constitution.

Gardner then positions this account of state power within a functional account of state constitutions within a federalist system. At a minimum, his account requires a state constitution to do at least three things:

> First, it should grant the state government sufficient authority to permit it to work directly for the benefit of its citizens. Second, it should establish sufficient limits on state power to restrain, at least to some extent, the ability of state officials to use state power for unjust ends. Third, a state constitution should grant the state government sufficient power to assert itself with at least some degree of efficacy against abuses of national power by the national government.[34]

Given these functions, Gardner discusses how state constitutions take different approaches in allocating public versus private power and in allocating power among various branches, based primarily on the degree of "distrust" among a state's people in chapter five. For example, many state constitutions provide for term limits for legislators, provide for recalls, and provide for the election of judges. Since state constitutions are amended much more frequently than the U.S. Constitution, Gardner sees state constitutions as a "record of a series of popular *adjustments* to state power."[35]

C. *State Courts as Agents of Federalism*

Gardner's functional approach has important implications for state judicial power. As Gardner suggests, the functional approach does have one substantial obstacle: state constitutions are silent on the topic. However, since state courts have "day-to-day superintendency of the state constitution,"[36] Gardner views them as integral participants in any state's struggle against national authority.

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34. *Id.* at 123.

35. *Id.* at 179.

36. *Id.* at 189.

To be sure, courts may indirectly facilitate state resistance by construing state legislative and executive branch power to ensure that these political branches have powers adequate to resist national authority. Gardner does not dismiss this as necessary to courts serving as agents of federalism but argues that this is not sufficient. In addition, he argues that "state courts may help check abuses of national power, especially national judicial power, by interpreting generously the scope of individual liberty under the state constitution."[37] This functional account of state judicial power authorizes state courts to interpret "the state constitution both to ensure, vigorous, effective resistance to national power by the state executive and legislative branches, and to provide more protection for individual rights than does the national Constitution."[38] Gardner argues that this interpretive enterprise allows a state court to consider factors that go beyond its borders, although he does not state precisely how broad these factors are in scope.

Gardner concludes his book with the recommendation that state courts endorse a broad presumption in favor of acting as agents of federalism in interpreting state constitutions. A court serves as an agent of federalism when the decision before it has potential ramifications for the balance of federal and state power. As Gardner suggests, state constitutional text rarely speaks to the particular bounds of judicial power in such circumstances, which presents an interpretive challenge for state courts confronting federal/state power disputes. He suggests that courts rise to the challenge by embracing a "rebuttable presumption to the effect that the people of the state wish their courts to act as agents of federalism, and constitutionally grant them the authority to do so."[39] Given the function of state constitutions, Gardner argues that this presumption is more desirable than the contrary presumption of precluding courts from exercising such authority absent constitutional or statutory authorization. As he states, "[F]ederalism is likely to work better, and will thus more likely accomplish the liberty-enhancing goals for

37. *Id.* at 193.

38. *Id.* at 223.

39. *Id.* at 230.

which it was established, when state courts are authorized to act as agents of federalism than when they lack such authority."[40]

This presumption in favor of state courts acting as agents of federalism is not absolute. Gardner discusses how a state court can rebut the presumption where a constitution and related evidence deny courts any discretion at all to act as agents of federalism—he argues that California provides a possible example, based on that state's popular distrust of state government—or where a constitution limits courts in an issue-specific manner, as Florida's Constitution does in the context of unreasonable searches and seizures.[41] Still, Gardner's approach to state constitutionalism gives state courts a more central role in adjudicating rights and in addressing federalism than its alternatives.

II. MISSING PIECES

Gardner's book provides a groundbreaking solution to the puzzle state constitutions present for a federalist system that recognizes national power, but the interpretive puzzle of state constitutions is incomplete. Gardner relies heavily on predominant understandings that (a) federalism exists primarily to protect liberty against national intrusion and (b) that state courts must enforce federalism values by resisting national power. To the extent these understandings are overly narrow, Gardner's theory of state constitutional interpretation faces unnecessary limits and may not adequately deal with the range of problems presented by subnational constitutional interpretation more generally.

A. *The Functions of Federalism*

One of the themes Gardner consistently returns to throughout his book is the idea that federalism—a division or allocation of power between the federal and state governments—exists to enhance liberty. Gardner defines federalism as "a structural system that divides governmen-

40. *Id.* at 231.

