Federalism Is Your Friend

Federalism allows state courts to disagree with their federal counterparts. Some say that this principle of state sovereignty is now more important than ever. We say that, as a design feature intended to protect individual liberty, federalism is *always* important. Today we consider this question: "What can a state high court do when it disagrees with federal precedent?" The answer is always the same: rely on the state constitution as may be appropriate.

Overview

The federalist design of this country's system for integrating fifty-one governments is based on the theory that dual sovereignty will better protect individual liberty by empowering both sovereigns to rule on questions concerning citizens' rights.[1] Dual sovereignty permits a citizen who feels oppressed by one sovereign to turn to the other for protection. Several important assumptions underlie this system.

First, both the state and federal governments must be supreme in their domains. Federalism relies on the U.S. Constitution's supremacy clause and the principle of independent state law grounds—not to resolve conflicts, but to prevent them. Rather than being contradictory, these principles serve to categorize issues and keep each government in its domain: Federal courts have the final word on federal law, and state courts are supreme on state law matters.[2]

Next, we live in a post-Fourteenth Amendment world, in which the federal Bill of Rights sets the floor for the federally guaranteed individual rights that apply to the states. This does not undercut federalism. Instead, it enhances federalism's liberty-protecting function by making it harder for one actor to reduce rights below a set mark. Again, dual sovereignty protects liberty by giving a citizen two possible protectors, and the option to use one to defend against the other. Thus, if a state revises its individual rights to provide less protection than the federal analogue, a citizen can rely on federal law. And if the federal law is revised to reduce its protection, a citizen can turn to state law (we will return to this point below).

Finally, debate between federal and state courts is a feature, not a bug. The states

are the laboratories of democracy.[3] Here that truism manifests itself in the way the state and federal courts interact to develop the law: They engage in an ongoing conversation, consistent with this country's common law tradition. No serious student of the law would fall victim to the gross canard that the nation's judicial system is a vertical hierarchy, with the U.S. Supreme Court at the apex dictating to state courts. Instead, the law advances through the back-and-forth interplay between the state and federal courts, in which reasonable minds can differ on the just resolution of weighty issues. If it is true that hard cases make bad law, it is equally true that the hardest issues are least likely to present an obvious best answer. So it should be no surprise that thorny questions result in divergent answers from state and federal courts. That is the path of the law. And that discussion only happens because state high courts have the power to diverge from the U.S. Supreme Court when interpreting constitutional provisions.

State High Courts Are the Final Arbiters of Their State Constitutions

The California Supreme Court is the ultimate authority on California's constitution. *Sands v. Morongo Unified Sch. Dist.* (1991) at 902–03. The U.S. Supreme Court has long recognized that it "is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Minnesota v. Nat'l Tea Co.* (1940) at 557. "[A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle* (1982) at 293.

There are good reasons for this rule. Most importantly, it is an incident of a state's sovereignty. State high courts grapple regularly with interpreting their state constitutions; the U.S. Supreme Court does not. And it is absurd to expect the U.S. Supreme Court to manage fifty-one bodies of law. Reserving custody over a state's constitution to its state high court is obvious given the states' police power and the policymaking duty of state high courts to develop the common law.

For a state high court to have the final word on interpreting its own constitution, federal courts cannot review those rulings. And that is the rule: The U.S. Supreme Court follows the long-standing principle that it "will not review judgments of state

courts that rest on adequate and independent state grounds." *Michigan v. Long* (1983) at 1041. To employ this doctrine, a state high court need only explicitly state that its decision relies on a state constitutional provision independent of federal law, which is adequate to support the judgment on its own. The U.S. Supreme Court then lacks jurisdiction to review the case.[4]

How Does Federalism Affect Individual Liberty in California Today?

