

Reconsidering *Murdock*: State-Law Reversals as Constitutional Avoidance

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*In 1874, the Supreme Court held in *Murdock v City of Memphis* that it lacked “jurisdiction” to review a state supreme court’s interpretation of state law, even in cases that present federal-law claims. The justices have since backed away from that seemingly ironclad rule; they now review and set aside state-court interpretations of state law that lack “fair and substantial” or “adequate” support in certain cases where the justices wish to enforce federal rights against the states. Yet the justices continue to labor under the *Murdock*-inspired notion that they are powerless even to consider reversing a state supreme court’s ruling solely on state-law grounds, as a means to avoid ruling on the federal-law claims presented in a case. This Article challenges the Court’s categorical unwillingness to consider such state-law reversals. First, there are no statutes or constitutional provisions that foreclose the Supreme Court from reversing a state supreme court’s judgment solely on state-law grounds, so long as the case presents a colorable federal-law claim sufficient to satisfy Article III and 28 USC § 1257. Second, the Supreme Court’s refusal to consider such state-law reversals is in tension with its oft-stated desire to avoid resolving federal constitutional issues unless absolutely necessary. When state supreme courts issue controversial interpretations of state law that simultaneously give rise to difficult constitutional questions, the *Murdock* regime forces the justices into a binary choice: allow such state-court judgments to stand, or reverse on federal constitutional grounds. When the justices are unwilling to affirm the state supreme court’s ruling, this false dichotomy causes them to issue unnecessary and often contentious pronouncements of federal constitutional law. These *Murdock*-induced constitutional pronouncements are often costly substitutes for state-law reversals. They produce nationalized, constitutionally entrenched holdings; this significantly increases the error costs of the Court’s ruling if the justices’ views turn out to be mistaken. In addition, the novel constitutional holdings that the Court has created in its efforts to counter what it perceives as pernicious state-court rulings threaten to impose large decision costs on future courts by complicating federal constitutional doctrines. The Supreme Court could mitigate or avoid these harms by recognizing an option to reverse certain state supreme court rulings on minimalist, state-law grounds; this will alleviate the hydraulic pressure that the *Murdock* regime imposes on federal constitutional doctrine.*

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INTRODUCTION

State supreme courts occasionally issue questionable interpretations of their states' statutes, constitutional provisions, or other laws. Sometimes this reflects home-town favoritism or bias against out-of-state parties.¹ On other occasions, state-court judges use their interpretive power over state law to combat political movements that they oppose. During the 1950s and 1960s, for example, state supreme courts in the South twisted state laws to thwart the nascent civil-rights movement.² More recent state supreme court rulings have generated controversy by forcing the Boy Scouts to accept homosexuals as Scoutmasters or sustaining large punitive-damages awards against foreign corporations. Yet everyone agrees that Supreme Court justices are powerless to reverse these decisions solely on state-law grounds, no matter how erroneous or misguided they think the state court's reasoning is. Instead, the Supreme Court may reverse a state supreme court only when it wishes to enforce some provision of federal law. This principle has become a pillar of judicial federalism, regularly assumed in court opinions and commentary with little analysis or justification.³

This Article challenges the longstanding notion that the Supreme Court should never reverse a state supreme court's judgment solely on

¹ See, for example, *World-Wide Volkswagen Corp v Woodson*, 585 P2d 351, 354 (Okla 1978) (adopting an expansive interpretation of Oklahoma's long-arm statute to reach an out-of-state automobile distributor and retail dealer).

² See, for example, *Ex parte NAACP*, 91 S2d 214 (Ala 1956); *City of Columbia v Bouie*, 124 SE2d 332 (SC 1962).

³ See, for example, *Herb v Pitcairn*, 324 US 117, 125–26 (1945) (describing the reasons for the Supreme Court's refusal to review state-court determinations of state law as "so obvious that it has rarely been thought to warrant statement. It is 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."); William J. Brennan, Jr, *State Constitutions and the Protections of Individual Rights*, 90 Harv L Rev 489, 501 (1977) (asserting that state-court interpretations of state constitutional provisions "not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions."); Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U Pa J Const L 399, 406 (2008) (noting that "Federal Courts scholarship . . . tends to view [the notion that] state courts are the final word on state law as fundamentally constitutive of our constitutional order").

Some recent scholarship has suggested that the Supreme Court's power to review a state supreme court's interpretation of state law may be more extensive than the conventional wisdom allows. See, for example, Henry Paul Monaghan, *Supreme Court Review of State Court Determinations of State Law in Constitutional Cases*, 103 Colum L Rev 1919 (2003) (arguing that the Supreme Court has "ancillary jurisdiction" to review de novo state-court determinations of state law in cases where the Constitution or federal law "directly constrains or incorporates state law"); John Harrison, *Federal Appellate Jurisdiction over Questions of State Law in State Courts*, 7 Green Bag 2d 353 (2004) (arguing that Article III of the Constitution permits the Supreme Court to review state-law questions decided by state courts).

state-law grounds. It contends that there exists a narrow category of cases in which the justices can and should consider state-law reversals as an alternative to rulings that would otherwise rest on novel and contentious federal constitutional pronouncements.

If this claim seems dramatic, it is only because the intuition that state supreme courts are final and absolute expositors of state law has attained an almost natural-law status in our way of thinking. Yet there are no statutes or constitutional provisions that block the Supreme Court from reversing a state supreme court's judgment solely on state-law grounds, so long as the case presents a federal claim sufficient to satisfy Article III and 28 USC § 1257. The Supreme Court's reluctance to consider such state-law reversals is a self-imposed constraint that stems from its 1874 decision in *Murdock v City of Memphis*,⁴ which held that the justices lacked "jurisdiction" to review a state supreme court's interpretation of state law, even in cases that present federal claims. The Supreme Court has since backed away from this seemingly absolute rule; it now reviews and sets aside state-court interpretations of state law that lack "fair and substantial" or "adequate" support in cases where the justices wish to enforce federal rights against the states.⁵ Yet vestiges of *Murdock* remain; the justices will not even consider reversing a state supreme court *solely* on state-law grounds, as a means to *avoid ruling on* the federal claims presented in a case.

The Supreme Court's unwillingness to consider such state-law reversals is in tension with the Court's oft-stated desire to avoid resolving federal constitutional issues unless absolutely necessary.⁶ When state supreme courts issue controversial interpretations of state law that simultaneously give rise to difficult constitutional questions, the *Murdock* regime forces the justices into a binary choice: allow such state-court judgments to stand, or reverse on federal constitutional grounds. When the justices are unwilling to affirm the state supreme court's ruling, this false dichotomy causes them to issue unnecessary and often contentious pronouncements of federal constitutional law to justify their decision to reverse the state court's judgment. Consider the following examples:

- The New Jersey Supreme Court holds that the Boy Scouts qualifies as a "place of public accommodation" under the state's antidiscrimination statutes and bars the Scouts from excluding

⁴ 87 US (20 Wall) 590 (1874).

⁵ See, for example, *Howlett v Rose*, 496 US 356, 366 (1990) (collecting authorities); Charles Alan Wright and Mary Kay Kane, *The Law of Federal Courts* 793–98 (West 6th ed 2002) (same).

⁶ See, for example, *Northwest Austin Municipal Utility District Number One v Holder*, 129 S Ct 2504, 2508 (2009); *INS v St. Cyr*, 533 US 289, 299–300 & n 12 (2001) (collecting authorities); *Ashwander v Tennessee Valley Authority*, 297 US 288, 341–56 (1936) (Brandeis concurring).

homosexuals as Scoutmasters. The Supreme Court of the United States, deeming itself powerless to reverse this holding solely on state-law grounds, must choose between allowing the state-court ruling to stand and reversing on federal constitutional grounds. Unwilling to affirm the state-court ruling, the justices hold in a 5-4 decision that the First Amendment protects the Boy Scouts' right to discriminate against homosexuals.

- The Alabama Supreme Court sustains a \$2 million punitive-damages award against BMW in a case where compensatory damages were only \$4,000. The Supreme Court of the United States deems itself powerless to review whether this decision comports with Alabama law, which limits punitive damages to an "amount that will accomplish society's goals of punishment and deterrence."⁷ Unwilling to allow this state-court decision to stand, the justices hold in a 5-4 ruling that the Fourteenth Amendment's Due Process Clause imposes substantive limitations on the size of punitive-damage awards.

These (and other) *Murdock*-induced constitutional pronouncements are often costly substitutes for rulings that would reverse a state court solely on state-law grounds. They produce nationalized, entrenched holdings that the political branches are powerless to change except by constitutional amendment or new Supreme Court appointments; this significantly increases the error costs of the Court's ruling if the justices' views turn out to be mistaken. A state-law reversal, by contrast, would affect only one state and preserve space for democratic institutions to enact different policies in the near or distant future. In addition, the novel constitutional holdings that the Court has created in its efforts to counter what it perceives as pernicious state-court rulings threaten to impose large decision costs on future courts by complicating federal constitutional doctrines. The Supreme Court could mitigate or avoid these harms by recognizing an option to reverse certain state supreme court rulings on minimalist, state-law grounds; it need not trundle out the heavy artillery of federal constitutional law whenever it decides to reverse an unacceptable state-court decision.

The justices' categorical refusal to reverse state-court rulings solely on state-law grounds stands in contrast to the Supreme Court's already-established prerogative to reject state supreme court interpretations of state law in cases where the justices wish to *enforce* federal rights against the states. When a state supreme court rejects a federal-law claim by concluding that a litigant failed to comply with state

⁷ *Green Oil Co v Hornsby*, 539 S2d 218, 222 (Ala 1989).

procedural rules, the justices will review those state-law grounds and set aside the state supreme court's interpretation of state law if it lacks "fair and substantial" or "adequate" support.⁸ And it is well established that the Supreme Court may review and reverse a state supreme court's determination of whether a "contract" was formed under state law when litigants assert rights under the Contracts Clause.⁹ These longstanding practices represent a substantial retreat from *Murdock's* holding that the Supreme Court lacks "jurisdiction" to review a state supreme court's interpretation of state law, and the justices should bury that jurisdictional fiction and acknowledge their power to review a state supreme court's interpretation of state law in any case that presents a colorable federal-law claim. Rather than using *Murdock's* jurisdictional pretense to exclude state-law issues from their docket, the justices should use the writ of certiorari to limit their involvement in state law to the rare cases in which state-law reversals can advance important systemic goals. Such cases include, but are not necessarily limited to, the established precedents that reject a state supreme court's interpretation of state law in order to ensure the efficacy of federal rights litigated in state-court proceedings.

This Article proposes one additional category of cases in which the Supreme Court should review a state supreme court's interpretation of state law as a means to advance important systemic goals. These are the cases in which a state-law reversal would provide an alternative to a ruling that would otherwise rest on a novel and contentious federal constitutional pronouncement. This expanded prerogative to review and reverse state supreme court interpretations of state law is designed to mitigate the *Murdock* regime's feedback effects on federal constitutional doctrine, and enable the justices to use state-law dispositions to economize on the decision costs and error costs associated with Supreme Court rulings.

This is a second-best proposal designed for the judicial institutions and personnel that we actually have. In a perfect world, the Supreme Court would always adopt the best possible interpretation of the Constitution, and under the *Murdock* regime the justices would never reverse a state supreme court ruling except on incontrovertible federal constitutional grounds. In a slightly less ideal world, the justices might adopt decisionmaking strategies such as James Bradley Thayer's "rule of clear mistake,"¹⁰ which instructs them to hold their

⁸ See notes 81–83 and accompanying text.

⁹ See note 84 and accompanying text.

¹⁰ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129 (1893). See also Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* 230–90 (Harvard 2006) (defending Thayerian deference).

noses and deny certiorari in cases where state supreme courts issue controversial interpretations of state law that do not clearly violate the US Constitution. But in reality, the justices will always have the power to reverse state supreme court rulings that they believe to be lawless, and pleas for consistent Thayerian deference have gone unheeded by every justice on the modern Supreme Court.¹¹ What is more, federal constitutional provisions and doctrines are sufficiently pliable to enable litigants to establish a colorable constitutional case for reversing many of the state supreme courts' controversial rulings; this has led the Supreme Court to issue a number of contentious and sharply divided federal constitutional pronouncements in cases where a state-law reversal would have been much easier to defend. One can always hope that persuasion or new appointments will someday produce a Supreme Court that never intervenes to reverse controversial state-court rulings except in cases of clear and palpable federal constitutional error. But this Article's proposal proceeds on the assumption that the justices will remain able and willing to reverse state-court rulings that they regard as questionable or mistaken, and offers a means to mitigate the potential harms that can arise from such Supreme Court interventions.¹²

The Article proceeds in four parts. Part I clears away some underbrush by demonstrating that the Constitution and Congress's jurisdictional statutes permit the Supreme Court to review and reverse a state supreme court's interpretation of state law in any case presenting a federal claim. *Murdock's* conclusion to the contrary lacked any support in constitutional or statutory text, structure, or history. It rested instead on docket-control concerns; at the time, the justices lacked discretionary certiorari jurisdiction, and they did not want to empower litigants to force the Court to resolve state-law issues in cases presenting weak or contrived federal-law claims. Now that the justices can avoid this problem by simply denying certiorari in such cases, they should abandon *Murdock's* "jurisdictional" fiction and use discretionary certiorari denials as the exclusive means for limiting their involvement in state-law issues. Part I also shows that the justices have already exercised their constitutional and statutory prerogative to

¹¹ See Cass R. Sunstein, *A Constitution of Many Minds* 118 (Princeton 2009) (noting that Thayerianism "has no supporters on the Supreme Court").

¹² Nothing in this proposal assumes or implies that the justices are result-oriented when they decide cases. It accepts that their decisions to reverse state-court rulings rest on sincere (even if mistaken) beliefs that allowing such rulings to stand will more likely than not violate a federal constitutional guarantee. But this proposal gives them a means to avoid *both* the outcome that they believe to be a constitutional violation as well as the need to entrench a federal constitutional pronouncement that they should know will be highly controversial and at least possibly mistaken.

review and reverse a state supreme court's state-law pronouncements in cases such as *NAACP v Patterson*¹³ and the Contracts Clause cases, and that Supreme Court appellate review of such state-law issues is reconcilable with the *Erie* doctrine.

Part II considers whether the Supreme Court *should* expand its willingness to consider state-law reversals beyond the above-mentioned cases. It shows how the justices' reluctance to reverse state supreme court rulings solely on state-law grounds has led the Supreme Court to issue questionable pronouncements of federal constitutional law in cases that it could have easily resolved on state-law grounds. In such cases, the justices should consider state-law reversals as alternative dispositions that avoid the potential error costs of these *Murdock*-induced constitutional pronouncements, as well as the decision costs that novel constitutional doctrines can impose on future courts and litigants. This is not to say that the justices should always opt for a state-law reversal over a federal constitutional one. In some cases the risk of error from issuing a federal constitutional pronouncement is low, and a constitutional resolution can sometimes bring clarity and thereby reduce decision costs in future litigation.¹⁴ And in other cases the state supreme court will have specialized expertise in the relevant state-law issues, and the justices should be reluctant to second-guess its interpretation. But in many cases a state-law reversal would have been far more defensible than the Court's decision to issue a disputed federal constitutional pronouncement that entrenches a controversial policy and promises to increase significantly decision costs by complicating judicial judgments in future cases.

Part III addresses whether anything could motivate the justices to opt for reversals that rest solely on state law in cases where they already have five votes to reverse on federal constitutional grounds. It contends that three mechanisms could induce a justice to prefer state-law reversals in such cases. First is the veil of uncertainty behind which the Court announces its federal constitutional pronouncements. A court majority cannot predict or control how future courts might use or build upon its constitutional holding; this uncertainty might make a reversal that rests solely on state-law grounds seem more appealing.

¹³ 357 US 449 (1958).

¹⁴ See, for example, Eric A. Posner and Adrian Vermeule, *Constitutional Showdowns*, 156 U Pa L Rev 991, 993 (2008) (noting that institutions should practice the "active virtues" in situations "where the social benefits of clarifying the constitutional allocation of authority for future generations are large, and the countervailing costs of constitutional conflict and erroneous or premature resolution of issues are low").

The second mechanism is the “civilizing force of hypocrisy”:¹⁵ in some cases, a reversal resting solely on state-law grounds will be easier to reconcile with a justice’s previously stated interpretive commitments than a reversal that issues a federal constitutional holding. Third, a justice may believe that a state supreme court decision is wrong and wish to reverse it, yet want to avoid entrenching his ruling as federal constitutional law if he harbors any doubt about the correctness of his views. These mechanisms can induce a justice to vote for a state-law reversal even in cases where his colleagues prefer to resolve the federal constitutional issues. In many cases, a single justice’s decision to reverse solely on state-law grounds can deprive a federal constitutional holding of the fifth vote necessary to make it law, thereby avoiding the potentially problematic constitutional pronouncement. Part IV responds to objections to this proposal. A brief conclusion follows.

I.

A. Text and Structure

Article III gives the Supreme Court appellate jurisdiction “both as to Law and Fact” in every “case” or “controversy” described in Article III, § 2 (other than cases within the Supreme Court’s original jurisdiction), subject only to “exceptions” and “regulations” that Congress makes. 28 USC § 1257(a), in turn, defines the Supreme Court’s appellate jurisdiction over the state supreme courts:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

These provisions empower the Supreme Court to review an entire state-court “judgment or decree” whenever a litigant presents a federal-law claim. Nothing in Article III or in 28 USC § 1257(a) precludes the justices from reviewing or reversing a state supreme court’s factfinding or its interpretations of state law, so long as the judgment satisfies

¹⁵ See Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U Pa J Const L 345, 413 (2000).

§ 1257(a)'s finality and federal-claim requirements and constitutes a single constitutional "case" under Article III.¹⁶ The federal-law claim is what gives the Supreme Court jurisdiction over the "judgment or decree," but it does not foreclose the justices from reversing the state court's judgment solely on non-federal-law grounds.