41. *Id.* at 245-53.

tal power for the purpose of protecting liberty."[42] On this account of federalism, it is assumed that the power of state governments diffuses national power and, in so doing, promotes liberty. Gardner does add the caveat that the notion of liberty in his account of federalism is a broad one and can be used interchangeably with the "public welfare" or "public good."[43]

This classical view of federalism echoes many predominant constitutional theories[44]—and there is an undeniable validity to it (after all, who wants to argue with more liberty?)—but I wonder whether the classical account is overly myopic for state constitutionalism and might limit its path. As Richard Briffault has noted, the classical notion of federalism "relies on a set of political arguments, quasi-empirical assumptions, and intuitive hunches that may be countered by conflicting arguments, assumptions, and hunches."[45] Edward Rubin and Malcolm Feeley similarly warn against adhering to an idealistic notion of federalism "conjur[ing] up images of Fourth of July parades down Main Street, drugstore soda fountains, and family farms with tire swings in the front yard."[46]

Federalism may serve functions beyond the protection of liberty per se. To be sure, some have questioned the very validity of states as legally significant entities, asking whether, based on process accounts of federalism, a judicially-centered federalism has any significant role at all to play in modern American governance.[47] If correct, such a

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42. *Id.* at 143.

43. *Id.* at 84.

44. *See, e.g.*, The Federalist No. 51 (James Madison) (promoting federalism, along with separation of powers, as part of the "double security" for liberty); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 498 (1991) (noting that federalism provides "protection against abusive government").

45. Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1327 (1994).

46. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 906 (1994).

47. For example, under process-based theories of federalism, states are protected to ensure a legitimate process of national governance. Larry Kramer argues that the more important variables in ensuring state representation in national political processes are political parties and state representation in bureaucratic governance–variables that are primarily political rather than

view would reduce state constitutionalism to a much more modest role than the protection of liberty, particularly if liberty is defined broadly to include state judges' views of the public good. Others see states as significant, but much less so than the classic account of federalism as diffusing government power would entail. For example, on the view of Rubin and Feeley, states fill the important governmental function of facilitating decentralization. However, state boundaries can serve the administrative function of facilitating decentralized nationwide government without resorting to the traditional notions of federalism as diffusing national power.[48] As these critiques of classical federalism suggest, it is not entirely clear that a classical understanding of federalism is the only account from which to build a theory of state constitutionalism. It is also not clear that classical federalism is the best account for a theory of state constitutional interpretation.

To begin, the claim that federalism enhances liberty is seriously questionable. As Richard Briffault has illustrated, there is no empirical evidence for the claim that federalism and the protection of state power enhances liberty.[49] Barry Friedman is also cynical of efforts to link federalism and liberty, highlighting the historical lesson that states opposed desegregation and the elimination of slavery.[50] According to Rubin and Feeley:

> During the Kennedy-Johnson era and the heyday of the Warren Court, states' rights became a rallying cry of those who opposed desegregation, social welfare, and controls on law enforcement

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legal. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

48. *See id.*

49. Briffault, *supra* note 45, at 1323-24 (noting "no necessary linkage of federalism and freedom has ever been demonstrated" and that in the United States such a link "has certainly not been established"). Briffault argues that "[i]n federal-state cases in general, the proper focus of judicial attention ought to be on whether federal action is inconsistent with the formal federal structure rather than on the values of federalism." *Id.* at 1352-53. As he notes, "on the recent record of federalism cases there does not appear to be much of a problem of federal legislation threatening formal state existence, state territorial integrity, the participation of the states in the constitutional amendment process, or the representation of the states in Congress." *Id.* at 1351.

50. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 403 (1997) (noting that states has sometimes exercised their resistance role in a "regrettable fashion").

> agents. During the years of the Reagan and Bush administrations and the Rehnquist Court, proponents of abortion, gay rights, and abolition of the death penalty became enamored of federalism for equivalent reasons. This is perfectly good political strategy, but it is hardly a convincing argument for federalism.[51]

Descriptively, it is fair to say that the claim that the protection of state power necessarily increases liberty is inflated. Gardner explicitly recognizes such concerns,[52] but at the same time, the protection of liberty against national intrusion is central to the account of federalism on which his functional theory of state constitutionalism builds. To the extent that the protection of liberty is the primary function of federalism, Gardner makes a convincing case that we may not have achieved this function because of an impoverished understanding of state constitutionalism.