Here we return to the point made above regarding a citizen's options when one sovereign curtails the individual rights it formerly guarded. Some recent media coverage has expressed concern about possible changes in federal law, and there has been speculation about California's options for protecting the degree of liberty its citizens currently enjoy. One fringe theory even posits that California might secede.[5]

Students of history will see a pattern repeating here. In the past 241 years, the status of each sovereign as the chief protector of individual liberty has cycled back and forth, as state and federal power has waxed and waned relative to each other. Indeed, the debate over protecting states' rights versus a nationalist federal power precedes the nation's founding. At first the states were ascendant, with a weak federal government under the Articles of Confederation. When that proved unworkable, a stronger federal government providing explicit protections for individual rights emerged as a compromise under the federal constitution of 1789. Yet the federal Bill of Rights originally did not apply to the states, which were then the principal guardians of individual liberty. During the Civil War (which in part was a battle over federalism) a group of states claimed that secession was justified by grievous federal overreach. Despite a victory for the federal government in that conflict, the states largely held the field on individual liberty for the next 100 years. To be sure, in that time some states were particularly poor guardians of personal rights, but that only illustrates the main point: the recourse in those situations was to turn to the other sovereign for aid, culminating in most of the Bill of Rights being applied to the states.[6]

What is a Californian to do today if facing a reduction of liberty by one government? Simple: rely on federalism and call on the other sovereign. This is only possible if the

respective state and federal high courts can disagree with each other. As discussed above, that is so. Now we move to the questions of how the California Supreme Court can disagree with its federal counterpart, and when it should.

State High Courts Have Several Options When Considering Unsatisfactory Federal Decisions

A state high court that disagrees with federal decisional law on a question about individual liberty has several options: follow it, rely on the doctrine of adequate and independent state law grounds, or ignore it.[7] We will focus on the second option.

The doctrine of adequate and independent state law grounds is essential to maintaining federalism. Without it, the sovereignty of the states would inevitably be destroyed:

> *[I]t would seem impossible to deny to the States the right of deciding on the infractions of their powers, and the proper remedy to be applied for their correction. The right of judging, in such cases, is an essential attribute of sovereignty, of which the States cannot be divested without losing their sovereignty itself, and being reduced to a subordinate corporate condition. In fact, to divide power, and to give to one of the parties the exclusive right of judging of the portion allotted to each, is, in reality, not to divide it at all; and to reserve such exclusive right to the General Government (it matters not by what department to be exercised), is to convert it, in fact, into a great consolidated government, with unlimited powers, and to divest the States, in reality, of all their rights.[8]*

Indeed, these principles are well-accepted: the states retain sovereignty within their spheres; state high courts have exclusive authority to interpret their state constitutions; state high courts can base decisions about individual liberty on state constitutional protections; and the federal high court cannot review those decisions. The deeper question, of course, concerns when and why a state high court *should* rely on the doctrine of adequate and independent state law grounds.

The *Recorder* recently published some remarks by current Justice Goodwin Liu and former Justice Joseph Grodin as they debated that issue. Both jurists correctly noted

that California Supreme Court justices do not rely on state law strategically (meaning: for the express purpose of evading U.S. Supreme Court decisions). There is a practical reason for this: Unlike litigants (who are entitled to be strategic), courts are reactive and generally can only decide the cases brought before them.

The remainder of Justices Liu and Grodin's discussion focused on legitimate questions. The California constitution protects individual liberty independently of the federal Bill of Rights: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[9] So should a court rely on state or federal precedent to define individual liberties, and does that depend on which constitution is at issue? Are principles like equal protection fixed or evolving? Does the California Supreme Court, with its power to develop the common law, have a duty to think independently about the principles that underlie federal law?[10] If it does, that duty can justify taking a similarly worded state provision (even one with no identifiably distinct intent in its enactment) and departing from U.S. Supreme Court precedent on the same issue.[11] We question the premise that a state high court, when relying on *Long* to depart from the U.S. Supreme Court, is limited to cases in which a state constitutional provision has a distinct text or history. Good reasons can justify applying *Long* when a state court considers a state constitutional provision with *no* unique state history and text nearly identical to its federal constitutional counterpart.[12] Not least among those good reasons is that doing so will afford greater individual liberty.[13]

Yet the conversation between Justices Liu and Grodin shows that the debate over when and how a state court may rely on *Long* continues today. That implicates underlying questions about federalism—exceedingly difficult questions have vexed the wisest legal scholars for hundreds of years. Is it any wonder that current and former California Supreme Court justices continue to wrestle with them, and have reached well-reasoned but divergent conclusions?[14] At the very least, this debate contributes to the law's development when dissents signal to the U.S. Supreme Court the need to revisit its decisions.[15] Even majority opinions can signal to the high court that it needs to fix something.[16] This is the essence of our common law tradition: a conversation about the law's meaning.[17]

Whatever the correct answers on these issues may be, continued dialogue between

state high courts and the U.S. Supreme Court fosters federalism, which benefits individual liberty. And state high court justices participating in that conversation is the essence of the judicial function.