Some have suggested that principles of state autonomy establish an implicit constitutional prohibition on Supreme Court decisions that second-guess or reverse a state supreme court's interpretation of state law.¹⁷ But Article III gives the Supreme Court appellate jurisdiction over *all* questions of "Law and Fact," without excluding state-law issues from the Court's purview. And the Madisonian compromise, which allows Congress to decide whether to ordain and establish inferior federal courts,¹⁸ is hard to square with a constitutional prohibition on Supreme Court rulings that reverse a state supreme court's interpretation of state law. For if Congress had exercised its constitutional prerogative not to establish inferior federal courts, the Supreme Court's appellate jurisdiction would extend only to state-court decisions, and without the power to reverse a state supreme court's interpretation of state law, the Court's appellate jurisdiction over diversity controversies would have been largely pointless.¹⁹ Any suggestion that the Constitution confers upon state supreme courts a prerogative to misconstrue their own states' laws without redress in the "cases" and "controversies" within the Supreme Court's appellate jurisdiction is untenable; the Constitution established the federal courts in part to protect litigants from biased state-court judging,²⁰ and the Tenth

¹⁶ State-law and federal-law claims will constitute a single "case" under Article III whenever they derive from a "common nucleus of operative fact." See *United Mine Workers v Gibbs*, 383 US 715, 725 (1966).

¹⁷ See, for example, Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 Cal L Rev 1775, 1799–1800 (2007) (suggesting that Supreme Court review of a state supreme court's state-law pronouncements could offend the state court's "dignity" and thus present constitutional problems).

¹⁸ See US Const Art III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.") (emphasis added).

¹⁹ See Kermit Roosevelt, III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 Colum L Rev 1888, 1895 (2003). See also Harrison, 7 Green Bag 2d at 354 (cited in note 3) (noting that the Supreme Court's appellate jurisdiction over diversity cases under Article III creates an "unavoidable implication" that the Court has "appellate jurisdiction to correct errors in the application of state law by state courts," subject only to the Exceptions Clause). In a pre-*Erie* world, the Supreme Court might have applied general common law rather than state law when reviewing diversity cases decided by state supreme courts, but even that would extend only to a subset of such cases and would be unavailable in diversity cases governed by state statutes or local property law. See *Swift v Tyson*, 41 US (16 Pet) 1, 18–19 (1842).

²⁰ See, for example, Federalist 80 (Hamilton), in *The Federalist* 534, 538 (Wesleyan 1961) (Jacob E. Cooke, ed). See also Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U Pa

Amendment protects the state courts' autonomy only in cases and controversies that fall outside those enumerated in Article III, § 2.

Canons of construction that bend statutory language to advance general principles of state autonomy²¹ or avoid colorable (but unconvincing) constitutional objections²² are relevant when statutes are reasonably susceptible of such interpretations. Yet nothing in 28 USC § 1257's language can plausibly be construed as precluding the Supreme Court from reviewing or reversing a state supreme court's interpretation of state law. The requirement that the state-court judgment or decree present at least one federal-law claim does not purport to limit the Supreme Court's appellate jurisdiction to those issues. The Court's jurisdiction extends to the "judgment or decree"; the federal-law claim is a mere gateway through which the justices review the entire state-court judgment. And Article III forecloses interpreters from applying an "unmistakably clear" statement requirement that precludes the Supreme Court from reviewing a state supreme court's interpretation of state law absent specific statutory authorization from Congress.²³ The Constitution itself vests the Supreme Court with appellate jurisdiction "both as to Law and Fact" over the cases described in Article III, § 2, and places the onus on Congress to establish "exceptions" to that jurisdiction.²⁴ An interpretive rule presuming that state-law issues fall outside the Supreme Court's appellate jurisdiction absent clear and explicit congressional authorization would contradict

L Rev 1231, 1267–70 (1985) (collecting statements from various Framers claiming that the federal courts would "eliminate the various forms of bias that typified state tribunals").

²¹ See, for example, *City of Columbus v Ours Garage and Wrecker Service, Inc.*, 536 US 424 (2002) (construing a statute to avoid preempting "the traditional prerogative of the States to delegate their authority to their constituent parts").

²² See, for example, *Carey v South Dakota*, 250 US 118, 122 (1919) ("Where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other of which its constitutionality would be doubtful, the former construction should be adopted.").

²³ The Supreme Court has deployed such clear-statement requirements to advance values of state autonomy in *Gregory v Ashcroft*, 501 US 452, 464 (1991), and *Atascadero State Hospital v Scanlon*, 473 US 234, 242 (1985).

²⁴ The Supreme Court has recognized that its appellate jurisdiction is self-executing and does not depend on congressional authorization. See, for example, *Ex parte McCordle*, 74 US (7 Wall) 506, 512–13 (1868) ("[T]he appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution."); *United States v Hudson & Goodwin*, 11 US (7 Cranch) 32, 33 (1812) ("[T]he Supreme Court[] possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it."); *Durousseau v United States*, 10 US (6 Cranch) 307, 313–14 (1810) ("Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. . . . The appellate powers of this court are not given by the judicial act. They are given by the constitution."). See also Harrison, 7 Green Bag 2d at 354 (cited in note 3) ("Under the most natural reading of Article III, its rule concerning the original and appellate jurisdiction of the Supreme Court is self-executing.").

the constitutional default rule that Article III establishes;²⁵ *all* issues of Law and Fact are within the Supreme Court's appellate jurisdiction until Congress negates that jurisdiction under the Exceptions Clause.

The Supreme Court's categorical unwillingness to reverse state-court judgments solely on state-law grounds comes not from any constitutional or statutory command, but from its own pronouncement in *Murdock v City of Memphis*,²⁶ which held that the justices lacked "jurisdiction" to review a state supreme court's interpretation of state law, even in cases presenting federal-law claims. Part I.B shows that this 1874 decision was unsupported by constitutional or statutory text, structure, or history, and that the advent of discretionary certiorari jurisdiction has eroded the policy rationales that the *Murdock* Court invoked for its ruling. All of this is to demonstrate that the Supreme Court *may* retreat from the status quo *Murdock* regime without contradicting any external legal constraints on its powers. Later parts will consider whether the justices *should* take such a step.

B. *Murdock* and Its Aftermath

Prior to 1867, Congress's jurisdictional statutes explicitly precluded the Supreme Court from reversing state supreme court rulings on state-law grounds. Section 25 of the 1789 Judiciary Act²⁷ had imposed this restriction—and many others—on the Court's appellate jurisdiction over the state supreme courts. For example, the justices could review state-court "judgments or decrees" only when the highest state court had rejected or denied some federal-law claim; they lacked jurisdiction over state-court decisions upholding or accepting federal-law claims.²⁸ What is more, the Supreme Court could review such decisions only on writs of error, which extend only to errors of law.²⁹ And a crucial proviso specified that

[n]o other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, *and immediately respects the before mentioned*

²⁵ See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv L Rev 2085, 2092–98 (2002) (discussing situations in which the Constitution establishes rules of interpretation).

²⁶ 87 US (20 Wall) 590 (1874).

²⁷ Judiciary Act of 1789, 1 Stat 73.

²⁸ 1 Stat at 85–86. See also Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 Nw U L Rev *12 (forthcoming 2010), online at <http://ssrn.com/abstract=1348593> (visited Apr 30, 2010) (noting how § 25 of the 1789 Judiciary Act allowed the state supreme courts to adopt expansive interpretations of federal constitutional rights "without fear of correction by the Supreme Court" and advocating a return to such a regime).

²⁹ See William Blackstone, 3 *Commentaries on the Laws of England* 405 (Chicago 1979) (stating that the writ of error "only lies upon matter of law arising upon the face of the proceedings").

*questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.*³⁰

This proviso established the state supreme court as the unreviewable expositor of state law and cemented its interpretive supremacy over state-law issues.³¹

In 1867, the Reconstruction Congress enacted a statute “to amend” the 1789 Judiciary Act.³² This 1867 Act reenacted § 25 of the 1789 Judiciary Act almost verbatim and preserved many of the original statute’s limits on the Supreme Court’s appellate jurisdiction over state-court judgments.³³ But it made two crucial changes to the original § 25. First, the new statute omitted the “no other error” proviso that limited reversible errors to those “immediately respect[ing]” the federal-law claim in the case. Second, the 1867 statute authorized the Supreme Court to proceed to a final decision and award execution in all cases; the original § 25 allowed this prerogative only in cases that “have been once remanded before.”³⁴

The legislative history of this 1867 Act is sparse and unilluminating,³⁵ but state resistance to § 25 explains the Reconstruction Congress’s decisions to remove the “no other error” proviso and authorize the Supreme Court to award execution in any case where it reviewed a state supreme court’s ruling. Legislators and judges in the antebellum

³⁰ Judiciary Act of 1789 § 25, 1 Stat at 86–87 (emphasis added).

³¹ Early Supreme Court decisions repeatedly acknowledged the interpretive supremacy that § 25 of the 1789 Judiciary Act had conferred upon the state supreme courts. See *Elmendorf v Taylor*, 23 US (10 Wheat) 152, 159 (1825) (“This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws.”); *United States v Morrison*, 29 US (4 Pet) 124, 137 (1830) (“This court, according to its uniform course, adopts that construction of the act which is made by the highest court of the state.”); *Webster v Cooper*, 55 US (14 How) 488, 504 (1852) (noting that the exposition of state law “belongs to the judicial department of the government of the State, and its decision is final . . . and this court receives such a settled construction as part of the fundamental law of the State”).

³² See Act of February 5, 1867, ch 28, 14 Stat 385. The Act was entitled: “An Act to Amend ‘An Act to Establish the Judicial Courts of the United States,’ Approved September Twenty-Fourth, Seventeen Hundred and Eighty-Nine.”

³³ The 1867 statute continued to exclude from the Supreme Court’s review all questions of fact, all cases failing to present a federal claim, and state-court decisions upholding (rather than rejecting) federal-law claims. See Act of February 5, 1867, ch 28, 14 Stat at 386–87.

³⁴ See Judiciary Act of 1789 § 25, 1 Stat at 86 (“[T]he Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.”). There are some other minor discrepancies between § 2 of the 1867 Act and § 25 of the 1789 Judiciary Act, but none of them has any significance for the Supreme Court’s power to review state-court interpretations of state law.

³⁵ See William M. Wiecek, *Murdock v. Memphis: Section 25 of the 1789 Judiciary Act and Judicial Federalism*, in Maeva Marcus, ed., *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789* 223, 229–34 (Oxford 1992) (discussing the legislative history of the 1867 Act).

South had long opposed the Supreme Court's appellate jurisdiction over the state courts and often tried to subvert it. The most salient episode involved the Virginia judiciary's reaction to *Fairfax's Devisee v Hunter's Lessee*,³⁶ a Supreme Court ruling in favor of a British subject who claimed that the Commonwealth of Virginia had unlawfully confiscated his land. Years earlier, while this litigation was pending in the state courts, Virginia's legislature enacted a 1796 "act of compromise," in which the Fairfax family renounced its claims to land that the state had sold to Hunter while the state relinquished its claims to other Fairfax lands. Virginia's highest court then rejected Fairfax's claims against Hunter; each seriatim opinion relied on the 1796 "act of compromise" in holding that Fairfax had released his interests in Hunter's land.³⁷ The Supreme Court, per Justice Story, reversed this judgment, holding that Fairfax had title to the disputed property and that the state court's ruling violated the Jay Treaty's provisions that protected the property rights of British subjects.³⁸

On remand, Virginia's highest court refused to comply with the Supreme Court's mandate; each judge asserted that the Supreme Court lacked authority to review state-court judgments under Article III.³⁹ Judge Spencer Roane invoked § 25's "no other error" proviso as an *additional* reason to defy the Supreme Court, insisting that the *Fairfax's Devisee* decision had also exceeded the jurisdictional limits in the 1789 Judiciary Act. Roane noted that the earlier state-court judgment in Hunter's favor had rested on an independent state-law ground: the "act of compromise" of 1796.⁴⁰ That meant that even if Justice Story were correct in holding that federal treaties protected Denny Fairfax's property interests from confiscation, the previous state-court decision had found that Fairfax voluntarily relinquished those rights in the compromise act. Roane insisted that this independent state-law ground immunized the state court's judgment from reversal, given that § 25 allowed

³⁶ 11 US (7 Cranch) 603 (1812).

³⁷ See *Hunter v Fairfax's Devisee*, 15 Va (1 Munf) 218, 237 (1810) (Fleming) (holding that Fairfax's purchasers "gave up all claim" to the disputed lands under the 1796 act of compromise); id at 232 (Roane) (holding that Fairfax's purchasers "agreed to release to the Commonwealth" all claims to the disputed lands).

³⁸ *Fairfax's Devisee*, 11 US (7 Cranch) at 627; Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and The United States of America (Jay's Treaty), Art IX, 8 Stat 116, 122, Treat Ser No 105 (1794) ("It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein.").

³⁹ See *Hunter v Martin*, 18 Va (4 Munf) 1, 16 (1815) (Cabell); id at 22 (Brooke); id at 54 (Roane); id at 58–59 (Fleming).

⁴⁰ See id at 49–50 (Roane).

the Supreme Court to reverse only errors that “immediately respect” the federal-law claim in the case.⁴¹

This was a powerful criticism of Justice Story’s opinion, which never even tried to reconcile its decision with the jurisdictional limits that Congress had established in § 25.⁴² Worse, Story had resolved questions of state and local law in determining the title to the disputed lands, without explaining how § 25’s “no other error” proviso allowed him to review such non-federal-law issues.⁴³ When the case returned to the Supreme Court on a new writ of error, Story issued another opinion that reaffirmed *Fairfax’s Devisee* and attempted to rebut Judge Roane’s accusations that his earlier opinion had violated § 25.⁴⁴ Story asserted that § 25 allowed the Supreme Court to resolve state property-law issues as a necessary incident to determining whether Virginia had violated the Jay Treaty; only by first resolving the title to the disputed lands could the Supreme Court determine whether Virginia had “confiscated” Fairfax’s “property” under the treaty.⁴⁵ And without the power to review such state-law issues, the state courts could “evade[] at pleasure” our treaty obligations, simply by redefining “property” interests under state law;⁴⁶ hence, the state property-law issues “immediately respect[ed]” the treaty claim in the case and fell within the Supreme Court’s jurisdiction under § 25. But Story failed to supply a persuasive answer to Judge Roane’s objection that the 1796 “act of compromise” provided an *independent* state-law ground for the state court’s judgment. For even if Fairfax had title to the disputed lands, as

⁴¹ See *id.* (“[T]he actual decision of this Court was rendered upon another, and ordinary ground of jurisdiction—the act of compromise aforesaid: such a ground, as no error can be assigned on, under the proviso of the judicial act, as aforesaid, and as *must forever bar the Supreme Court of the United States from acting upon the case*, unless we go beyond the actual provision of the section in question.”) (emphasis added). See also *id.* at 48 (noting that on these state-law grounds, “the state courts possess the undoubted privilege even to err, without remedy”).

⁴² Justice Johnson’s dissent in *Fairfax’s Devisee*, unlike Justice Story’s majority opinion, did address the Supreme Court’s jurisdiction to resolve state-law issues under § 25. See 11 US (7 Cranch) at 632 (Johnson dissenting) (“[W]henever a case is brought up to this Court under [§ 25], the title of the parties litigant must necessarily be enquired into, and that such an enquiry must, in the nature of things, precede the consideration how far the law, treaty, and so forth, is applicable to it; otherwise an appeal to this Court would be worse than nugatory.”).

⁴³ See *id.* at 619–27 (majority).

⁴⁴ See *Martin v Hunter’s Lessee*, 14 US (1 Wheat) 304, 323–62 (1816).

⁴⁵ *Id.* at 358 (“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.”). See also *Smith v Maryland*, 10 US (6 Cranch) 286, 305 (1810) (“The construction of these [state] laws, then, is only a step in the cause leading to the construction and meaning of this article of the treaty.”).

⁴⁶ *Martin*, 14 US (1 Wheat) at 357.

Justice Story concluded, the state court had held that he had *voluntarily relinquished* those claims in the 1796 compromise act.⁴⁷

The Virginia judiciary's resistance to *Fairfax's Devisee* was one of many antebellum attacks on the Supreme Court's appellate jurisdiction over the state courts. Other state courts and legislatures challenged the Supreme Court's prerogative to review a state supreme court's rulings,⁴⁸ and Southern representatives in Congress repeatedly introduced measures to repeal § 25.⁴⁹ But the Fairfax episode vividly illustrated how state-court judges could use § 25's "no other error" proviso as an excuse to evade federal law and defy the Supreme Court's judgments. The two significant changes in the 1867 Act, enacted when Southern opposition to § 25 was largely absent from Congress, would prevent state-court judges from emulating Judge Roane's actions in the *Fairfax* litigation. Removing § 25's "no other error" proviso foreclosed state-court judges from invoking that proviso to attack the legitimacy of Supreme Court rulings, or attempting to insulate cases with federal claims from the Supreme Court's review by resting the judgment on independent state-law grounds. And empowering the Supreme Court to award execution in *all* cases, rather than in cases that "have been once remanded before," meant that the state-court judges no longer get one free bite at the Supreme Court's mandate in cases such as *Fairfax's Devisee*; the Supreme Court could now award execution at the moment it issued its initial ruling.

There were also pressing needs for these jurisdictional changes in 1867. Creditors were attempting to collect pre-Civil War debts in state courts that had been closed to them during the rebellion; many of them could have faced claims that state governments had confiscated these debts as enemy property or that the limitations period had run.⁵⁰ Both Congress and the Supreme Court took action to protect creditors

⁴⁷ Story glided past this problem with a perfunctory sentence that criticized the state court for resting its decision on a statute that was not "spread upon the record." Id at 360 ("[I]t is somewhat difficult to understand how the court could take judicial cognizance of the [compromise] act . . . unless spread upon the record.").

⁴⁸ See, for example, *Wetherbee v Johnson*, 14 Mass (14 Tyng) 412, 417 (1817) (noting that the Supreme Court's constitutional power to assert appellate jurisdiction over state-court decisions "has been a question of much doubt and argument"). See also Charles E. Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-fifth Section of the Judiciary Act*, 47 Am L Rev 1, 3–25 (1913) (compiling and discussing the state legislative actions and court decisions that challenged the Supreme Court's appellate jurisdiction over the state courts).

⁴⁹ See Warren, 47 Am L Rev at 27 (cited in note 48) (discussing pre-Civil War proposals in Congress to repeal § 25); Wiecek, *Section 25 of the 1789 Judiciary Act* at 228–29 (cited in note 35) (discussing a bill to repeal § 25 that failed in the House on a 138–51 vote; all but six votes in favor of the bill came from slave states).