However, some modern scholars question whether it is normatively desirable to view the protection of liberty as federalism's primary function. As Rubin and Feeley emphasize, the kind of state power federalism protects is not physical power or political power, but administrative power—"control over appointed officials, public resources, and regulatory rules."[53] As they illustrate, understood as such, the allocation of power between federal and state authorities is not a "zero sum exchange" as "the power of government at all levels has been steadily increasing in our culture for a substantial period of time."[54] Indeed, if the protection of liberty depends on an independent sphere of state power, such a view may substantially reduce the effectiveness of government to address a variety of problems, by limiting federal authority while leaving state authorities to address many problems they are simply ill-equipped or incapable to address. Such a view of federalism might understand state constitutions as serving the function of decentralization, but at the same time, is more agnostic towards national power where it is necessary to achieve certain goals for society.

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51. Rubin & Feeley, *supra* note 46, at 935.

52. GARDNER, *supra* note 8, at 136 (recognizing that "state power is rightly to be feared as much as or more than national power").

53. Rubin & Feeley, *supra* note 46, at 931.

54. *Id.* at 931-32.

An emphasis on liberty, even if broadly defined, might overshadow many other important functions of federalism. Federalism not only provides for participation in national politics, it allows for decentralization. It also provides jurisdictional competition between states and the national government and among states and might allow for a more efficient provision of public goods at the state and local level where the national government is not willing or able to provide these on its own. The diffusion of power to protect liberty may not capture the full range of these functions in modern American democracy and certainly does not accurately describe the function of federalism outside of American democracy.

Put simply, even within the American system an emphasis on liberty over other goals may be a misplaced emphasis for any theory of subnational state power. By embracing the protection of liberty against national encroachment as the primary core value of federalism, Gardner limits the application of his interpretive theory to American state constitutionalism and may even limit the scope of its application in that context to the extent there are plausible notions of American federalism which are agnostic towards national power.

B. *Why Courts, Why Resistance?*

Whether or not federalism is primarily about protecting liberty against national encroachment or about something else, Gardner's approach affords a certain institutional privilege to state courts and attributes a resistance role to them. For example, as he suggests, "state courts may employ state constitutional law as a tool to resist incorrect and abusive interpretations of the U.S. Constitution by federal courts."[55] Courts are but one aspect of state government, and attributing a resistance role to them narrowly defines their main project in interpreting state constitutions. Both the judicial privilege and the resistance

55. GARDNER, *supra* note 8, at 110. As Gardner discusses, the mechanism of state resistance to national authority has four distinct benefits: it contributes to public dissent, it helps to establish state-wide consensus, it directly checks national authority that suppresses certain kinds of private behavior, and it "provid[es] protection for second-best alternatives to the types of behavior that such national rulings permit governments to suppress." *Id.* at 100.

role for courts seem to call into question the ability of state constitutionalism to assist in the larger project of federalism, simultaneously limiting the promise of state constitutionalism while also potentially extending its reach in troubling directions.

While Gardner focuses on judicial power to resist national power, it is unclear why the judicial branch should have any special institutional privilege in playing this role. For example, local officials in San Francisco, California, and Multnomah County, Oregon attracted nationwide attention when they drew on their own interpretation of state constitutional guarantees of equality to issue marriage licenses to same-sex couples, even over the objections of governors and other state officials. Drawing from these disputes, Norman Williams has argued that a state executive branch, along with the state legislature, have independent abilities to determine the constitutionality of their actions in enforcing and enacting statutes.[56]

Other branches of state government can and will play the same role as courts in interpreting state constitutions, but their roles—just as much as the courts—may depend on recognizing a presumption of constitutional interpretive power. "Extra-judicial" interpretation of state constitutions can play many roles, including enhancing competition among different visions of constitutional text and furthering political accountability for constitutional interpretations. It thus seems important that a theory of state constitutional interpretation focus not only on the presumptive power of courts but also on the powers of the legislative and executive branches. Walter Dodd, for example, viewed the function of state constitutions as limiting legislative power, and the main presumption for him would have been to authorize the legislature to act absent limiting evidence to the contrary.[57] Indeed, to the extent federalism matters in interpreting state constitutions, state legislatures and executives already face strong political reasons to oppose the exercise of illegitimate federal power. The powers of these other branches may depend on judicial interpretation of a state constitution, insofar as courts will need to resolve

56. *See* Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same Sex-Marriage*, 154 U. PA. L. REV. 565 (2006).