Conclusion

The essential nature of this republic is one from many, unity from division. "[T]he Constitution diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer* (1952) at 635. Reasoned debate over conflicting ideas is intended, and essential. For state high courts, this means that they may disagree with their federal counterparts. And for justices of those state courts, it means confronting the hard choice of whether in a given case it is proper to do so. To any California Supreme Court justice who disagrees with federal precedent: Federalism and the California constitution are your friends.

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[1] The Federalist No. 51 (James Madison):

> *In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.*

[2] Also relevant here is the Tenth Amendment making explicit what should already be clear given the limited nature of the federal government: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *See, e.g.*, Puerto Rico v. Sanchez Valle (2016) 136 S. Ct. 1863, 1871 (separate sovereign principle of double jeopardy doctrine relies on the states' "authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment," which is an "inherent sovereignty" unconnected to and pre-existing the federal government).

[3] *See New State Ice Co. v. Liebmann* (1932) at 311 (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may,

if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

[4] *Eustis v. Bolles* (1893) at 366 (discussing the "settled law" that the U.S. Supreme Court has jurisdiction only where a federal question is "necessary" to determine the case).

[5] Even the *New York Times* (not generally considered a Confederate sympathizer) called these rumblings "a slow-motion secession." Adam Nagourney, *California Strikes a Bold Pose as the Vanguard of Resistance*, N.Y. Times (Jan. 19, 2017). On the feasibility of California seceding, see http://scocablog.com/calexit-good-luck-with-that/.

[6] But the cycle did not end there. Many would cite the Warren Court as the apex of the development of civil rights under the U.S. Constitution, from which the federal courts have subsequently retreated. This narrative is true only if we limit ourselves to *federal* civil rights litigation. For instance, after *Bowers v. Hardwick* (1986), LGBTQ-rights litigators were left with little recourse but to pursue claims in state courts and to seek state constitutional protection. *See* William B. Rubenstein, *The Myth of Superiority*, 16 Const. Commentary at 607 (1999); *see generally id.* (responding to claims of a systematic preference of federal courts for civil rights litigation in Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977)). Rubenstein references a Kentucky Supreme Court decision that we find illustrative of the power of federalism to safeguard liberty:

> *To be treated equally by the law is a broader constitutional value than due process of law as discussed in the Bowers case. We recognize it as such under the Kentucky Constitution, without regard to whether the United States Supreme Court continues to do so in federal constitutional jurisprudence. "Equal Justice Under Law" inscribed above the entrance to the United States Supreme Court, expresses the unique goal to which all humanity aspires. In Kentucky it is more than a mere aspiration. It is part of the "inherent and inalienable" rights protected by our Kentucky Constitution.*

Commonwealth v. Wasson (1992) at 501 (holding unconstitutional a statute that

penalized same-sex sexual activity on state constitutional grounds).

[7] An article by Dorothy Beasley describes it thus:

> *Because state provisions may resemble those in the federal Constitution, there may be some assumption that they should be similarly construed, that state courts should follow the Supreme Court's interpretation. This, however, conflicts with the notion that state courts are the authoritative interpreters of their state constitutions. A state may see its constitution's protection of rights as overlapping; or identical to; or independent, separate, and distinct from; or greater than; or lesser than the protections enshrined in the federal Constitution. Of course, if the state's protection is lesser, the state court must still enforce the greater federal protection.*

Dorothy T. Beasley, *Federalism and the Protection of Individual Rights: The American State Constitutional Perspective*, *in* Federalism and Rights 104–05 (Ellis Katz & G. Alan Tarr eds., 1995).

[8] John C. Calhoun, *South Carolina Exposition and Protest* (1828). We acknowledge that Calhoun made this point for a different purpose, and we disavow any Confederate sympathy.

[9] Cal. Const. art. I, § 24.

[10] *City of Milwaukee v. Illinois & Michigan* (1981) at 312 ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision").