⁵⁰ *Stewart v Kahn*, 78 US (11 Wall) 493, 504–07 (1870).

against such claims. Congress enacted legislation in 1864 that tolled the limitations period for all claims in state or federal court that were unable to proceed on account of the Civil War.⁵¹ And the Supreme Court's 1867 decision in *Hanger v Abbot*,⁵² while acknowledging that the law of nations once recognized a state's right to confiscate debts owed to alien enemies,⁵³ concluded that this was "a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times."⁵⁴ The justices held that the law of nations not only preserved the debts but also suspended the statute of limitations on account of the creditors' inability to sue during the hostilities.⁵⁵ But *Hanger* was a diversity case litigated in federal court; for creditors relegated to state courts, § 25's "no other error" proviso would have likely blocked the justices from reversing state-court decisions for misinterpreting the "law of nations,"⁵⁶ as well as state-court decisions purporting to honor the federal tolling statute while contriving independent state-law grounds to shaft creditors. Giving the Supreme Court power to reverse state-court judgments on non-federal-law grounds would ensure the efficacy of the 1864 tolling statute and creditors' attempts to collect pre-Civil War debts in Southern state courts.

Yet despite these statutory amendments, the Supreme Court held in *Murdock v City of Memphis* that the 1867 Act continued to block the Court from reviewing a state supreme court's interpretation of state law in cases presenting federal claims.⁵⁷ *Murdock* gave two reasons for this conclusion. First, the Court thought that if Congress wanted the Supreme Court to review such state-law issues, it would have enacted explicit language to that effect, rather than merely repealing § 25's "no other error" proviso.⁵⁸ It noted that state courts are

⁵¹ See An Act in Relation to the Limitation of Actions in Certain Cases, 13 Stat 123 (1864).

⁵² 73 US (6 Wall) 532 (1867).

⁵³ *Id.* at 536 ("In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist.").

⁵⁴ *Id.*

⁵⁵ *Id.* at 536–38, 542.

⁵⁶ See, for example, Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815, 822–26 (1997) (noting that the law of nations had the legal status of general common law prior to *Erie*; it therefore failed to qualify as federal law that binds the states and could not supply a basis for federal-question jurisdiction); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U Pa L Rev 1245, 1279–80 (1996) (noting that nineteenth-century courts "had no occasion to characterize the various branches of the law of nations as either federal or state law. At the time, it was thought to be neither.").

⁵⁷ 87 US (20 Wall) at 627–28 ("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 [federal] questions mentioned in the statute.").

⁵⁸ *Id.* at 619;

“the appropriate tribunals” for resolving questions of state and local law, 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.”⁵⁹ Second, the Court feared that parties might start raising frivolous federal claims in state-court proceedings in order to compel the Supreme Court to review the state-law issues in the case.⁶⁰ The Supreme Court at that time lacked discretionary jurisdiction over writ-of-error petitions brought from state courts, so it was unable simply to deny certiorari in those situations.

As a matter of statutory interpretation, *Murdock*'s analysis is unconvincing. The 1867 statute conferred jurisdiction over the state court's “judgment or decree,” and *Murdock*'s conclusion leaves a mystery as to why the Reconstruction Congress deleted the “no other error” proviso if its omission served only to preserve the status quo. It is hard to credit the Court's suggestion that lawmakers deleted the proviso because they deemed it unnecessary;⁶¹ Justice Story's opinions in the *Fairfax* litigation, which the *Murdock* opinion did not cite, showed that the Supreme Court was already reaching beyond the proviso's boundaries by reversing state-court interpretations of state law and reversing state-court judgments that rested on independent state-law grounds. The decision to remove the “no other error” proviso from the 1867 Act seems to ratify Justice Story's actions; it could not possibly have reflected a settled belief that the Supreme Court had no business reviewing a state supreme court's interpretation of state law, or a state-court judgment resting on independent state-law grounds.⁶² In a sense,

But if Congress, or the framers of the bill, had a clear purpose to enact affirmatively that the court *should consider* the class of errors which that clause forbid, nothing hindered that they should say so in positive terms; and in reversing the policy of the government from its foundation in one of the most important subjects on which that body could act, it is reasonably to be expected that Congress would use plain, unmistakable language in giving expression to such intention.

There is, therefore, no sufficient reason for holding that Congress, by repealing or omitting this restrictive clause, intended to enact affirmatively the thing which that clause had prohibited.

⁵⁹ Id at 626.

⁶⁰ See id at 627; id at 628–29.

⁶¹ See *Murdock*, 87 US (20 Wall) at 618–19:

No doubt there were those who, believing that the Constitution gave no right to the Federal judiciary to go beyond the line marked by the omitted clause, thought its presence or absence immaterial; and in a revision of the statute it was wise to leave it out, because its presence implied that such a power was within the competency of Congress to bestow. There were also, no doubt, those who believed that the section standing without that clause did not confer the power which it prohibited, and that it was, therefore, better omitted.

⁶² See, for example, Wright and Kane, *The Law of Federal Courts* at 792 (cited in note 5) (noting that it “seems entirely plausible that Congress intended by eliminating the proviso to open the whole case for review by the Supreme Court, if there is a federal question in the case sufficient to take the case to the Supreme Court!” because that interpretation “seems wholly

the rulings in *Murdock* and *Fairfax's Devisee* were mirror images of each other. In *Fairfax's Devisee*, Justice Story and a nationalist Supreme Court were anticipating the 1867 Act that freed the Supreme Court from § 25's exclusionary proviso, rather than applying the terms of the Judiciary Act enacted by a Congress more solicitous of state-court autonomy. In *Murdock*, by contrast, the Court acted as though it were still governed by the original 1789 Act, rather than the 1867 statute enacted by a Reconstruction Congress that distrusted the state courts.⁶³

What is more, the Supreme Court had recognized on many occasions before *Murdock* that its appellate jurisdiction is self-executing; it comes directly from Article III of the Constitution and does not require affirmative statutory authorization.⁶⁴ Article III extends this self-executing appellate jurisdiction to "Law and Fact," not just federal law, and it encompasses entire "cases" and "controversies" on the Article III menu, subject only to "Exceptions" and "Regulations" that Congress makes. The Court will recognize implicit "Exceptions" when Congress's jurisdictional statutes define the Supreme Court's appellate jurisdiction over a limited category of cases, as the "affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed."⁶⁵ But *Murdock's* requirement that Congress "enact affirmatively that the court should consider" the state-law issues in cases that Congress has *explicitly included* within the Supreme Court's appellate jurisdiction establishes a regime in which a subset (but only a subset) of the Court's appellate jurisdiction over "Law and Fact" depends on affirmative congressional authorization rather than Article III's self-executing command. The Supreme Court had also established in

consistent with the temper of the times"); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv L Rev 881, 920–21 n 180 (1986) ("Given Congress's mood in 1867 . . . it seems unavoidable that the repeal of the restrictive sentence was designed to expand the scope of federal review; historians have agreed that such an expansion was the congressional intent."); Richard A. Matasar and Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 Colum L Rev 1291, 1319 (1986) ("The [*Murdock*] Court simply refused to give effect to the language of the Act" and "clearly misread Congress' intent."); Charles Warren, 2 *The Supreme Court in United States History* 682 (Little, Brown 2d ed 1926) (noting that it was "highly probable" that Congress intended § 2 of the 1867 Judiciary Act to authorize Supreme Court review of non-federal-law issues decided by state supreme courts).

⁶³ See Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U Pa L Rev 793, 815–16, 819 n 11 (1965) (noting "the extreme disfavor in which the Thirty-ninth Congress held the state courts").

⁶⁴ See note 24.

⁶⁵ *McCardle*, 74 US (7 Wall) at 513. See also *Durousseau*, 10 US (6 Cranch) at 314 ("They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.").

*Osborn v Bank of the United States*⁶⁶ that federal district courts have ancillary jurisdiction over state-law claims in cases brought under the federal-question jurisdiction.⁶⁷ Applying this principle to state-court decisions brought to the Supreme Court on writ of error was hardly a novel or revolutionary proposition that required “plain, unmistakable language” from Congress, as the *Murdock* Court claimed.⁶⁸

Finally, *Murdock*’s recognition that state supreme courts have authority and expertise in construing state and local law suggests only that the Supreme Court should review their state-law pronouncements deferentially. It does not support *Murdock*’s conclusion that a reviewing court should *disclaim jurisdiction* over these ancillary state-law issues. In administrative law, for example, the Supreme Court has long recognized that agencies have interpretive authority over statutes that they administer;⁶⁹ this doctrine rests on agencies’ institutional advantages over federal courts in resolving such issues⁷⁰ as well as a willingness to interpret certain statutory ambiguities as implicit delegations of interpretive authority to the agency that administers the statute.⁷¹ Yet this does not negate or even limit the federal courts’ jurisdiction to review agency interpretations of statutes; instead, the courts review such agency interpretations to ensure that they remain within the boundaries of the agency’s delegated interpretive powers.⁷² *Murdock* recognized that

⁶⁶ 22 US (9 Wheat) 738 (1824).

⁶⁷ See *id.* at 821–22 (emphasis added):

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, provided the facts necessary to support the action be made out, *then all the other questions must be decided as incidental to this*, which gives that jurisdiction.

⁶⁸ See note 58 and accompanying text.

⁶⁹ See, for example, *Chevron U.S.A. Inc v NRDC*, 467 US 837 (1984); *United States v Mead Corp.*, 533 US 218 (2001).

⁷⁰ See *Chevron*, 467 US at 865–66. See also Vermeule, *Judging under Uncertainty* at 209 (cited in note 10) (noting that administrative agencies’ “specialized competence and relative accountability” give them advantages in interpreting statutes that they administer).

⁷¹ See *Chevron*, 467 US at 844; *Mead*, 533 US at 226–27.

⁷² See, for example, *FDA v Brown & Williamson Tobacco Corp.*, 529 US 120 (2000) (holding that the FDA exceeded its delegated interpretive authority by regulating tobacco products as “drugs” and “devices” under the Food and Drug Act). See also *Quinn v Gates*, 575 F3d 651, 654 (7th Cir 2009) (Easterbrook) (citations omitted):

Subject-matter jurisdiction is the authority to resolve the parties’ dispute. Sometimes the ground on which this resolution occurs is that decision belongs to another governmental actor. Consider, for example, the provision exempting from the APA action “committed to agency discretion by law.” That supplies a ground on which the dispute must be resolved (the agency’s decision prevails) without contracting federal subject-matter jurisdiction.

state statutes, constitutional provisions, and common law similarly vest a degree of interpretive authority in a state's supreme court, yet state supreme courts can exceed the boundaries of these delegated interpretive powers if they construe state laws unreasonably or apply them in a biased fashion. None of this supports the wholesale exclusion of state-law issues from the Supreme Court's jurisdiction; on the contrary, it indicates that the justices may enforce interpretive boundaries against the state supreme courts in the same manner that they (deferentially) police the administrative agencies and executive-branch institutions that hold delegated interpretive powers from Congress.

What was really driving the *Murdock* Court's decision to relinquish jurisdiction over state-law issues was concern that a contrary holding would have adverse effects on the Court's caseload. The writ-of-error device in the 1867 statute gave disappointed state-court litigants a *right* to Supreme Court review whenever they could present a federal-law claim that the state courts had rejected. Had the Supreme Court embraced the "whole case" theory that the petitioners had urged (and that Justice Bradley embraced in his dissent⁷³), the justices would have compelled themselves to resolve all state-law issues in cases where the plaintiff-in-error had propounded a weak or contrived federal-law claim in state-court proceedings. This would encourage state-court litigants to raise frivolous federal-law claims and empower them to divert the Supreme Court's resources into cases where the disputed issues turned almost entirely on state law.⁷⁴

But it is no longer necessary for the Supreme Court to renounce jurisdiction over state-law issues to avoid these problems. The writ of certiorari gives the justices discretionary power to choose the cases

⁷³ See *Murdock*, 87 US (20 Wall) at 639–42 (Bradley dissenting) ("I cannot concur in the conclusion that we can only decide the Federal question raised by the record. If we have jurisdiction at all, in my judgment we have jurisdiction of the *case*, and not merely of a *question* in it.").

⁷⁴ See *id.* at 627 (majority):

Let us suppose that we find that the court below was right in its decision on that question. What, then, are we to do? Was it the intention of Congress to say that while you can only bring the case here on account of this question, yet when it is here, though it may turn out that the plaintiff in error was wrong on that question, and the judgment of the court below was right, though he has wrongfully dragged the defendant into this court by the allegation of an error which did not exist, and without which the case could not rightfully be here, he can still insist on an inquiry into all the other matters which were litigated in the case? This is neither reasonable nor just.

See also *id.* at 629 (noting that there would be "no conceivable case so insignificant in amount or unimportant in principle that a perverse and obstinate man may not bring it to this court by the aid of a sagacious lawyer raising a Federal question in the record—a point which he may be wholly unable to support by the facts, or which he may well know will be decided against him, the moment it is stated").

and issues that they will decide;⁷⁵ the specter of state-court litigants raising contrived federal claims as a means to compel the Supreme Court to resolve the state-law issues in their cases has evaporated. *Murdock* created this “jurisdictional” limitation to avoid overcrowding the Supreme Court’s docket with state-law claims when the writ-of-error petition gave parties a right to Supreme Court review, just as the Supreme Court once characterized constitutional violations in criminal trials as “jurisdictional” defects when that was the only ground for a convict to obtain federal habeas corpus relief.⁷⁶ Now that these docket-control concerns have disappeared, so too should the Court’s pretense that it lacks “jurisdiction” to review state-law issues in cases that present federal claims.⁷⁷

Murdock’s jurisdictional fiction has also been eroded by the Supreme Court’s willingness to review and reject state supreme courts’ interpretations of state law when state courts purport to reject federal-law claims on independent state-law grounds. The most famous of these cases is *NAACP v Patterson*, where a state trial court had held the NAACP in contempt for failing to produce its membership list. The NAACP petitioned for certiorari in the Alabama Supreme Court, alleging that the trial court’s order violated its federal constitutional rights. But the state supreme court dismissed the petition on the flimsiest of state-law grounds. It held that certiorari review could extend only to a subset of legal claims, such as jurisdictional and procedural errors,⁷⁸ and

⁷⁵ See Act of June 27, 1988, Pub L No 100-352, 102 Stat 662, 662–63 (expanding the Supreme Court’s certiorari jurisdiction and eliminating almost all rights of appeal to the Supreme Court). See also US S Ct R 10 (“Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.”).

⁷⁶ See, for example, *Ex parte Bain*, 121 US 1 (1887); *Frank v Mangum*, 237 US 309, 345–50 (1915) (Holmes dissenting); *Johnson v Zerbst*, 304 US 458, 467 (1938) (holding that the Sixth Amendment right to counsel is an “essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty”). See also *United States v Cotton*, 535 US 625, 630 (2002) (admitting that “[t]he Court’s desire to correct obvious constitutional violations led to a somewhat expansive notion of ‘jurisdiction,’ which was more a fiction than anything else”) (citations and quotation marks omitted).

⁷⁷ See *Cotton*, 535 US at 631 (overruling *Ex parte Bain*’s holding that defective indictments deprive a court of “jurisdiction”). See also *Fisher v Cockerell*, 30 US (5 Pet) 248, 259 (1831) (“As this court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it.”).

⁷⁸ See *Ex parte NAACP*, 91 S2d 214, 217 (Ala 1956):

Review on certiorari is limited to those questions of law which go to the validity of the order or judgment of contempt, among which are the jurisdiction of the court, its authority to make the decree or order, violation of which resulted in the judgment of contempt. It is only where the court lacked jurisdiction of the proceeding, or where on the face of it the order disobeyed was void, or where procedural requirements with respect to citation for contempt and the like were not observed, or where the fact of contempt is not sustained, that the order or judgment will be quashed.

that the NAACP should have pursued a writ of mandamus to challenge the lower court's membership-list order.⁷⁹ By rejecting the NAACP's constitutional claim on independent "state law" grounds, the Alabama Supreme Court thought it could insulate its judgment from Supreme Court review: under *Murdock*, the justices are powerless to review a state supreme court's interpretation of state law, even in cases presenting federal claims, and because the state-law grounds were broad enough to support the state court's judgment, any Supreme Court ruling on the NAACP's federal-law claim would violate the constitutional prohibition on advisory opinions.⁸⁰ But the justices were undeterred and set aside the Alabama Supreme Court's state-law pronouncement; they found that it lacked "fair or substantial support" because it contradicted the state supreme court's "past unambiguous holdings as to the scope of review available upon a writ of certiorari."⁸¹ The justices then held that the order to produce the membership list violated the NAACP's federal constitutional rights.⁸²

It is now well settled that the Supreme Court may review and set aside a state supreme court's interpretation of state law that lacks "fair and substantial" or "adequate" support when state courts use their interpretive powers over state law to thwart litigants' efforts to vindicate their federal rights.⁸³ The justices take a similar approach in Contracts Clause cases, giving only "respectful consideration and great weight" to a state supreme court's determination of whether a state-law "contract" exists.⁸⁴ These longstanding practices are hard to reconcile with *Murdock*'s holding that the Supreme Court lacks "jurisdiction" to review or reverse a state supreme court's interpretation of state law.

⁷⁹ *Id.*

[I]f petitioner felt itself aggrieved by the order requiring it to produce certain evidence, it should have sought to have the order reviewed by mandamus. Where a party to a cause elects not to avail of such remedies to test the validity of an order requiring him to do or refrain from doing a certain act and simply ignores or openly declines to obey the order of the court, he necessarily assumes the consequences of his defiance, and is remitted to the lone hope of having the reviewing court find and declare the order of contempt void on its face.

⁸⁰ See, for example, *Herb v Pitcairn*, 324 US 117, 126 (1945) ("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.").

⁸¹ *Patterson*, 357 US at 455–56.

⁸² *Id.* at 460–66.

⁸³ See, for example, *Howlett v Rose*, 496 US 356, 366 (1990) (collecting authorities); Wright and Kane, *The Law of Federal Courts* at 793–98 (cited in note 5) (same).

⁸⁴ See, for example, *General Motors Corp v Romein*, 503 US 181, 187 (1992) ("We 'accord respectful consideration and great weight to the views of the State's highest court,' though ultimately we are 'bound to decide for ourselves whether a contract was made.'"), quoting *Anderson v Brand*, 303 US 95, 100 (1938); *Appleby v City of New York*, 271 US 364, 380 (1926) ("[W]hether it turns on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment.").