57. Dodd, *supra* note 1.

disputes between branches. However, it is not clear why courts should be afforded any special status in interpreting state constitutions, particularly where other branches may more readily lend political legitimacy with their interpretation.[58]

In chapter four, Gardner discusses how it is important for states to engage in self-restraint in resisting national authority to protect individual liberty.[59] He further suggests in chapter six that courts have superior comparative institutional competence to state legislatures or executives in resisting national authority.[60] However, at the same time he acknowledges that "the state executive and legislative branches are likely to exercise this power (of resistance to national authority) anyway, regardless of whether courts do so."[61] Gardner seems to clearly favor direct efforts to protect liberty over indirect measures, but it would be interesting to know whether evidence supports this. In fact, it could well be the case that the exercise of broad judicial discretion to protect liberty varies, depending on the political composition of state courts. If so, this could have a negative impact on the independence of state courts, many of which are already considered highly political. Gardner responds to this concern in his last chapter, but it is undeniable that his view emboldens state courts to protect liberty and this alone could create considerable political backlash against state courts, leading the people of a state to limit their power in ways that undermine, rather than further, the function of state constitutions.

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58. The argument for extra-judicial interpretation of constitutions seems stronger at the state level than at the federal level, to the extent that state constitutions are more readily and frequently amended through referenda or by scheduled constitutional conventions. One rationale for regular amendment of state constitutions is to create a sort of jurisdictional competition with the state legislature. For instance, if the legislature fails to recognize the importance of a topic, such as the protection of the environment, referenda allows law reformers to go directly to the people with their concerns. To the extent state constitutions are loaded with law reforms adopted for this reason, it would be odd to afford these law reforms the same constitutional status as the bill of rights under the federal constitution.

59. GARDNER, *supra* note 8, at 132-36.

60. *Id.* at 180-227.

61. *Id.* at 242.

Further, to the extent indirect constitutional measures—through interpreting the power of other branches, such as the legislature or executive, to resist national authority—may suffice to protect federalism values, it is not clear how courts serving as agents of resistance by the direct expansion of liberties will always further the goals of federalism and, at some level, a resistance attitude in state courts could thwart it. Courts have some comparative institutional advantage over legislatures and executives in dealing with conflicts between national and state authorities, particularly to the extent that they are less likely to be deceived by political expediency. However, if courts have the independent—but not unique—authority to resist, Gardner's approach simultaneously authorizes all three branches of state government to resist national power. By reinforcing an attitude of resistance towards national authority within state government, such an approach could pose a significant obstacle to any exercise of federal authority that touches on state matters. Diluting checks and balances that exist within a state's democratic process, and unifying the branches of state government, Gardner's approach will have strengthened the power of the state vis-à-vis national authorities, but this does not necessarily promote the goals of federalism.

One way of responding to this concern might be to see courts not primarily as independent agents of resistance to federal power but equally adept at serving as facilitators of legitimate exercises of national power. On such a view, state courts interpreting state constitutions would not only have the presumptive power to interpret state constitutions to resist national authority—as Gardner urges—but would also possess the presumptive authority to facilitate federal power. Roderick Hill, for example, has argued in favor of "dissecting the state"—that courts should presumptively possess the power to authorize executive actors to regulate on behalf of national goals.[62] I have argued that this should justify a broad presumption by state courts authorizing state actors to act on behalf of clear federal goals, in contexts such as power plant transmission line siting and

62. Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999).

environmental regulation.[63] By contrast, as articulated, Gardner's version of federalism seems to limit courts to a resistance role. If he were to broaden the presumption of authority to include state courts facilitating as well as resisting national goals in interpreting state constitutions, this could allow state courts to strike more of a balance than authorizing state courts to interpret their constitutions exclusively for purposes of resistance. State courts should be able to respond to the full range of problems presented by federalism—including the problem of too much resistance by other state actors—while still having the ability to protect liberty.

Finally, in emboldening state courts to consider "all pertinent materials" in interpreting state constitutions (including, but not limited, to "unique state sources of law"),[64] it is unclear how far Gardner intends to go in licensing state courts to interpret constitutional meaning. It could send state courts in some troubling directions for federalism. At some level, an invitation for state courts to serve as agents of federalism in pursuit of liberty, as they define it, could have radical implications for state constitutional law. In an appendix to Gardner's book, he includes a sample application of his theory—a hypothetical state supreme court opinion which holds the death penalty unconstitutional under state constitutional language that is identical to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.[65] That hypothetical opinion embraces Justice Blackmun's dissent in *McCleskey v. Kemp*,[66] suggesting that federal court dissents and social science may be legitimate sources of meaning for state constitutional interpretation.[67] I think that Gardner is right in recognizing how state courts can part ways from federal courts in interpreting their own constitutional text, even

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63. *See* Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343 (2004).