[11] See People v. Teresinski (1982) at 835-36 in which the court "reaffirm[ed] the now settled principle that the California courts, in interpreting the Constitution of this state, are not bound by federal precedent construing the parallel federal text; . . . state courts, in interpreting constitutional guarantees contained in state constitutions, are independently responsible for safeguarding the rights of their citizens." (citations and quotations omitted).

[12] Since at least 1938, the California Supreme Court has followed a self-imposed

rule that "cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution." Raven v. Deukmejian (1990) at 353. Yet it has not hesitated, when it finds "cogent reasons," "independent state interests," or "strong countervailing circumstances," to construe similar state constitutional language differently from the federal approach. *Id.* at 353–54 (collecting cases); see also *People v. Teresinski* (1982) at 836 (discussing factors used to decide whether cogent reasons existed in that case).

[13] See, e.g, People v. Batts (2003) at 692, holding that cogent reasons existed for construing the double jeopardy clause of the California constitution differently from its federal counterpart, because a broader test is required in order to more fully protect double jeopardy interests guaranteed under the state constitution, while a narrower test inadequately protects the double jeopardy interests set out in California constitution article I, section 15.

[14] *See, e.g., Katzberg v. Regents of Univ. of Cal.* (2002) at 331–32 (Brown, J., dissenting) (arguing that the court in that case "betray[ed] our obligation as final arbiter of state constitutional law" when it applied an analytical framework based not on California's own jurisprudence but a derivation of U.S. Supreme Court decisions, calling this a "lapse of analytical independence—and apparent 'assumption that any Supreme Court doctrine is generic constitutional law'").

[15] Two examples of this. First, in *Lawrence v. State* (2001), at 377 n.12, 378, Justice Anderson's dissent reasoned that the U.S. Supreme Court had in effect already overruled its opinion in *Bowers v. Hardwick* through the rational basis review the court employed more recently in *Romer v. Evans*. In *Lawrence v. Texas* (2003), at 574–76, 578, the U.S. Supreme Court reversed the state court majority opinion, rejected an option to rely solely on *Romer* to justify declaring the Texas statute unconstitutional, observed that *Bowers* had "sustained serious erosion" in part from *Romer*, and overruled *Bowers*. Second, a dissent in *State v. Clark* (2013), at 360 observed that the U.S. Supreme Court had yet to address an open question under the confrontation clause. ("[T]he United States Supreme Court has yet to decide under what circumstances statements are testimonial when they are made to someone other than law-enforcement personnel"). In reversing the Supreme Court

of Ohio, the U.S. Supreme Court agreed that they had not yet addressed this open question under their precedent. *See Ohio v. Clark* (2015) at 2181 ("We are therefore presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause").

[16] *See, e.g., Seminole Tribe of Fla. v. State of Fla.* (1994) at 1027 ("Some courts have noted not only that there are weaknesses in the *Union Gas* Court's holding, but also that changes in the composition of the Court make it likely that a majority of the present Court would disagree with *Union Gas* and find that Congress was *not* empowered to abrogate the states' immunity"). The U.S. Supreme Court did eventually fix the problem, overruling *Union Gas. Seminole Tribe of Fla. v. Fla.* (1996) at 66. A state high court has perhaps an even stronger ability to signal to the U.S. Supreme Court. *See Michigan v. Long* (1983) at 1054 (reversing in part because the state court felt compelled by what it understood to be federal constitutional considerations to construe its own law in the manner it did). A majority may explicitly signal that it is compelled to follow a U.S. Supreme Court case, voice its disagreement with that case's rationale, and the U.S. Supreme Court may grant certiorari without the obstacle of adequate and independent state grounds.

[17] *See* Beasley, *supra* note 7, at 110. Beasley writes:

> *A system of dual constitutions allows a "wider wisdom" to be brought to bear on the development of individual rights. With respect to construing the United States Constitution, the U. S. Supreme Court can call upon not only the written views of state courts as to its meaning but also as to the meaning of similar provisions in their respective state constitutions. In a two-way vertical dialogue, the state supreme courts can likewise learn from the written views of the U. S. Supreme Court on the federal Constitution, when considering their own constitutions, although they are not bound to. The "wider wisdom" is enhanced by the fifty-by-fifty-way dialogue horizontally as well. States can look to other states for persuasive reasoning when construing their own constitutions.*