As Professor Alfred Hill notes, the Supreme Court in such cases functions “as if it were the highest court of the state,” and “independently determines whether, in light of the state materials available to the highest state court at the time of its decision on the threshold question, the decision was erroneous *as a matter of state law*.”⁸⁵ Some have attempted to square the circle by suggesting that cases such as *Patterson* are consistent with *Murdock* because the Alabama Supreme Court’s state-law pronouncement itself conflicted with federal law; on this view, the Supreme Court’s decision in *Patterson* rested on the Supremacy Clause and a preemptive “federal common law” rather than a prerogative to review directly a state supreme court’s interpretation of state law.⁸⁶ But it is far more plausible to view *Patterson* as a Supreme Court reinterpretation of state law; the Supreme Court rejected the Alabama Supreme Court’s procedural ruling solely because it conflicted with that court’s earlier *state-law* pronouncements, not because it conflicted with any federal rule of decision. Alabama law *could* have limited the writ of certiorari to jurisdictional or procedural errors without violating federal law; the problem was that the existing state-law doctrines imposed no such limitations, and the Alabama Supreme Court misapplied state law in a manner that evinced bias against a litigant.⁸⁷

The justices, however, review and reverse these state supreme court interpretations of state law only when they wish to *enforce* federal rights against the states.⁸⁸ In *Patterson*, for example, the justices reversed the Alabama Supreme Court’s state-law holding regarding the scope of certiorari jurisdiction, but went on to hold that the state trial court’s membership-disclosure order violated the NAACP’s federal

⁸⁵ See Alfred Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum L Rev 1050, 1082 (1978).

⁸⁶ See, for example, Field, 99 Harv L Rev at 968–70 & n 384 (cited in note 62); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv L Rev 1128, 1185 (1986).

⁸⁷ To be sure, *some* of the Supreme Court’s decisions that find state-law grounds “inadequate” to preclude review of federal-law grounds are more plausibly understood as federal-preemption holdings rather than Supreme Court reinterpretations of state law. In some cases, for example, the justices appear to reject state procedural rules on the ground that they unduly burden litigants asserting federal rights. See, for example, *Davis v Wechsler*, 263 US 22 (1923); *Brown v Western Railway*, 338 US 294 (1949). In such cases, even if a state law clearly and explicitly established the burdensome procedural requirements, the justices might *still* refuse to allow such procedural rules to defeat a federal-law claim, and such a holding would necessarily rest on something in federal law that preempts the state procedural rules. But *NAACP* did not prohibit Alabama (or any other state) from limiting the writ of certiorari to a subset of legal errors; it objected to the Alabama Supreme Court’s interpretation of the relevant state legal authorities. See note 81 and accompanying text.

⁸⁸ See Wright and Kane, *The Law of Federal Courts* at 794–95 (cited in note 5) (collecting authorities).

constitutional rights.⁸⁹ And when a Contracts Clause case rejects a state supreme court's application of state contract law, it almost always goes on to hold that the state violated the constitution by impairing the obligation of contracts.⁹⁰ *Murdock's* legacy has left the justices unwilling to consider reversing state supreme court rulings *solely* on state-law grounds, as a means to *avoid ruling on* the federal constitutional claims presented in a case. This is so even when the state supreme court's interpretation of state law lacks "fair and substantial" or "adequate" support. But no statute or constitutional provision blocks the Supreme Court from issuing such state-law reversals in cases presenting federal claims; the justices' categorical refusal to entertain this possibility is merely a surviving vestige of *Murdock's* jurisdictional concoction. The justices have as much power to reverse a state supreme court ruling solely on state-law grounds as they have power to reverse state supreme court interpretations of state law in cases such as *NAACP*. The only external legal constraint is that the case must present a federal claim sufficient to satisfy Article III and 28 USC § 1257; the ultimate scope of this power is for the justices to decide as they grant and deny certiorari petitions.

Finally, the Supreme Court can expand its already-established prerogative to set aside state supreme court interpretations of state law without contravening the *Erie* doctrine. *Erie* precludes the federal courts from displacing state law with judge-created "federal general common law";⁹¹ this prohibition rests on constitutional principles of federalism and separation of powers.⁹² But when the Supreme Court

⁸⁹ See *Patterson*, 357 US at 460–66.

⁹⁰ See, for example, *Anderson*, 303 US 95. But see *United States Mortgage Co v Matthews*, 293 US 232 (1934) (reversing a state supreme court's interpretation of contractual language and thereby avoiding a conflict between the contract and a state statute that a litigant had challenged as a violation of the Contracts Clause).

⁹¹ See *Erie Railroad Co v Tompkins*, 304 US 64, 78–80 (1938) ("There is no federal general common law. . . . [N]o clause in the Constitution purports to confer such a power upon the federal courts. . . . [I]n applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.").

⁹² Congress (at the time of *Erie*) was deemed to lack the constitutional prerogative to legislate substantive common-law rules within a state, and the justices thought it implausible to allow federal courts to exercise lawmaking powers that the Constitution had withheld from the national legislature. See *Erie*, 304 US at 78. See also Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 NYU L Rev 383, 395 (1964) ("[I]t would be even more unreasonable to suppose that the federal courts have a law-making power which the federal legislature does not. . . . The spectacle of federal judges being able to make law without possibility of Congressional correction would not be a happy one.").

Even if Congress had been understood to have near-plenary powers to displace state common-law rules, *Erie* recognized that separation-of-powers principles would still preclude the federal courts from creating federal general common law absent authorization from a constitutional provision or an act of Congress. See 304 US at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the

reviews and corrects a state supreme court's mistaken interpretations or applications of that state's statutes, constitutional provisions, or common law, it is enforcing rather than supplanting state law. There are two crucial differences between Supreme Court rulings that reverse a state supreme court for misinterpreting its own state's laws and those that displace a state supreme court's ruling with federal general common law. The former must be rooted in preexisting state legal authorities; the Supreme Court may reverse only if the state supreme court contravenes or misapplies state statutes, state constitutional provisions, or state common-law precedents. It does not allow the justices to depose state law by relying on their own notions of what the common law should be, or on any "brooding omnipresence in the sky"⁹³ untethered to a positive state-law source. The second important distinction is that the Supreme Court's state-law reversals can have precedential value only when courts review or apply the laws of that state; they have no application in diversity litigation generally, as the federal general common law did.

Erie also requires federal courts to apply a state's common law, no less than its statutory law, in cases where state law provides the rule of decision.⁹⁴ The *Erie* Court noted that deviating from state common law in diversity litigation created incentives for vertical forum shopping and led to inequitable treatment of similarly situated litigants.⁹⁵

state." This separation-of-powers principle continues to sustain the *Erie* doctrine even as contemporary notions of congressional power have expanded well beyond the 1938 understandings. See, for example, *Texas Industries, Inc v Radcliff Materials, Inc*, 451 US 630, 640 (1981) (noting that federal courts may formulate federal common law only when "Congress has given the courts the power to develop substantive law" or when "a federal rule of decision is 'necessary to protect uniquely federal interests'"); *id* at 641 ("[N]or does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts."). See also Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 Harv L Rev 1682, 1682–83 (1974):

[T]he Constitution bears not only on congressional power but also imposes a distinctive, independently significant limit on the authority of the federal courts to displace state law.

...

That Congress may have constitutional power to make federal law displacing state substantive policy does *not* imply an equal range of power for federal judges. Principles related to the separation of powers impose an additional limit on the authority of federal courts to engage in lawmaking on their own (unauthorized by Congress).

⁹³ *Southern Pacific Co v Jensen*, 244 US 205, 222 (1917) (Holmes dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.").

⁹⁴ See 304 US at 72–73 (holding that federal diversity courts should "apply as their rules of decision the law of the state, unwritten as well as written"); *id* at 78 ("[W]hether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

⁹⁵ See *id* at 73–77. Under pre-*Erie* practice, litigants sued in state court were judged by state common law, while those sued in federal diversity courts were subject to the federal general

The Court also suggested that the Rules of Decision Act⁹⁶ might compel federal diversity courts to apply a state's common law as well as its statutory enactments.⁹⁷ For nearly a century, the Court had held that the Rules of Decision Act's requirement that federal diversity courts apply "the laws of the several states" excluded a state's judge-made common law,⁹⁸ but the *Erie* Court cited a law review article by Charles Warren challenging this longstanding interpretation.⁹⁹ The *Erie* Court declined to rest its holding solely on this revisionist understanding of the Rules of Decision Act,¹⁰⁰ and several commentators have since attacked Warren's claim that the Rules of Decision Act requires diversity courts to apply a state's unwritten common law.¹⁰¹ But regardless of whether Warren's reinterpretation is right or wrong,¹⁰² nothing in the Rules of Decision Act *forbids* the Supreme Court from requiring, as it

common law. This gave noncitizens significant forum-shopping advantages over in-state litigants, because the removal statute blocks in-state defendants from removing diversity cases to federal court. See *id.* at 74–75.

⁹⁶ Judiciary Act of 1789 § 34, 1 Stat at 92, codified as amended at 28 USC § 1652.

⁹⁷ *Erie*, 304 US at 72–73.

⁹⁸ See *Swift*, 41 US (16 Pet) at 18 ("In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws."). *Swift*'s interpretation of the Rules of Decision Act enabled federal courts to apply federal general common law rather than state common law in contract or commercial-law disputes. See *id.* at 18–19 (holding the Rules of Decision Act inapplicable to "the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law").

⁹⁹ Warren uncovered a draft proposal in the first Congress that required federal diversity courts to apply "the Statute law of the several states in force for the time being and their unwritten or common law now in use"; he maintained that "the laws of the several states" was mere shorthand for that earlier formulation's inclusion of both statutes and judge-made common law. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv L Rev 49, 86 (1923) ("The meaning of this change was probably as follows: that the word 'laws of the several States' was intended to be a concise expression and a summary of the more detailed enumeration of the different forms of State law, set forth in the original draft.").

¹⁰⁰ See *Erie*, 304 US at 77–78 ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.").

¹⁰¹ See, for example, William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv L Rev 1513, 1514–15 (1984); Friendly, 39 NYU L Rev at 389 (cited in note 92).

¹⁰² Warren's argument can just as easily support the Court's pre-*Erie* interpretation of the Rules of Decision Act; the decision in Congress to replace the explicit reference to a state's "unwritten or common law" with the ambiguous "the laws of the several states" could indicate that legislators were unwilling to require federal diversity courts to apply state common law as rules of decision. See Field, 99 Harv L Rev at 903–04 (cited in note 62):

The draft does treat statutory and common law in the same manner, but it refers only to "the statute law of the several states *in force for the time being* and their unwritten or common law *now in use*." To accept Warren's conclusion, one would have to believe that the omission of this language in the final version of the Act was only stylistic (as he maintains) with respect to the equation of statutory and common law, but not with respect to its application only to preexisting law. . . . Warren's reinterpretation was therefore shaky.

did in *Erie*, that federal diversity courts apply state common law, and *Erie*'s constitutional holding would still preclude those courts from applying federal general common law in those cases absent statutory authorization from Congress.

Yet *Erie*'s decision to recognize state common law as a rule of decision in diversity litigation did not establish that "the law" of a state is whatever its highest court says it is. *Erie* merely recognized that state laws can include the court-created doctrines that evolve through common-law adjudication; there is a great distance between that proposition and the extreme legal-realist view that state law simply "is" whatever the state supreme court declares, even when it deviates from constitutional or statutory text or misapplies its established common-law precedents. Although it may seem illogical to believe that the Supreme Court of the United States could "correct" a state supreme court's application of state common law, which is entirely a creation of the state courts, the justices have done this in pre-*Erie* and post-*Erie* cases, including *Fairfax's Devisee*, *NAACP v Patterson*, and the Contracts Clause cases.¹⁰³ *Patterson* nicely illustrates how a post-*Erie* state supreme court can violate or misapply its own common law. The Alabama Supreme Court's previous rulings had indicated that litigants could use the common-law writ of certiorari to challenge errors of law,¹⁰⁴ yet the state supreme court inexplicably departed from this regime while purporting to follow its earlier precedents.¹⁰⁵ The Supreme Court regarded this state-court ruling as a misapplication of the existing state common law governing certiorari petitions. None of this denies the Alabama Supreme Court's *power* to change unilaterally the common-law rules governing certiorari petitions; had the Alabama Supreme Court announced prior to *NAACP* that it was inaugurating a new rule to govern certiorari petitions, and based its change on a reason or principle rather than an opportunistic desire to harm a disfavored litigant, then the state-court ruling in *NAACP* might have qualified as a genuine application of Alabama's common law. But acknowledging a state supreme court's power to create or modify common-law principles does not entail absolute deference to its case-specific applications of

¹⁰³ See notes 36–47 and 78–90 and accompanying text.

¹⁰⁴ See *Patterson*, 357 US at 456 (collecting state-law authorities).

¹⁰⁵ See *NAACP*, 91 S2d at 217, which relied on *Ex parte Dickens*, 50 So 218, 220 (Ala 1909), to establish that the writ of certiorari is limited to certain jurisdictional or procedural errors, despite *Dickens*'s statement that the writ of certiorari extends to "the law questions involved in the case which may affect its merits." See 50 So at 220, quoting George E. Harris, *A Treatise on the Law of Certiorari at Common Law and under the Statutes: Its Use and Practice* § 1 at 3 (Laywer's Co-op 1893).

those doctrines, especially in federal-question or diversity cases that raise the specter of biased state-court judging.¹⁰⁶

Finally, post-*Erie* cases have required the *inferior* federal courts to apply state supreme court pronouncements as rules of decision in diversity litigation without inquiring into their legal correctness.¹⁰⁷ But there is no contradiction between this longstanding practice and Supreme Court rulings that review and reverse a state supreme court's interpretations of state law on direct appeal. First, no statute or constitutional provision empowers the inferior federal courts to hear appeals from a state supreme court's rulings, and federal courts are not to launch collateral attacks on state-court civil proceedings.¹⁰⁸ Second, the inferior federal courts are subject to the Supreme Court's supervisory powers, and the justices may require those courts to accord absolute deference to a state supreme court's rulings, while reserving to themselves the prerogative to correct a state supreme court's mistaken interpretations of state law. Such a regime promotes *Erie*'s consequentialist goals of promoting uniform treatment of litigants and discouraging forum-shopping between state and federal courts;¹⁰⁹ it need not rest on the notion that state supreme courts have absolute and unreviewable interpretive supremacy over state law—a proposition that would have rendered the justices powerless to directly review the Alabama Supreme Court's "interpretation" of state law in *Patterson*. The Supreme Court can expand its practice of reversing state supreme court rulings on state-law grounds as an exercise of its appellate jurisdiction while simultaneously insisting that the *inferior* federal courts give absolute deference to state supreme court interpretations of state law.

Commentators often assume a symbiotic relationship between *Murdock* and *Erie*, but the Supreme Court's power to reverse a state supreme court's interpretation of state law on direct appeal is logically distinct from the prohibition on federal general common law, the status of state common law as a rule of decision in diversity litigation, and the inferior federal courts' inability to second-guess a state supreme

¹⁰⁶ See, for example, *Harrison*, 7 Green Bag 2d at 356–58 (cited in note 3) (suggesting that the Supreme Court could regard the "real law of the state" as "the law as announced in [state supreme court rulings] that present no temptation to distort that law, cases that do not appear on the Article III menu," and that this would enable the justices to provide a forum for the "neutral application of settled state law" in diversity or federal-question cases).

¹⁰⁷ See, for example, *Commissioner of Internal Revenue v Estate of Bosch*, 387 US 456, 465 (1967).

¹⁰⁸ See *Rooker v Fidelity Trust Co*, 263 US 413 (1923). Habeas corpus proceedings are an exception to this rule. See *Brown v Allen*, 344 US 443 (1953).

¹⁰⁹ See note 95 and accompanying text. See also *Hanna v Plumer*, 380 US 460, 468 (1965) (describing the "twin aims" of the *Erie* doctrine as the "discouragement of forum-shopping and avoidance of inequitable administration of the laws").

court's state-law pronouncements. Just as the *Murdock* regime existed without *Erie* for sixty-five years, the *Erie* doctrine can and will continue to exist if the Supreme Court continues its retreat from *Murdock*'s once-absolute prohibition on state-law reversals.

II.

Part I showed that Article III and 28 USC § 1257 permit the Supreme Court to review and reverse a state supreme court's interpretation of state law in any case presenting a federal claim. And despite *Murdock*'s holding that the Supreme Court lacks "jurisdiction" to review a state supreme court's interpretation of state law, the justices have been willing to reverse state supreme court interpretations of state law to ensure the efficacy of federal rights litigated in state courts.¹¹⁰ Yet the justices will reject a state supreme court's interpretation of state law only in cases where they wish to enforce a litigant's federal-law claim against the state. *Murdock*'s residue has left the justices reluctant to reverse state supreme court rulings *solely* on state-law grounds, as a means to *avoid ruling on* the federal claims presented in a case.

The justices' categorical unwillingness to consider such state-law reversals cannot rest on a legalistic proposition that the Supreme Court lacks "jurisdiction" to review a state supreme court's interpretation of state law; the only external legal constraint on the justices' power to consider state-law reversals is the requirement that the case present a federal claim sufficient to satisfy Article III and 28 USC § 1257. Yet certiorari jurisdiction gives the justices unfettered discretion in choosing the cases and the discrete issues that they will review; this allows them to exclude state-law issues from their docket even in the absence of a legal command to do so. Their decisions to review, or not to review, a state supreme court's interpretation of state law in cases presenting federal claims should rest on consequentialist considerations, given that no statute or constitutional provision prohibits or compels Supreme Court review of such state-law pronouncements.¹¹¹

The justices have already recognized that the objective of ensuring litigants a meaningful opportunity to vindicate federal rights in state-court proceedings can justify reversing a state supreme court's

¹¹⁰ See Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 *Stan L Rev* 971, 1030 (2009) (noting that jurisdictional doctrines often claim to be "fixed and inflexible," while still containing "pockets of pliability and places where firm rules bend").

¹¹¹ See generally Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 *U Chi L Rev* 636 (1999) (arguing that formalistic constraints on judges should be defended in terms of their overall consequences, including their effects on decision costs, error costs, and the likely performance of institutions).

interpretation of state law. This Part proposes an additional category of cases in which state-law reversals can advance important systemic goals. Specifically, it argues that the justices should consider state-law reversals as an alternative for rulings that would otherwise rest on disputed federal constitutional pronouncements.