64. GARDNER, *supra* note 8, at 256.

65. *Id.* at 277-83.

66. 481 U.S. 279, 345 (1987).

67. The dissent in *McCleskey* drew on a social science study, making a legislative finding of fact that there was systematic discrimination against blacks in the application of the death penalty. *See id.*

where that text is identical to the U.S. Constitution, but a strong judicial presumption might also allow highly controversial sources of meaning to enter into state courts' interpretive toolbox with few, if any, limits. It simultaneously may allow state courts to address a broader range of federal constitutional issues than federal courts.

For example, some have suggested that state legislatures or executives ought to feel free to engage in subnational integration of international treaties that have not been ratified by Congress.[68] It is clear that Gardner intends to authorize state courts to consider extra-jurisdictional concerns in interpreting state constitutions. One implication is to authorize state courts to look to other states, which holds some promise to encourage a more "trans-state" constitutional dialogue.[69] However, another implication of this is to authorize state courts to draw from international treaties that the national government has failed to ratify—effectively making these protections controlling within an individual jurisdiction's constitution even though the larger national system has explicitly failed to endorse them. Gardner does not advocate the adoption of international legal protections by state courts, but his interpretive account also does not place clear limits on the extra-jurisdictional sources on which state courts would draw for constitutional meaning, so this could be taken to be a logical extension of his presumption. At some level, this would authorize state courts to serve as a force of resistance to national complacency to embrace international norms or international law—certainly a new direction for state constitutionalism and one that could prove highly controversial to the extent that state courts are authorized to draw on broader sources of meaning that federal courts would recognize.

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68. *See* Lesley Wexler, *Take the Long Way Home: Sub-federal Integration of Unratified and Non-self-executing Treaty Law* (Nov. 28, 2005) (unpublished manuscript, on file with author) (arguing that federal preemption jurisprudence does not present a barrier to subnational endorsement of international treaties where Congress is silent or where the President has refused to sign treaty).

69. In this sense, Gardner's project echoes Dan Rodriguez's call for a "trans-state" constitutionalism, in which constitutional issues are not jurisdiction-specific but "raise similar stakes and have more or less similar shapes." Daniel B. Rodriguez, *State Constitutional Theory and its Prospects*, 28 N.M. L. REV. 271, 301 (1998).

Further, it is unclear whether Gardner is claiming that state courts should have broader implicit power to determine state constitutional meaning than federal courts have power to determine the meaning of the U.S. Constitution. To the extent that state standing requirements are more expansive (as they frequently are) or state political question doctrine is more narrow than in the federal courts (as it frequently is—many state courts can give advisory opinions), one potential impact of Gardner's presumption of judicial power is to invite state courts to engage constitutional questions that federal courts routinely avoid, especially where federal and state constitutions contain similar provisions. While challenges presented by open-ended legal sources and more state court adjudication of federal (as well as state) constitutional questions are not insurmountable, at the practical level, Gardner's interpretive account challenges scholars and judges to develop some limiting principles to distinguish the judicial task of constitutional interpretation at the state level from other kinds of political discourse.

CONCLUSION

None of these questions should detract from this book's significance as a major addition to the growing and increasingly important literature on state constitutions. Gardner solves the puzzle of state constitutions by placing the interpretive problems they present within constitutional federalism. This is an extremely important conceptual innovation, but his analysis also has practical implications for state courts. In favoring a strong presumption of state court jurisdiction to interpret the meaning of state constitutions, Gardner's account of state constitutionalism envisions a more active role than alternative accounts for state courts in interpreting state constitutions, especially in ways that resist national authority that encroaches on individual liberty. However, I suspect that definition of goals for overlapping constitutional systems (liberty or other goals?), who exercises interpretive discretion (courts, legislatures, or executives?), and what their role should be (resistors or facilitators?) will remain topics of considerable debate among constitutional theorists and, I think, judges, governors, and legislators.

Gardner's innovative and clearly argued book lays out a bold new path for scholars and state courts as they position subnational constitutions within the larger federalism project. He has given us the leading account to date of the interpretation of state constitutions. Any scholar or judge interested in state constitutions, state or local government, or federalism must take his framework and questions seriously.