When state supreme courts issue dubious interpretations or applications of state law, litigants will often attempt to paint such rulings as federal constitutional violations. Indeed, the *Murdock* regime compels them to couch their appeals to the Supreme Court of the United States in constitutional language, as this is the only basis on which the justices might reverse a state-court ruling. And when the justices encounter a state supreme court decision that appears biased or mistaken, they are understandably reluctant to allow such decisions to stand. But because the *Murdock* regime forecloses the justices from reversing state-court rulings solely on state-law grounds, the Court has expanded federal constitutional law to counteract these state supreme court decisions. This has caused the Supreme Court to issue unnecessary (and highly contentious) holdings of constitutional law in cases that it could have resolved on state-law grounds. As a result, the justices nationalize and entrench their pronouncements rather than issue localized holdings subject to political-branch override. Many of these *Murdock*-induced constitutional rulings rest on questionable legal and policy grounds, producing potential error costs that can be overcome only by a constitutional amendment or new Supreme Court appointments. They have also created novel constitutional doctrines that promise to impose large decision costs on courts and litigants in the future. In these types of cases, a state-law reversal can alleviate the hydraulic pressure that the *Murdock* regime places on federal constitutional doctrine, and can mitigate both the decision costs and potential error costs associated with Supreme Court rulings. Of course, a decision by the justices to review a state supreme court's interpretation of state law will also come with some decision costs and potential error costs, but in many cases the costs of a federal constitutional resolution will be far greater.

This Part provides examples of cases in which state-law reversals could have avoided federal constitutional pronouncements that have increased decision costs in constitutional litigation and may have produced mistaken or misguided interpretations of the federal Constitution that will be difficult to change.

A. *Boy Scouts v Dale*

New Jersey's Law Against Discrimination¹¹² (LAD) guarantees the opportunity to obtain "all the accommodations, advantages, facilities, and privileges of any place of public accommodation" without discrimination based on sexual orientation.¹¹³ The New Jersey Supreme Court deemed the Boy Scouts a "place of public accommodation" and ordered the Scouts to accept homosexuals as Scoutmasters.¹¹⁴

As a matter of state law this holding was a reach, even in light of the state legislature's instructions to "liberally construe[]" the antidiscrimination laws.¹¹⁵ The LAD applies only to "place[s] of public accommodation," and the Boy Scouts is a membership organization rather than a facility or a structure; its activities are not tied to a fixed physical situs. The state supreme court asserted that "the various locations where Boy Scout troops meet fulfill the LAD 'place' requirement,"¹¹⁶ but never explained how those "places," which include private homes, church basements, and the wilderness, could be places of public accommodation.¹¹⁷ And the status of Scoutmaster is a "privilege" of the organization rather than a "privilege" of the places where the Boy Scouts meet. The state supreme court essentially equated membership associations with "places of public accommodation";¹¹⁸ that conclusion does not fit the statutory language. New Jersey's LAD also prohibits places of public accommodation from discriminating based on "creed," "age," "sex," and "gender identity or expression." Classifying the Boy Scouts as a "place of public accommodation" would prohibit the Scouts from setting minimum ages for Scoutmasters, requiring its members to believe in God, or excluding women or girls from membership or any leadership position. The state supreme court never addressed these implications of its ruling.¹¹⁹

¹¹² Law Against Discrimination, NJ Stat Ann § 10:5 (West).

¹¹³ NJ Stat Ann § 10:5-4.

¹¹⁴ See *Dale v Boy Scouts of America*, 734 A2d 1196 (NJ 1999).

¹¹⁵ See NJ Stat Ann § 10:5-3 ("The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State."). See also Rosenkranz, 115 Harv L Rev at 2139-40 (cited in note 25) (arguing that courts should generally follow such legislatively enacted interpretive instructions).

¹¹⁶ *Dale*, 734 A2d at 1210.

¹¹⁷ The state supreme court instead stated that the Boy Scouts *organization* was a "public accommodation" because it solicits participation from the public and maintains close relationships with governmental bodies. *Id.* at 1210-13. But the Boy Scouts *organization* is still not a "place"; only the locations where it meets can be "places," and none of those places is open to an unselected public.

¹¹⁸ *Id.* at 1210 ("A membership association . . . may be a 'place' of public accommodation.").

¹¹⁹ In an amicus brief filed with the Supreme Court in *Boy Scouts of America v Dale*, 530 US 640 (2000), New Jersey's Attorney General denied that the state supreme court's ruling

On writ of certiorari, the Boy Scouts asserted that the New Jersey Supreme Court's ruling violated the First Amendment; this federal-law claim brought the entire state-court judgment within the Supreme Court's jurisdiction under 28 USC § 1257. But *Murdock* forced the justices into a binary choice: either entrench a constitutional entitlement for membership organizations to discriminate against homosexuals, or affirm the state-court decision. Reversing the state court for misinterpreting New Jersey's Law Against Discrimination was off the table. Faced with this dichotomy, the justices sided with the Boy Scouts in a 5-4 vote.¹²⁰ The Court relied on prior cases that recognized a right to "expressive association" under the First Amendment,¹²¹ and held that the "forced inclusion of an unwanted person in a group" violates this right when it "affects in a significant way the group's ability to advocate public or private viewpoints."¹²²

It was unsurprising that the conservative justices voted to reverse the New Jersey Supreme Court; its ruling had threatened the Boy Scouts' institutional autonomy in ways extending far beyond the issue of homosexual Scoutmasters, and had done so with scant support from the language in the state's antidiscrimination statutes. The majority opinion even chided the New Jersey Supreme Court for "appl[ying] its public accommodations law to a private entity without even attempting to tie the term 'place' to a physical location."¹²³ But excluding the possibility of a state-law reversal induced the *Boy Scouts* Court to constitutionalize the justices' desire to prioritize the Boy Scouts' institutional autonomy over the New Jersey Supreme Court's desire to protect homosexuals from discrimination. And it is far from clear that the Supreme Court's opinion in *Boy Scouts* correctly interpreted the First and Fourteenth Amendments.¹²⁴

would compel the Boy Scouts to admit girls because of a statutory exemption for "any place of public accommodation which is in its nature reasonably restricted exclusively to one sex." See Brief of Amicus Curiae State of New Jersey in Support of Respondent, *Boy Scouts of America v Dale*, No 99-699, *12-13 n 2 (US filed Mar 29, 2000) (available on Westlaw at 2000 WL 339906), citing NJ Stat Ann § 10:5-12(f). This exemption, however, applies only to a separate antidiscrimination mandate in NJ Stat Ann § 10:5-12; it has nothing to say about the prohibitions at issue in the *Boy Scouts* litigation. See NJ Stat Ann § 10:5-4.

¹²⁰ *Boy Scouts*, 530 US 640.

¹²¹ See id at 647 (describing the right "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends"), quoting *Roberts v United States Jaycees*, 468 US 609, 622 (1984).

¹²² *Boy Scouts*, 530 US at 648.

¹²³ Id at 657. The Court's opinion also noted that "[f]our state supreme courts and one United States Court of Appeals have ruled that the Boy Scouts is not a place of public accommodation," and that "no federal appellate court or state supreme court—except the New Jersey Supreme Court in this case—has reached a contrary result." Id at 657 n 3.

¹²⁴ *Boy Scouts* has spawned a vast literature that includes both criticisms and defenses of the Court's opinion. Compare Andrew Koppleman, *Sign of the Times: Dale v. Boy Scouts of*

To begin, the New Jersey Law Against Discrimination was a facially neutral, generally applicable law targeting conduct, not speech or expression. Such laws may have incidental effects on an organization's ability to express itself, but the Supreme Court has long rejected claims that the First Amendment requires exemptions to such laws simply because someone mingles prohibited conduct with expressive activity.¹²⁵ Even if one believes that the First Amendment should require exemptions to antidiscrimination laws in certain extreme situations, such as a church's decision to hire and fire clergy, it does not follow that heightened scrutiny applies whenever an individual or an organization violates these or other laws for expressive reasons. The *Boy Scouts* opinion never explains why the Boy Scouts' attack on New Jersey's antidiscrimination law should be treated differently than other neutral, generally applicable conduct regulations that the Court

America and the Changing Meaning of Nondiscrimination, 23 *Cardozo L Rev* 1819 (2002) (criticizing the *Boy Scouts* opinion as "sheer lunacy"); Jed Rubenfeld, *The First Amendment's Purpose*, 53 *Stan L Rev* 767 (2001) (rejecting *Boy Scouts*' "reasoning and result") with Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 *S Cal L Rev* 119, 129 (2000) (defending the federal constitutional holding in *Boy Scouts*); David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 *Mo L Rev* 83 (2001) (same); Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 *Minn L Rev* 1639 (2001) (same).

¹²⁵ See, for example, *Virginia v Hicks*, 539 US 113, 123 (2003) (rejecting a First Amendment challenge to trespass policy, in part because it was applicable to "all persons . . . not just those who seek to engage in expression"); *Barnes v Glen Theatre, Inc.*, 501 US 560, 572 (1991) (Scalia concurring) (arguing that "general law[s] regulating conduct and not specifically directed at expression [are] not subject to First Amendment scrutiny at all"); *Oregon v Smith*, 494 US 872, 886 n 3 (1990) ("[G]enerally applicable laws unconcerned with regulating speech that have the effect of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment."); *Clark v Community for Creative Non-Violence*, 468 US 288 (1984) (finding that generally applicable regulations prohibiting camping in certain areas of national parks did not violate First Amendment rights, even when applied to protesters requesting permits to sleep at the site of their protests); *United States v O'Brien*, 391 US 367 (1968) (upholding a generally applicable law banning destruction of draft cards as applied to a defendant who publicly burned his draft card in an attempt to persuade others to adopt his anti-war beliefs). See also Rubenfeld, 53 *Stan L Rev* at 769 (cited in note 124) (noting that "[p]eople constantly want to violate laws for expressive reasons" and that "there is no such thing as a free speech immunity based on the claim that someone wants to break an otherwise constitutional law for expressive purposes").

To be sure, the justices will at times apply heightened scrutiny when facially neutral, generally applicable laws are applied to expressive conduct because of the message that it conveys. See Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 *Cornell L Rev* 1277, 1287-94 (2005) (collecting authorities). Consider, for example, the Court's holding in *Cohen v California*, 403 US 15 (1971), that the First Amendment shielded a war protestor's "F--- the Draft" jacket from a facially neutral and generally applicable breach-of-the-peace statute. But the New Jersey Supreme Court's conclusion that the Boy Scouts had violated the Law Against Discrimination did not depend on the expressive message that the Boy Scouts was attempting to convey; the problem was simply that it denied homosexuals access to something that the court deemed a "place of public accommodation." *Boy Scouts*, 734 A2d at 1230.

regularly upholds against First Amendment challenge without applying heightened scrutiny.¹²⁶

This is especially troubling because opposition to homosexuality did not appear to be central to the Boy Scouts' mission. The Scout Oath and Law fail explicitly to denounce homosexuality; they require only that a scout be "morally straight" and "clean." Perhaps the Scouts' leadership wanted to couch the organization's disapproval of homosexuality in these vague platitudes, given that they lead an organization of young, impressionable boys.¹²⁷ But that made it all the more difficult for the Scouts to demonstrate that homosexual Scoutmasters would "significantly affect" their ability to advocate viewpoints under the First Amendment. To accommodate the Boy Scouts, the Court held that the assertions in the Scouts' brief were sufficient to establish that the organization disapproved of homosexuality,¹²⁸ and that courts must "give deference to an association's view of what would impair its expression."¹²⁹ Even those who approve of *Boy Scouts*'s constitutional holding should be skeptical of the majority opinion's reasoning, which establishes a potentially far-reaching constitutional right to disregard laws for expressive reasons and makes little effort to cabin it to the situation presented in *Boy Scouts*.¹³⁰

¹²⁶ See, for example, Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 Pepperdine L Rev 641, 650–51 (2001) (noting the "mystery of why a neutral rule of general applicability, such as the New Jersey law against discrimination based on race, sex, or sexual orientation in institutions with a certain public character, should give way to any First Amendment objection . . . simply because the rule has the incidental effect, as applied to a particular group, of interfering with its freedom of expression" and concluding that "[a]nti-discrimination rules, it seems, furnish exceptions to that generalization"); Louis Michael Seidman, *The Dale Problem: Property and Speech under the Regulatory State*, 75 U Chi L Rev 1541, 1560 (2008) ("Perhaps, then, the *Dale* Court can be chastised for hypocrisy, having failed to apply its usual deference to a facially neutral law that had the effect of protecting the rights of gay men and lesbians."); Rubinfeld, 53 Stan L Rev at 769 (cited in note 124) ("[T]he Scouts' First Amendment claim should have been taken no more seriously than that of a tax protestor or that of a racist employer who demanded an exemption from Title VII on the theory that he wanted to discriminate for expressive, rather than merely commercial, reasons.").

¹²⁷ See Epstein, 74 S Cal L Rev at 129 (cited in note 124).

¹²⁸ *Boy Scouts*, 530 US at 651 ("The Boy Scouts asserts that it 'teach[es] that homosexual conduct is not morally straight,' Brief for Petitioners 39, and that it does 'not want to promote homosexual conduct as a legitimate form of behavior,' Reply Brief for Petitioners 5. We accept the Boy Scouts's assertion. We need not inquire further to determine the nature of the Boy Scouts's expression with respect to homosexuality.")

¹²⁹ *Id.* at 653 (claiming that homosexual Scoutmasters would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior").

¹³⁰ Laurence Tribe offers a rationale for the outcome in *Boy Scouts* that treats antidiscrimination laws as outside the domain of neutral, generally applicable laws. See Tribe, 28 Pepperdine L Rev at 653 (cited in note 126):

When the state decides to prohibit refusals to associate based on a given characteristic—whether race, gender, sexual orientation, religion, political affiliation, or something else—it

The Supreme Court also held that the New Jersey Supreme Court's interest in quelling discrimination against homosexuals was insufficient to overcome the Boy Scouts' First Amendment interests. This constitutionalized another controversial proposition, which many *Boy Scouts* critics regard as a grievous error.¹³¹ Yet even those who agree with the Court's decision to prioritize the Boy Scouts' institutional autonomy over the New Jersey Supreme Court's efforts to protect homosexuals from discrimination should be hesitant to support the Court's decision to entrench that holding as a matter of federal constitutional law. Our society's willingness to indulge discriminatory practices is sensitive to context and subject to change over time. And attitudes regarding the legitimacy of such anti-homosexuality policies could easily shift over the next few decades. Perceptions of homosexuality are strongly influenced by religious beliefs and competing empirical assumptions about its causes; as these wax or wane, or as new scientific discoveries sharpen understandings of homosexuality, future policymakers might reasonably conclude that antidiscrimination norms should take precedence over the Boy Scouts' desire to exclude homosexuals as Scoutmasters. At the very least, it was precarious for the justices to constitutionalize the notion that First Amendment interests can trump laws protecting homosexuals from discrimination, even in future situations where a representative legislature might clearly and explicitly opt for a contrary policy. This type of entrenchment risks ensconcing a policy that may prove to be misguided in light of future experience.¹³²

As for decision costs, the *Murdock* regime spared those that the Supreme Court would have incurred in reviewing the New Jersey Supreme Court's interpretation of the Law Against Discrimination. But these will be dwarfed by the decision costs that future courts and

is rarely, if ever, enacting a "neutral" rule of general applicability akin to a rule against destroying government property or using a dangerous and addictive substance . . . "[D]iscrimination" is but a pejorative label for the very thing the individual or group must do in order to express its contrary philosophy and transmit that philosophy to the next generation.

This may provide a plausible basis for reconciling *Boy Scouts* with the Court's general reluctance to recognize constitutionally mandated exceptions to neutral, generally applicable laws, but the *Boy Scouts* opinion does not purport to limit its holding to antidiscrimination laws. To the contrary, it recognizes that "[g]overnment actions that may unconstitutionally burden" the right of expressive association "may take many forms, one of which is 'intrusion into the internal structure or affairs of an association' like a 'regulation that forces the group to accept members it does not desire.'" *Boy Scouts*, 530 US at 648, quoting *Roberts*, 468 US at 623 (emphasis added).

¹³¹ See, for example, Koppleman, 23 *Cardozo L Rev* at 1835–37 (cited in note 124).

¹³² See, for example, Ronald J. Allen, *Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty*, 88 *Nw U L Rev* 436, 448 (1994) (arguing that the "complexity suffusing important issues" creates a "need to keep decisionmaking open").

litigants will face in resolving *Boy Scouts*-like First Amendment claims.¹³³ Practically any organization that intentionally discriminates against homosexuals, women, racial minorities, military recruiters, or other groups can characterize its discriminatory acts as “expressive association.” By deferring to the Boy Scouts’ characterizations of its expressive efforts and to its claim that the New Jersey court ruling “significantly burdens” the Boy Scouts, the Court’s opinion provides a potential First Amendment shield for anyone accused of unlawful discrimination. The Court tried to stave off these implications,¹³⁴ but it is hard to see a nonarbitrary basis for distinguishing the Boy Scouts’ decision to exclude a homosexual Scoutmaster from that of an employer or institution claiming to express beliefs about white supremacy or the role of women in society.¹³⁵ Earlier cases allowed government efforts to eradicate race or sex discrimination to override First Amendment expressive-association claims,¹³⁶ yet the *Boy Scouts* opinion asserts (without reasons or analysis) that the New Jersey Supreme Court’s desire to squelch discrimination against homosexuals is insufficient to tip the balance.¹³⁷ Many resources will be dissipated in future litigation as parties fight over whether an antidiscrimination norm is sufficiently “compelling” to overcome an organization’s desire to violate it, or whether the expressive-association claims should prevail. Of course, *Boy Scouts* was not the first case to recognize a constitutional right of expressive association; earlier cases, such as *Roberts v United States Jaycees*,¹³⁸ had indicated that federal courts would protect a

¹³³ Litigants have already invoked *Boy Scouts* to challenge the Solomon Amendment’s denial of federal funding to academic institutions that deny military recruiters access to their campuses, see *Rumsfeld v Forum for Academic and Institutional Rights*, 547 US 47 (2006), to challenge extensive border searches against entrants who attended Islamic conferences in Canada, see *Tabbaa v Chertoff*, 509 F3d 89 (2d Cir 2007), and to assert that public schools must recognize student organizations with restrictive membership criteria, see *Christian Legal Society v Martinez*, 130 S Ct 2971 (2010).

¹³⁴ *Boy Scouts*, 530 US at 652 (“That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.”).

¹³⁵ See, for example, Richard A. Posner, *Pragmatism versus Purposivism in First Amendment Law*, 54 Stan L Rev 737, 749 (2002) (stating that *Boy Scouts v Dale* “was decided incorrectly” because “laws against discrimination would be ineffectual if discrimination that was based on opinion—which much, maybe most, discrimination is based on—were constitutionally privileged”).

¹³⁶ See, for example, *Roberts*, 468 US at 623 (“We are persuaded that Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms.”); *Bob Jones University v United States*, 461 US 574, 604 (1983) (asserting that the government has a “compelling” interest in eradicating racial discrimination in education, which “outweighs” burdens on the University’s First Amendment rights).

¹³⁷ 530 US at 659 (“The state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’s rights to freedom of expressive association.”).

¹³⁸ 468 US 609 (1984).

“right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”¹³⁹ But *Boy Scouts* significantly expanded the reach of such rights by holding for the first time that they could trump antidiscrimination laws, and left future courts with little guidance on the extent to which expressive-association claims can displace neutral, generally applicable laws.

The Supreme Court could have avoided these problems by reversing the New Jersey court solely on state-law grounds and holding that the Boy Scouts failed to qualify as a “place of public accommodation” under New Jersey’s Law Against Discrimination. Indeed, any single justice in the 5-4 majority could have opted for a state-law reversal and deprived the Court’s opinion of the fifth vote necessary to entrench its holding as federal constitutional law. Either outcome would have countered the New Jersey Supreme Court’s overreaching and protected the Boy Scouts’ institutional autonomy without establishing a controversial federal constitutional pronouncement that threatens to impose high decision costs in future cases and high error costs if the justices’ views prove to be mistaken.

B. *Bouie v City of Columbia*

South Carolina’s trespass statute criminalized “entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry.”¹⁴⁰ Two African-Americans entered a restaurant that had no visible signs or notices stating that blacks were unwelcome. After they sat down, a restaurant employee displayed a “no trespassing” sign. The manager then asked the duo to leave; they refused and were arrested. At trial, the petitioners argued that their entry occurred *before* the notice that they were unwelcome. But the state supreme court affirmed their trespassing convictions, construing the statute to encompass those who remain on premises after receiving notice to leave.¹⁴¹

At the Supreme Court, the petitioners challenged their convictions under the Due Process and Equal Protection Clauses; these federal-law claims gave the Supreme Court jurisdiction over the entire state-court judgment under 28 USC § 1257. But the justices, influenced by *Murdock*, would not consider reversing the state supreme court simply for misinterpreting South Carolina’s trespass statute. Instead, they reversed on federal constitutional grounds in a 6-3 vote. The justices’ desire to

¹³⁹ Id at 622. See also John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 Tenn L Rev 485, 558 (2010).

¹⁴⁰ *Bouie v City of Columbia*, 378 US 347, 349 n 1 (1964) (emphasis added), quoting SC Code § 16-386 (Michie 1952 & Supp 1960).

¹⁴¹ See *City of Columbia v Bouie*, 124 SE2d 332 (SC 1962).

reverse the South Carolina Supreme Court was understandable; the state court had adopted an atextual reading of its trespass statute, likely motivated by bias against civil-rights demonstrators. But as *Murdock* foreclosed a reversal on state-law grounds, the Court had to concoct a federal constitutional violation in order to reverse the convictions.

Justice Brennan's meandering opinion purported to find one. After dispatching the petitioners' ex post facto and void-for-vagueness claims,¹⁴² it held that the state court's judgment violated the due-process requirement that a criminal statute "give fair warning of the conduct which it prohibits"¹⁴³ because the state court's interpretation was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue."¹⁴⁴

Once again, *Murdock*'s jurisdictional fiction induced the justices to issue a novel and unnecessary constitutional pronouncement in the course of reversing a dubious state supreme court ruling. Of course, *Bouie*'s constitutional holding was more fact-bound than the holding in *Boy Scouts*, and largely avoided the risk of error that arises whenever the justices decide to entrench a broad substantive principle to govern a divisive policy issue. But *Bouie*'s constitutional pronouncement has produced significant decision costs that the Court would have avoided had it reversed the South Carolina Supreme Court solely on state-law grounds. First, *Bouie*'s constitutional holding has empowered state prisoners to file habeas corpus petitions in federal district court challenging any alleged misinterpretations of state criminal statutes as constitutional due-process violations.¹⁴⁵ A state-law resolution in *Bouie* would have precluded such attempts to bootstrap statutory-construction issues into constitutional violations, and conserved judicial resources in future habeas corpus litigation.¹⁴⁶ (Federal district and appellate courts, unlike the Supreme Court, lack the prerogative to deny certiorari, and must resolve all claims in habeas corpus petitions

¹⁴² The Ex Post Facto Clause applies only to state legislatures. See US Const Art I, § 10 ("No State shall . . . pass any . . . ex post facto law."). See also *Marks v United States*, 430 US 188, 191 (1977) (stating that the Ex Post Facto Clause "is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government"). And the Court acknowledged that the South Carolina trespass statute was "admirably narrow and precise" and could not be void for vagueness. *Bouie*, 378 US at 351.

¹⁴³ *Bouie*, 378 US at 350.

¹⁴⁴ *Id* at 354.

¹⁴⁵ See, for example, *Webster v Woodford*, 369 F3d 1062 (9th Cir 2004) (rejecting a habeas corpus petitioner's due-process challenge to a state court's interpretation of California's robbery statute). See also *Hunter v United States*, 559 F3d 1188, 1190 (11th Cir 2009) (refusing to issue a certificate of appealability for a postconviction due-process challenge to a trial court's erroneous interpretation of a statutory sentencing enhancement), vacd and remd, 130 S Ct 1135 (2010).

¹⁴⁶ Federal habeas relief is unavailable for mere errors of state law. See *Lewis v Jeffers*, 497 US 764, 780 (1990).

on the merits.) Second, *Bouie* established a loose standard for deciding when a state court's interpretation of state law violates the Due Process Clause: it must be "unexpected" and "indefensible." This creates considerable latitude for judges who must decide whether to extend *Bouie* to other contexts, and imposes still more decision costs as litigants fight over just how "unexpected" and "indefensible" a state-court interpretation must be.¹⁴⁷ Reversing the South Carolina court solely on state-law grounds would have enabled the justices to vindicate the defendants while avoiding the need to expand federal constitutional law in this manner.

C. The 2000 Election Dispute

During the 2000 election controversy, George W. Bush twice asked the Supreme Court to review decisions in which the Florida Supreme Court had issued questionable interpretations of the state election code. Because of *Murdock*, these cases were litigated under the assumption that the justices lacked jurisdiction to reverse the Florida Supreme Court solely on state-law grounds. This left Bush's lawyers scrambling to find a federal-law ground that could supply not only a basis for jurisdiction, but also a basis for reversal.

In both cases, Bush's federal-law claims were weak. But the Supreme Court, as in *Bouie* and *Boy Scouts*, was reluctant to allow the state-court opinions to stand. Some have gone so far as to assert that this reflected nothing more than a partisan preference for a Bush presidency.¹⁴⁸ A more charitable view might attribute the justices' actions to their perception that the Florida Supreme Court was determined to rewrite Florida's election code in order to produce a Gore victory.¹⁴⁹ Whatever the justices' motives, the *Murdock* regime caused them to issue unpersuasive pronouncements of constitutional law that left many Gore supporters believing that the election had been stolen. In a world without *Murdock*, the Supreme Court could have intervened in a more statesmanlike manner to counter what the justices perceived as the Florida Supreme Court's disregard of state election

¹⁴⁷ See, for example, *Rogers v Tennessee*, 532 US 451 (2001) (refusing, by a 5-4 vote, to extend *Bouie* to the Tennessee Supreme Court's decision to abolish the common-law rule that precluded a murder conviction when the victim lived more than a year and a day after the attack).

¹⁴⁸ More than five hundred people describing themselves as "teachers whose lives have been dedicated to the rule of law" signed a letter accusing the five justices in the *Bush v Gore* majority of "acting as political proponents for candidate Bush, not as judges." See *554 Law Professors Say*, NY Times A7 (Jan 13, 2001) (advertisement attributed to Law Professors for the Rule of Law).

¹⁴⁹ See, for example, David A. Strauss, *Bush v Gore: What Were They Thinking?*, 68 U Chi L Rev 737, 738 (2001).

law while still giving Vice President Gore and the country a meaningful opportunity to ensure that Bush had won.

1. *Bush v Palm Beach County Canvassing Board.*

Florida's election-night tally had Bush leading Gore by a slim margin, and Florida's election code required all counties to certify their vote totals by 5:00 PM on the seventh day following an election.¹⁵⁰ In 2000, this date was November 14. During that seven-day window, candidates may "protest" a county's election returns as "being erroneous" and "request" a manual recount in that county.¹⁵¹ The county canvassing board "may authorize" a partial hand count in response to such a request,¹⁵² and if that partial recount indicates an "error in the vote tabulation which could affect the outcome of the election," the county canvassing board can "manually recount all ballots."¹⁵³ If a county canvassing board manually recounts all ballots, but fails to file its amended returns within the seven-day protest window, the secretary of state "may" ignore those results and certify the returns on file.¹⁵⁴ (Another statute said that such late returns "shall be ignored" in the certified results.¹⁵⁵ Either way, the secretary undoubtedly had the *power* to ignore late returns.) After the secretary certifies a winner, a candidate may "contest" the certified election results in court.¹⁵⁶

Gore filed "protests" and requested manual recounts in four of Florida's most Democratic-leaning counties. All four counties opted for a full manual recount, but only one (Volusia) completed the task by November 14. When the secretary of state announced that she would ignore the results of any manual recount not completed before the November 14 certification deadline, the Florida Supreme Court issued a unanimous decision in *Palm Beach County Canvassing Board v Harris*¹⁵⁷ commanding the secretary to postpone certification until

¹⁵⁰ See Fla Stat Ann § 102.111(1) (West 2000).

¹⁵¹ See Fla Stat Ann §§ 102.112(1), 102.166(1), 102.166(4)(a).

¹⁵² See Fla Stat Ann § 102.166(4)(c). See also *Broward County Canvassing Board v Hogan*, 607 S2d 508, 510 (Fla App 1992) ("The statute clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board.").

¹⁵³ Fla Stat Ann § 102.166(5)(a)–(c).

¹⁵⁴ See Fla Stat Ann § 102.112(1).

¹⁵⁵ See Fla Stat Ann § 102.111(1).

¹⁵⁶ Fla Stat Ann § 102.168(1) ("[T]he certification of election or nomination of any person to office . . . may be contested in the circuit court by any unsuccessful candidate for such office or nomination.").

¹⁵⁷ 772 S2d 1220 (Fla 2000).

5:00 PM on November 26 and include the results of any manual recounts completed before that time.¹⁵⁸

This ruling was irreconcilable with the provisions in Florida's election-protest statute. To begin, Florida's election code explicitly delegated interpretive authority over its provisions to the secretary of state.¹⁵⁹ Even without that provision, the secretary's refusal to accommodate the manual recounts was undoubtedly permissible under the protest statute, which says that late returns "may be ignored" in the certified results. It was the secretary of state's prerogative to decide whether to certify returns filed after the statutory deadline; absent a constitutional violation or an abuse of discretion, the Florida Supreme Court could not arrogate this power to itself.¹⁶⁰ The Florida Supreme Court tried to assert that the seven-day certification deadline "conflicted" with the provisions allowing the county canvassing boards to conduct manual recounts on the theory that manual recounts might extend beyond that deadline in populous counties or if a candidate waits until the sixth day to request a hand count.¹⁶¹ But that is not a statutory conflict. If time is short, the county canvassing board can forego the manual recount (no provision of Florida law *requires* manual recounts at the protest phase), or it can ask the secretary of state

¹⁵⁸ The court declared that the secretary could enforce the seven-day certification deadline "only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." Id at 1239.

¹⁵⁹ Fla Stat Ann § 97.012 (giving the Secretary of State responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws").

¹⁶⁰ The secretary had valid reasons for ignoring the late manual recounts. Including them could bias the certified results by including hand counts from heavily Democratic counties while entirely excluding undervotes from more Republican-leaning counties in the state. And there were reasons to doubt the accuracy and integrity of the manual recounts; the Broward County Canvassing Board counted dimpled chads as votes (even on ballots where the voter punched through chads for nonpresidential candidates), see Mike Williams, *Florida Names Bush Winner as He Asks Gore to Halt Fight*, Atlanta Journal-Constitution A1 (Nov 27, 2000), and the Palm Beach County Canvassing Board changed its treatment of dimples multiple times throughout its manual recount, see Lynette Holloway and Rick Bragg, *Tempers Flare as Broward Recount Plods On*, NY Times A1 (Nov 24, 2000).

¹⁶¹ In the Florida Supreme Court's words:

[L]ogic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days. The protest provision thus conflicts with section 102.111 and 102.112, which state that the Boards "must" submit their returns to the Elections Canvassing Commission by 5:00 p.m. of the seventh day following the election or face penalties. For instance, if a party files a pre-certification protest on the sixth day following the election and requests a manual recount and the initial manual recount indicates that a full countrywide recount is necessary, the recount procedure in most cases could not be completed by the deadline in sections 102.111 and 102.112, i.e., by 5:00 p.m. of the seventh day following the election.

Palm Beach County Canvassing Board, 772 S2d at 1233.

to exercise her discretion to accept the late results. And even if these provisions in the protest statute conflicted with each other, the prerogative to resolve that conflict belonged to the secretary of state, not the Florida Supreme Court.¹⁶² Finally, the Florida Supreme Court suggested (without explicitly holding) that adhering to the November 14 certification deadline might contravene state constitutional provisions guaranteeing the right to vote.¹⁶³ But if this right to vote requires manual recounts when voters fail to mark their ballots in a machine-readable manner, then that should require protest-stage hand counts in every Florida county, not just the four Democratic-leaning counties handpicked by Gore. Whatever protections the state constitution confers on voters must extend equally to voters in Bush-leaning counties; if it guarantees them a right to protest-stage hand counts in close elections, that right cannot be defeasible at the whim of the Gore campaign. The Florida Supreme Court was unwilling to interpret the state constitution to require such statewide measures, and it therefore had no basis to rewrite the election-protest statute in the guise of avoiding a constitutional violation.

Of course, 28 USC § 1257 blocked Bush from seeking Supreme Court review unless he could present a federal claim. His certiorari petition relied on Article II, § 1, clause 2 of the Constitution, which requires states to appoint presidential electors “in such Manner as the Legislature thereof may Direct,” and argued that the Florida Supreme Court’s interpretation of the election-protest statute had unconstitutionally changed the legislature’s “manner” of appointing presidential electors. The Supreme Court then granted certiorari in *Bush v Palm*

¹⁶² See note 159. Akhil Amar has defended the Florida Supreme Court’s actions in the recount litigation by suggesting that the Florida legislature implicitly delegated authority to the Florida judiciary to construe liberally the state’s election statutes. See Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 U Fla L Rev 945, 953–56 (2009). That view is hard to square with the provision of Florida’s election code that explicitly delegated interpretive authority over Florida’s election statutes to the secretary of state. See note 159. Nor is it plausible to believe that legislation that establishes a deadline implicitly delegates power to the state’s courts to replace it with a deadline of their own choosing; implied delegations exist only when a statute contains ambiguity. See, for example, *Chevron U.S.A. Inc v NRDC*, 467 US 837 (1984). See also *United States v Locke*, 471 US 84, 89–90, 93–96, 98–100 (1985) (holding that a statute requiring certain documents to be filed “prior to December 31” precludes courts from accepting documents filed on December 31, even for litigants who acted in good faith and mistakenly construed the statute to mean that they could “wait[] until December 31 to submit” their documents).

¹⁶³ See *Palm Beach County Canvassing Board*, 772 S2d at 1239 (“Because the right to vote is the preeminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county’s returns filed after the initial statutory date are limited.”); *id* at 1240 (“[T]o allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members . . . misses the constitutional mark.”).

*Beach County Canvassing Board*¹⁶⁴ and unanimously vacated the Florida Supreme Court's ruling. *Murdock* precluded the justices from directly reviewing the Florida Supreme Court's interpretation of state law, so the justices relied exclusively on Article II grounds. They did not go so far as to hold that the Florida Supreme Court had violated Article II, § 1, clause 2; they stated only that they were "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2."¹⁶⁵

The Supreme Court's decision to rely on these federal constitutional grounds in *Bush v Palm Beach County Canvassing Board* was problematic for several reasons. First, it was far from evident that Article II, § 1, clause 2 even applied to Florida's election-protest statute; only statutes that "direct" the "manner" of appointing presidential electors can be immune from judicial revision. Section 103.011 of the Florida Statutes was the provision specifying that presidential electors "shall be elected" by the voters in a winner-take-all election, and it required the secretary of state to certify "the presidential electors of the candidates for President and Vice President who receive the highest number of votes," without specifying whether those votes should be counted by machine or hand. *Bush*, however, was challenging the Florida Supreme Court's interpretation of the election-protest statute, a statute that applied across the board to *all* Florida elections. It is hard to believe that a violation of Article II, § 1, clause 2 occurs whenever a state court misinterprets a provision in a state's general election code that incidentally affects a state's final vote tally in a presidential election. Such a view could allow even nonpresidential candidates to launch constitutional challenges to state-court interpretations of statutes defining the scope of the franchise or establishing election-dispute mechanisms, so long as those statutes also apply in the state's presidential election. That the Florida Supreme Court's alleged misconstruction of the election-protest statute might have affected the outcome of the 2000 presidential election does not mean that it changed the "manner" for appointing presidential electors into something other than the winner-take-all, statewide election that the Florida legislature had "directed" in § 103.011 of the Florida Statutes.¹⁶⁶ It is not as though the Florida Supreme Court had ordered that the presidential electors be chosen by congressional district, or awarded in proportion to the candidate's statewide popular vote.

¹⁶⁴ 531 US 70 (2000).

¹⁶⁵ *Id.* at 78.

¹⁶⁶ See Fla Stat Ann § 103.011 (West 2000).

Second, by criticizing the Florida Supreme Court's inattention to Article II, § 1, clause 2, the opinion in *Bush v Palm Beach County Canvassing Board* left the Florida Supreme Court justices in a catch-22 when they ordered a statewide recount of undervotes in *Gore v Harris*:¹⁶⁷ If they specified a uniform standard for discerning the "intent of the voter," they would risk a reversal on Article II grounds for imposing a definition of "legal vote" that the state legislature had not "directed."¹⁶⁸ But leaving the "intent of the voter" vague and unresolved would open the door to the arbitrary and inconsistent treatment of ballots that the justices later held to be an equal-protection violation in *Bush v Gore*.¹⁶⁹

2. *Bush v Gore*.

By the time the Supreme Court issued its ruling in *Bush v Palm Beach County Canvassing Board*, Bush had been certified as the winner and the recount proceedings were in the "contest" stage. Florida's contest statute allowed Gore to challenge the certified election results if he could show the "rejection of a number of legal votes sufficient to change or place in doubt the result of the election,"¹⁷⁰ and it authorized the "circuit judge to whom the contest is presented" to "provide relief appropriate under the circumstances."¹⁷¹ The circuit court denied relief, but the Florida Supreme Court, in *Gore v Harris*, held that all ballots displaying the clear intent of the voter were "legal votes," even if unreadable by machines, and that the machines' inability to read such ballots were "rejections" of such votes. The court then ordered a manual recount of undervotes (but not overvotes) in every Florida county.

This decision to order a statewide recount was controversial, but it did not fly in the face of any legislative directive, as the earlier Florida Supreme Court decision had done. To be sure, many have questioned whether *Gore v Harris* adopted the most plausible interpretation of the contest statute; the provision for a precertification "protest" phase implies a more modest role for courts at the contest stage, limited to reviewing the earlier decisions of county canvassing boards.¹⁷² But the statutory language is vague—a court can "provide

¹⁶⁷ 773 S2d 524 (Fla 2000).

¹⁶⁸ See *id.* at 526 ("The 'intent of the voter' standard adopted by the Legislature was the standard in place as of November 7, 2000, and a more expansive ruling would have raised an issue as to whether this Court would be substantially rewriting the Code after the election, in violation of article II, section 1, clause 2 of the United States Constitution and 3 U.S.C. § 5 (1994).").

¹⁶⁹ 531 US 98 (2000).

¹⁷⁰ Fla Stat Ann § 102.168(3)(c).

¹⁷¹ Fla Stat Ann § 102.168(8).

¹⁷² See, for example, *Bush v Gore*, 531 US at 118 (Rehnquist concurring); Richard A. Epstein, "In Such Manner as the Legislature Thereof May Direct": *The Outcome in Bush v Gore*

any relief appropriate under the circumstances”—and, more importantly, the judiciary (rather than the secretary of state) is the institution charged with resolving contest disputes. The problem in *Gore v Harris* was that the Florida Supreme Court did not appear to exercise its discretion in an impartial or prudent manner. It never explained why it excluded overvotes from the statewide-recount order, which appeared to stack the deck against Bush because overvotes may have been handcounted in the four Democratic-leaning counties that manually recounted their ballots during the protest phase.¹⁷³ It issued the recount order on December 8 in the face of looming deadlines brought about by its earlier decision to extend the protest phase beyond November 14. And the Florida Supreme Court failed even to acknowledge, let alone resolve, Bush’s legal challenge to Broward County’s decision to include dimpled chads as votes, leaving the status of dimples unresolved as the statewide recount began.

Bush again asked the Supreme Court to review the Florida Supreme Court’s judgment. This time, the Court held in *Bush v Gore* that the recount order violated the Equal Protection Clause because the court-mandated “intent of the voter” standard lacked safeguards to ensure equal treatment for dimpled chads and other recurrent ballot issues, and a 5-4 majority refused to order a new recount to proceed under uniform standards.¹⁷⁴

3. The effects of *Murdock* on the Supreme Court’s rulings.

Events could have unfolded differently in a world without *Murdock*. Both the Bush and Gore campaigns could have benefited if the Supreme Court had simply reviewed the Florida Supreme Court’s interpretations of state law and avoided the need to decide the federal constitutional issues that Bush’s lawyers raised in *Bush v Palm Beach County Canvassing Board* and in *Bush v Gore*. In the former case, the justices’ disapproval of the Florida Supreme Court’s decision to extend the certification deadline should have led them to reverse solely on state-law grounds without opining on the Article II issue. That would have prevented the Supreme Court’s Article II pronouncement from looming over the contest proceedings, where it may have deterred the Florida Supreme Court from specifying uniform standards

Defended, 68 U Chi L Rev 613, 629–34 (2001); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v Gore*, 68 U Chi L Rev 657, 668–69 (2001); Richard A. Posner, *Bush v Gore: Prolegomenon to an Assessment*, 68 U Chi L Rev 719, 728–32 (2001).

¹⁷³ Chief Justice Wells’s dissenting opinion criticized the majority for its unexplained refusal to include overvotes in the statewide recount, yet the majority did not deign to reply. See *Gore v Harris*, 772 S2d at 1264 n 26 (Wells dissenting).

¹⁷⁴ See *Bush v Gore*, 531 US at 105–12.

for counting ballots in *Gore v Harris* out of fear that any such pronouncement would lead to an Article II reversal at the Supreme Court.¹⁷⁵ A prompt, state-law reversal in *Bush v Palm Beach County Canvassing Board* would have aided Bush by enabling the secretary of state to certify him as the winner sooner. But it also would have aided Gore's recount efforts by giving him extra time to pursue manual recounts during the post-certification contest stage. And the Florida courts would have been able to specify uniform standards for the treatment of dimples without facing the dilemma of contradicting standards that county canvassing boards used during the protest-phase hand counts, as those hand counts would no longer be included in the certified vote tally. Under this scenario, the Supreme Court might not even have intervened in *Bush v Gore*. If the Florida Supreme Court had issued a statewide recount order that specified uniform standards for deciphering votes on ballots, there would have been no grounds for the equal-protection claim that convinced the justices to reverse the recount order in *Bush v Gore*.

And in *Bush v Gore*, the justices' desire to reverse the *Gore v Harris* recount order should have led them to issue a state-law reversal rather than an equal-protection holding. The recount order's failure to ensure uniform treatment among voters is a problem that infects every election, including the initial vote cast on Election Day 2000, where different counties used different ballots and different vote-counting machinery. To declare this an equal-protection violation is to question the constitutional validity of every election,¹⁷⁶ and proclaiming that the holding is "limited to the present circumstances"¹⁷⁷ conveys an impression that the Court's equal-protection analysis rested on partisan preferences rather than neutral principles. The real flaws in the Florida Supreme Court's *Gore v Harris* ruling were its unexplained decision to exclude overvotes, its decision to order a statewide recount only days before the electoral college was scheduled to meet, and its failure to acknowledge or resolve Bush's legal challenges to Broward County's inclusion of dimpled chads.¹⁷⁸ The justices could have invoked these shortcomings to show that the Florida Supreme Court failed to provide "relief appropriate under the circumstances" under Florida's election-contest statute; this would have enabled the justices to reverse solely on state-law grounds and avoid any need to resolve Bush's weak equal protection claim.

¹⁷⁵ See note 168 and accompanying text.

¹⁷⁶ See, for example, Amar, 61 U Fla L Rev at 962 (cited in note 162).

¹⁷⁷ See *Bush v Gore*, 531 US at 109.

¹⁷⁸ See note 173 and accompanying text.

In both *Bush v Palm Beach County Canvassing Board* and *Bush v Gore*, *Murdock*-related habits of thinking led the Supreme Court to adopt problematic constitutional rationales for judgments that should have rested exclusively on state-law grounds. The equal-protection holding in *Bush v Gore* has created significant new decision costs in election-contest litigation; the justices' efforts to minimize these costs by limiting their constitutional holding to the facts of *Bush v Gore*¹⁷⁹ has failed to prevent courts and litigants from invoking the equal-protection analysis in routine election disputes.¹⁸⁰ The error costs of the constitutional holdings in those cases are also significant. Justice Stevens may have overstated matters by asserting that these costs included the loss of "the Nation's confidence in the judge as an impartial guardian of the rule of law,"¹⁸¹ but the Court's equal-protection analysis and its "this train only" caveat have led many to denounce *Bush v Gore*'s constitutional holding as lawless.¹⁸² And it is particularly hard to defend the Court's remedy in *Bush v Gore*; after concluding that the Florida Supreme Court's recount order violated the Equal Protection Clause, the justices should have remanded for a new recount to proceed under uniform standards.¹⁸³

¹⁷⁹ See *Bush v Gore*, 531 US at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.")

¹⁸⁰ See, for example, *Coleman v Franken*, 767 NW2d 453 (Minn 2009) (resolving a contest to a US Senate election that relied, in part, on *Bush v Gore*); *League of Women Voters of Ohio v Brunner*, 548 F3d 463, 477–78 (6th Cir 2008) (allowing litigants to pursue a *Bush v Gore* challenge to Ohio's voting system); *Black v McGuffage*, 209 F Supp 2d 889, 898 (ND Ill 2002) (noting that the "rationale behind" *Bush v Gore* allowed litigants to state an equal-protection claim when a state used "different types of voting equipment with substantially different levels of accuracy"). See also Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 Stan L Rev 1, 5 (2007) ("*Bush v. Gore*'s main legacy has been to increase the amount of election-related litigation.").

¹⁸¹ *Bush v Gore*, 531 US at 129 (Stevens dissenting).

¹⁸² See, for example, Strauss, 68 U Chi L Rev at 756 (cited in note 147); Cass R. Sunstein, *Order without Law*, 68 U Chi L Rev 757, 759 (2001); Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 Const Comment 571, 574 (2002); Michael J. Klarman, *Bush v. Gore through the Lens of Constitutional History*, 89 Cal L Rev 1721, 1723 (2001). Some law clerks from the Supreme Court's October Term 2000 believed that the *Bush v Gore* decision was so lawless that it released them from their obligations of confidentiality to the Court. See David Margolick, Evgenia Peretz, and Michael Shnayerson, *The Path to Florida*, Vanity Fair 310, 320 (Oct 2004) (quoting an anonymous law clerk who rationalized his actions as follows: "We feel that something illegitimate was done with the Court's power, and such an extraordinary situation justifies breaking an obligation we'd otherwise honor Our secrecy was helping to shield some of those actions.").

¹⁸³ The per curiam opinion defended its refusal to order a new recount by claiming that Florida wanted to satisfy a safe-harbor provision in the Electoral Count Act, 3 USC § 5, which would immunize Florida's electors from congressional challenge if finally determined on or before December 12, 2000. Because the Supreme Court issued its decision shortly before midnight on December 11, there was insufficient time to complete a constitutional recount before the safe-harbor date. Yet nothing in Florida's election code established the December 12 safe-harbor date as a mandatory deadline for resolving presidential election disputes. The justices inferred this supposed requirement of state law from statements in Florida Supreme Court

State-law reversals could have avoided all of these problems. Although such reversals would have caused the Court to incur the decision costs associated with resolving issues of Florida election law in the 2000 election litigation, these are one-time decision costs; they would not have imposed decisional burdens on future courts by manufacturing novel constitutional doctrines to govern election disputes. The risk of error would also have been lower had the justices based their decisions to set aside the Florida Supreme Court's rulings on state-law grounds rather than on federal constitutional law. The Florida Supreme Court's initial decision to extend the certification deadline was a clear departure from the state's election-protest statute; the justices could have reversed this decision without risking a novel and questionable constitutional pronouncement on the Article II, § 1, clause 2 issue. And the justices' decision to vacate the statewide recount order in *Gore v Harris* would have been far more defensible had it rested solely on state-law grounds. The election-contest statute empowered the state judiciary to issue "relief appropriate under the circumstances," and the Florida Supreme Court's unexplained refusal to include overvotes in the statewide recount and its unwillingness to address Bush's challenges to dimpled chads appeared to evince bias sufficient to disqualify the recount order as "appropriate" relief. Even if the justices might have misinterpreted Florida election law in the process of resolving the cases solely on state-law grounds, such mistakes would have been easier to change than decisions that misconstrue federal constitutional provisions. The former can be amended with new state legislation, whereas the latter can be changed only by constitutional amendments or new Supreme Court appointments. The 2000 election litigation vividly illustrates the problems that can arise when the *Murdock* regime forces the justices to choose between allowing a questionable state supreme court ruling to stand and reversing on federal constitutional grounds.

D. Punitive Damages

In the early 1990s, BMW refinished a newly manufactured automobile after its paint sustained acid-rain damage and sold it to Ira Gore without disclosing this fact. This nondisclosure was consistent with BMW's nationwide policy in cases where a new car had sustained damage but the costs of repair were less than 3 percent of the sales

opinions, but even those opinions never went so far as to suggest that state law would forbid recounts that extend beyond that federal safe-harbor date. See *Gore v Harris*, 773 S2d at 528–29 (Shaw concurring) ("December 12 was not a 'drop-dead' date under Florida law. . . . It certainly was not a *mandatory* contest deadline under the plain language of the Florida Election Code (i.e., it is not mentioned there) or this Court's prior rulings.").

price. When Gore discovered that his car had been refinished, he sued BMW for fraud. An Alabama jury awarded him \$4,000 in compensatory damages and \$4 million in punitive damages. The jury computed the punitive damages by multiplying Gore's compensatory damages by the number of BMW's similar sales throughout the United States, even though BMW's nondisclosure policy is legal in many US jurisdictions. The trial court denied BMW's new-trial motion, and the Alabama Supreme Court affirmed this denial on the condition that Gore accept a remittitur of \$2 million in punitive damages. The Alabama Supreme Court held that the jury erred by using BMW's out-of-state acts as a multiplier,¹⁸⁴ but did not explain how it decided that \$2 million was an appropriate remittitur.¹⁸⁵

BMW petitioned for certiorari and alleged that this \$2 million punitive-damages award violated its constitutional rights under the Fourteenth Amendment's Due Process Clause. The Supreme Court granted certiorari in *BMW v Gore*¹⁸⁶ and, for the first time in its history, invalidated a punitive-damages award under the federal Constitution. A 5-4 majority held that the Fourteenth Amendment's Due Process Clause prohibits states from imposing "grossly excessive" punishments on tortfeasors, and requires "fair notice" of the "severity of the penalty that a State may impose."¹⁸⁷ The majority thought BMW lacked fair notice of this \$2 million award because its conduct was insufficiently reprehensible, the state-law civil penalties for its misconduct were only \$2,000, and the 500-to-1 ratio between the punitive and actual damages was "breathtaking" and unjustifiable.¹⁸⁸ The dissenters protested this decision to create a new constitutional law of punitive damages as lacking any textual basis in the Constitution,¹⁸⁹ being incapable of principled application,¹⁹⁰ and saddling state and federal courts with the daunting responsibility of measuring every punitive-damages award against BMW's constitutional test, in addition to the already-established common-law standards for granting new trials or remittiturs.¹⁹¹

¹⁸⁴ See *BMW v Gore*, 646 S2d 619, 627 (Ala 1994) ("[T]his jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award. Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful.").

¹⁸⁵ See *id.* at 629.

¹⁸⁶ 517 US 559 (1996).

¹⁸⁷ *Id.* at 574.

¹⁸⁸ *Id.* at 574-75, 583.

¹⁸⁹ *Id.* at 599 (Scalia dissenting).

¹⁹⁰ *BMW*, 517 US at 602-07; *id.* at 612 (Ginsburg dissenting) ("Tellingly, the Court repeats that it brings to the task no 'mathematical formula,' no 'categorical approach,' no 'bright line.' It has only a vague concept of substantive due process, a 'raised eyebrow' test, as its ultimate guide.").

¹⁹¹ *Id.* at 605-07 (Scalia dissenting).

Once again, the *Murdock* illusion precluded the justices from reversing the Alabama Supreme Court's judgment on state-law grounds, and forced the justices to choose between affirming the punitive-damages award and creating a novel and contentious federal constitutional doctrine to counter the excessive jury verdict in that case. Yet BMW's federal constitutional claim gave the Court jurisdiction over the entire state-court "judgment or decree" under 28 USC § 1257, and the justices could have overturned the punitive-damages award by relying solely on Alabama law, which provides that punitive damages "must not exceed an amount that will accomplish society's goals of punishment and deterrence."¹⁹² It would have been far more defensible for the Supreme Court majority to have granted BMW's new-trial motion on the ground that the \$2 million punitive-damages award was inconsistent with this state common-law standard, rather than constitutionalizing punitive-damages law and holding that this large jury verdict violated the Fourteenth Amendment's Due Process Clause.

Consider first the risk of error costs in a decision to reverse the Alabama Supreme Court on federal constitutional grounds. The Eighth Amendment prohibits "excessive" bail and fines in criminal proceedings, yet no constitutional provision purports to create uniform federal protections against excessive civil jury verdicts. To justify its constitutional holding, the *BMW* Court had to rely on "substantive due process," a controversial doctrine that many jurists and commentators deem illegitimate. Even those who embrace the Court's use of substantive due process in other contexts should be wary of using this doctrine to protect economic rights or business interests; such substantive-due-process rulings have produced some of the most reviled and discredited Supreme Court decisions of all time.¹⁹³ "Substantive due process" is also an awkward fit with the constitutional text,¹⁹⁴ and departures from constitutional language weaken the document's ability to serve as a focal point that enables a diverse society to agree on what qualifies as law.¹⁹⁵ There is little reason for the executive branch to forbear from using loose interpretative techniques to declare "unconstitutional" laws or

¹⁹² *Green Oil Co v Hornsby*, 539 S2d 218, 222 (Ala 1989).

¹⁹³ See, for example, *Dred Scott v Sandford*, 60 US (19 How) 393 (1857); *Lochner v New York*, 198 US 45 (1905).

¹⁹⁴ See, for example, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 Va L Rev 493 (1997); Henry P. Monaghan, *Our Perfect Constitution*, 56 NYU L Rev 353, 353-60 (1981); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (Harvard 1980).

¹⁹⁵ See, for example, David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L J 1717, 1733-35 (2003) ("Every time the [Constitution's] text is ignored or obviously defied, its ability to serve as common ground, as a focal point, is weakened. . . . It may be that if one person cheats, by failing to follow the text, others are more likely to cheat too, and soon the ability of the text to coordinate behavior will be lost, to everyone's detriment.").

policies that it regards as normatively undesirable when Supreme Court opinions invoke similar techniques on behalf of the justices' preferred goals.¹⁹⁶

If the *BMW* Court had relied on state law to reverse the Alabama Supreme Court, it would have applied Alabama's common-law rule limiting punitive damages to an "amount that will accomplish society's goals of punishment and deterrence."¹⁹⁷ This would have provided the justices with a rule of decision that was clearly established in Alabama law, rather than leaving the justices to invent their own "guideposts" for measuring punitive damages and equate these substantive constraints with "due process of law." Applying this state-law standard would have removed any need to rely on the contentious idea that the Due Process Clause authorizes judges to create and impose substantive policies on state governments, while eliminating any challenge to the legitimacy of the legal standard that the justices would apply. There would still be some risk that the justices might misapply this state-law standard to the facts of *BMW*, but the worst-case scenario would be a Supreme Court opinion that makes a one-time misapplication of a state-law doctrine. It would avoid risking a mistaken federal constitutional pronouncement that can be fixed only with a constitutional amendment or new Supreme Court appointments.

A state-law reversal also would have avoided the decision costs that *BMW*'s constitutional holding imposes on future courts. *BMW* now requires every federal and state court to undertake an open-ended constitutional inquiry into "gross excessiveness" whenever a jury returns an arguably disproportionate verdict; courts must apply this constitutional test in addition to the common-law standards for new trials and remittiturs whenever a litigant challenges the size of a punitive-damages award. In most if not all cases, these constitutional and common-law standards will diverge. The *BMW* Court requires

¹⁹⁶ The Bush administration's legal memoranda provide abundant examples of this. See, for example, DOJ, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan 19, 2006), online at <http://www.usdoj.gov/opa/whitepaperonnsa/legalauthorities.pdf> (visited Feb 7, 2010); DOJ, Office of Legal Counsel, Office of the Assistant Attorney General, *Memorandum for Alberto R. Gonzales, Counsel to the President: Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (Aug 1, 2002), online at http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug2002.pdf (visited Feb 7, 2010).

¹⁹⁷ *Green Oil*, 539 S2d at 222. Alabama law also requires courts to consider seven factors when determining whether punitive damages are excessive. These include: (1) the relationship between the amount of punitive damages and the actual or likely harm from the defendant's conduct; (2) the degree of reprehensibility of the defendant's conduct; (3) whether the defendant profited from the wrongful conduct; (4) the financial position of the defendant; (5) the costs of litigation; (6) whether criminal sanctions have been imposed on the defendant; and (7) whether other civil actions have been filed against the same defendant based on the same conduct. See *id.* at 223–24.

courts to consider three “guideposts”: the “degree of reprehensibility,” the ratio between the amount of punitive damages and the actual harm inflicted on the plaintiff, and the civil or criminal penalties that could be imposed for comparable misconduct. State-law standards for granting new trials or remittiturs may or may not include these factors, and may require courts to consider factors beyond those mentioned in *BMW*.¹⁹⁸ A state-law reversal would have avoided an outcome that requires future courts to apply overlapping federal-law and state-law standards for judicial review of punitive-damage awards. This approach would have enabled the Supreme Court to avoid imposing decision costs on future courts with its constitutional “excessiveness” inquiry, along with the potential error costs of *BMW*’s constitutional analysis.

* * *

These examples just scratch the surface in demonstrating how the *Murdock* regime’s prohibition on state-law reversals has caused the justices to use federal constitutional law as a substitute weapon for counteracting state supreme court rulings that they deem mistaken. In addition to the above-described cases, the Supreme Court’s decision in *World-Wide Volkswagen v Woodson*¹⁹⁹ relied on constitutional due-process grounds to reverse a state supreme court’s dubious interpretation of Oklahoma’s enumerated long-arm statute;²⁰⁰ *New York Times v Sullivan*²⁰¹ constitutionalized the law of defamation in response to a state supreme court decision that misapplied Alabama’s defamation law and upheld a \$500,000 verdict without any showing of actual damages;²⁰² and *Caperton v A.T. Massey Coal Co*²⁰³ reversed, on constitutional due-process grounds, a state court’s questionable interpretation of state-law rules governing judicial recusals.²⁰⁴

But rulings that expand federal constitutional law will often be costly substitutes for state-law reversals. In many cases, the risk of error will be higher when the justices issue a controversial federal constitutional pronouncement in the course of reversing a state supreme

¹⁹⁸ See note 197.

¹⁹⁹ 444 US 286 (1980).

²⁰⁰ Id at 291.

²⁰¹ 376 US 254 (1964).

²⁰² See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U Chi L Rev 782, 790, 793–94, 816 & n 55 (1986) (noting that the Alabama Supreme Court’s decision had misapplied state defamation law, including a state statute that denied a public officer recovery of punitive damages in a libel action regarding his official conduct unless he first made a written demand for a public retraction and the defendant failed or refused to comply, and that the plaintiffs failed to show actual damages).

²⁰³ 129 S Ct 2252 (2009).

²⁰⁴ Id at 2257.

court ruling. *Boy Scouts*, *Bouie*, *Bush v Gore*, and *BMW* are all examples of cases in which state-law reversals would have been easier to defend than the contentious and sharply disputed constitutional holdings that the Supreme Court produced. The costs of error are also likely to be higher when the Supreme Court resolves cases on federal constitutional grounds. An erroneous constitutional pronouncement has nationwide impact and is largely entrenched against political-branch override, whereas the Supreme Court's mistaken interpretations of state law would affect only one state and be subject to legislative override. Finally, these *Murdock*-induced constitutional doctrines promise to increase decision costs on future courts by complicating judicial judgments,²⁰⁵ especially in the aftermath of the rulings in *Boy Scouts*, *Bouie*, *Bush v Gore*, and *BMW*. State-law reversals in these cases would have spared future courts the need to resolve the precise scope and contours of the novel constitutional doctrines created in those cases.

In some cases, of course, a federal constitutional resolution may still be preferable to a reversal that rests solely on state-law grounds. If the federal constitutional question is straightforward or noncontroversial, or if the case presents arcane state-law issues outside the ken of generalist Supreme Court justices, then the error-cost calculation will cut in favor of refusing to review the state supreme court's interpretation of state law. Or if a federal constitutional resolution would bring doctrinal clarity and reduce decision costs in future litigation, then there is less to gain in using a state-law reversal to avoid a federal constitutional pronouncement. But there have been, and will continue to be, cases in which the decision to issue a state-law reversal as a means to avoid a federal constitutional pronouncement will economize on the decision costs and error costs of Supreme Court rulings. These are the types of cases in which the justices should consider reversing state supreme court rulings solely on state-law grounds.

III.

The discussion up to this point has shown that the Supreme Court *may* review a state supreme court's interpretation of state law in any case presenting a colorable federal claim, and that the justices *should* consider such state-law reversals in cases that would otherwise be resolved with novel and contentious federal constitutional pronouncements. This Part considers whether anything could motivate the justices to opt for state-law reversals in cases where they already have five

²⁰⁵ See, for example, Epstein, 53 U Chi L Rev at 808–11 (cited in note 202) (noting how the “actual malice” test that the justices announced in *New York Times v Sullivan* has increased litigation costs in defamation cases).

votes to reverse on federal constitutional grounds. The Supreme Court's failure to reconsider the *Murdock* regime in recent years, even in cases such as *Boy Scouts* or *Bush v Gore*, suggests that the justices may lack incentives to expand their prerogative to issue state-law reversals, especially given that federal constitutional law remains available as a substitute means for reversing undesirable state-court decisions.

The motivational question is crucial in determining whether this proposal to expand the Supreme Court's use of state-law reversals is feasible. Whenever the justices choose to reverse a state-court judgment, they retain discretion to resolve the case solely on federal constitutional grounds. Demonstrating a legal prerogative to review state-law issues in cases that present federal claims does not establish a legal obligation for the justices to consider such issues; something beyond the absence of external legal constraints must provide the impetus for the justices to expand their review of state-law issues in this manner. This is especially true when state-law reversals are a means to avoid a reversal that would otherwise rest on federal constitutional grounds. One might think that a rational Supreme Court majority that wants to reverse a state supreme court's judgment will prefer to rest its decision on federal constitutional grounds rather than state-law grounds; the former approach is more durable and more resistant to political-branch override. It is necessary to consider what, if anything, could induce a court majority to weaken the force of its pronouncements by relying solely on state law, especially in cases such as *Boy Scouts*, *Bouie*, *Bush v Gore*, or *BMW*, where it could still muster five votes for a federal constitutional reversal. Several considerations could persuade the justices to use state-law reversals in these situations. First, the Supreme Court announces constitutional doctrines behind a veil of uncertainty; it cannot anticipate or control how future court majorities might use or expand on its constitutional holdings in later cases. Justices who joined the Court's opinion in *Brown v Board of Education*²⁰⁶ might have been surprised or even appalled at the Roberts Court's reliance on that precedent to invalidate efforts to attain racial balancing in the Seattle public schools.²⁰⁷ Even case-specific constitutional pronouncements, such as *Bush v Gore*'s attempt to limit its equal-protection holding to "the present circumstances,"²⁰⁸ are unable to prevent litigants or

²⁰⁶ 347 US 483 (1954).

²⁰⁷ See *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701, 798–99 (2007) (Stevens dissenting) (denouncing the "cruel irony" in the Court's reliance on *Brown* and accusing the majority of "rewrit[ing] the history of one of this Court's most important decisions").

²⁰⁸ See 531 US at 109.

courts from extending those cases into new contexts.²⁰⁹ The inability to foresee the full consequences of a federal constitutional pronouncement can make a state-law reversal seem more attractive to the justices, even when that approach prevents them from entrenching their ruling against legislative override.

Second, any Supreme Court justice is likely to encounter situations in which the federal constitutional grounds for reversing a state supreme court ruling are in tension with his usual approach to constitutional interpretation, but a state-law reversal fits more easily with his methodological commitments. Many commentators noted that the justices in the *Bush v Gore* majority endorsed an interpretation of the Equal Protection Clause that seems inconsistent with the interpretive formalism that those justices advocate in other contexts.²¹⁰ And some justices in the *Boy Scouts* majority embraced an interpretation of the First Amendment that is hard to square with previously stated positions that categorically reject First Amendment challenges to neutral, generally applicable laws that regulate conduct.²¹¹ In these types of cases, those justices could opt for a state-law reversal while remaining consistent with their previously stated methodologies, once the Court moves beyond the *Murdock*-created notion that it lacks “jurisdiction” to consider those state-law issues. In such situations, the “civilizing force of hypocrisy” could induce justices to prefer a reversal that rests solely on state-law grounds.²¹²

Third, a justice may wish to reverse a state supreme court decision yet hold some doubts about the correctness of his views. These doubts may not be enough to convince him to affirm the state supreme court ruling, but they may lead him to opt for the intermediate step of reversing without entrenching his views as a matter of federal constitutional law. Justice O’Connor used this approach in *Thompson v Oklahoma*,²¹³ in which a fifteen-year-old murderer claimed that his death sentence violated the Eighth Amendment. Four justices wanted to entrench a constitutional prohibition on capital punishment for

²⁰⁹ See note 180 and accompanying text.

²¹⁰ See, for example, Richard A. Posner, *Law, Pragmatism, and Democracy* 347 (Harvard 2003) (noting that some justices in the *Bush v Gore* majority have “urg[ed] a concept of adjudication that is inconsistent with the majority opinion that they joined”); Strauss, 68 U Chi L Rev at 740 (cited in note 149) (acknowledging that the Court’s equal-protection holding was “not entirely implausible” but describing it as “wildly out of character” for the justices who joined the majority opinion).

²¹¹ See note 125 and accompanying text.

²¹² See Elster, 2 U Pa J Const L 345 (cited in note 15) (describing how the “civilizing force of hypocrisy” induces even self-interested actors to want to appear impartial and principled).

²¹³ 487 US 815 (1988).

crimes committed by offenders younger than sixteen years of age.²¹⁴ But Justice O'Connor refused to join their opinion even as she cast the fifth and decisive vote to vacate the petitioner's death sentence. As Justice O'Connor saw matters, it was "very likely" that a national consensus disapproved of capital punishment for such offenders, but she was unwilling to constitutionalize a prohibition on such executions "without better evidence than we now possess."²¹⁵ She therefore opted for a more narrow holding that interpreted the Eighth Amendment to prohibit fifteen-year-old offenders from being executed under capital-punishment statutes that fail to specify a minimum age. This approach made the Supreme Court's ruling in *Thompson* defeasible by state or federal legislation that clearly authorizes capital punishment for fifteen-year-old murderers.²¹⁶

Any justice could be drawn to a similar disposition in cases where *Murdock* and federal constitutional doctrines would otherwise force the Court into an all-or-nothing choice. In a case such as *Boy Scouts*, a justice might believe that the New Jersey Supreme Court should not have forced the Boy Scouts to accept homosexuals as Scoutmasters, yet remain open to the possibility that future experience or changed circumstances might make the Boy Scouts' anti-homosexuality policies seem indefensible. Or a justice might object to the New Jersey Supreme Court's high-handed treatment of the Boy Scouts and its questionable interpretation of the state's antidiscrimination statutes while maintaining a reluctance to constitutionalize a broad First Amendment right for institutions to disregard antidiscrimination laws in other contexts. But the Court's First Amendment doctrines leave no room for a disposition that reverses the New Jersey Supreme Court yet subjects the Supreme Court's ruling to legislative override. Any justice that shares the democracy-protecting sentiments in Justice O'Connor's *Thompson* concurrence, or the epistemic modesty of Judge Learned Hand, who wrote that the "spirit of liberty is that spirit which is not too sure that it is right,"²¹⁷ will want to consider state-law reversals as a substitute for rulings that would otherwise entrench a

²¹⁴ Id at 818–38 (Stevens) (plurality).

²¹⁵ Id at 848–49 (O'Connor concurring).

²¹⁶ Id at 858–59 ("[T]he approach I take allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people's elected representatives.").

²¹⁷ See Learned Hand, *The Spirit of Liberty*, in Irving Dillard, ed, *The Spirit of Liberty: Papers and Addresses of Learned Hand* 189, 190 (Knopf 1953). See also Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *Fordham L Rev* 1269, 1292 (1997) ("I am confident that an essential element of responsible judging is a respect for the opinions and judgments of others, and a willingness to suspend belief, at least provisionally, in the correctness of one's own opinions.").

novel and contentious federal constitutional pronouncement—once he or she moves beyond *Murdock*'s jurisdictional myth. *Thompson* also illustrates how a single justice can use state-law reversals as a constitutional-avoidance device, without securing the votes of other justices. Indeed, in many cases (including *Boy Scouts*, *Bush v Gore*, *BMW*, and *Caperton*) a single justice's decision to opt for a state-law reversal will be sufficient to prevent the Court from establishing a controversial constitutional holding.²¹⁸

Of course, none of these concerns induced the justices to avoid the novel and contentious federal constitutional pronouncements in cases such as *Boy Scouts*, *Bouie*, *Bush v Gore*, and *BMW*, cases where they could have affirmed the state supreme court rulings or denied certiorari.²¹⁹ But none of these decisions means that the justices are indifferent to the veil-of-uncertainty risks in creating new constitutional doctrines, or unconcerned with remaining consistent with their publicly stated interpretive philosophies. They show only that such concerns may be outweighed by the justices' desire to reverse what they perceive to be a particularly egregious state supreme court ruling, and that *Murdock* needlessly forces the justices to choose among these competing goals. Allowing for state-law reversals will facilitate constitutional avoidance, because it will no longer require the justices to swallow an unappealing or legally dubious state supreme court ruling as the price of avoiding a federal constitutional reversal.

Finally, the justices' continued adherence to the *Murdock* regime is explainable (at least in part) by litigants' failure to challenge it, as *Murdock* has become a habit of thinking among lawyers and judges alike. Even in high-stakes cases such as *Boy Scouts* or *Bush v Gore*, none of the litigants or amici asked the justices to reconsider their unwillingness to review state-law issues in cases that present federal claims. The *Murdock* regime's durability under these circumstances does not imply an absence of judicial motivation to reconsider it, or that additional retreats from *Murdock* are attainable only in some idealized, first-best world. At worst, it shows only that *Murdock* (like any judicial precedent) can produce herding behavior that dissuades litigants from challenging it;²²⁰ it does not mean that an entrepreneurial

²¹⁸ See Vermeule, *Judging under Uncertainty* at 118–48 (cited in note 10) (criticizing theories of adjudication that require sustained judicial coordination in order to achieve the systemic benefits that they purport to advance).

²¹⁹ See, for example, Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* 20–21, 70 (Oxford 2007) (criticizing “self-defeating proposals,” in which “the diagnosis and prescription make different assumptions about relevant features of the relevant actors”).

²²⁰ See, for example, Adrian Vermeule, *Law and the Limits of Reason* 74–75 (Oxford 2009).

litigant will be unable to motivate any of the justices to extend their retreat from *Murdock* if a future case presents a suitable vehicle for it.

IV.

This Part considers and responds to objections to this proposal. Part IV.A answers concerns that retreating from the *Murdock* regime would unduly infringe state autonomy. It also addresses the extent to which the Supreme Court's interpretations of state law can be "binding" in future state-court litigation. Part IV.B addresses those who believe that Congress, rather than the Supreme Court, should implement this change, because of statutory *stare decisis* or a Burkean skepticism toward unilateral judicial departures from traditional practices. Part IV.C considers whether this proposal will encourage arbitrary or results-driven Supreme Court decisionmaking.

A. State-Autonomy Concerns

Some commentators predict dire consequences if the Supreme Court departs from the status quo *Murdock* regime. Martha Field, for example, claims that without *Murdock*'s jurisdictional rule, "it would not be possible to identify any body of law as 'state law,'" because "the content of 'state law' would vary according to whether it was reviewed by the Supreme Court."²²¹ But such concerns are exaggerated and implausible. The concept of "state law" has survived the *Fairfax* litigation, the decision in *NAACP v Patterson*, the Supreme Court's Contracts Clause jurisprudence, and other cases where the justices rejected a state supreme court's interpretation of state law on direct review without expressly holding it preempted by federal law.²²² This history demonstrates that the Supreme Court need not vest the state supreme courts with absolute supremacy over state-law issues to preserve the concept of "state law" as an independent entity; rather, it needs only to limit the frequency with which it reverses a state supreme court's state-law pronouncements and the circumstances in which it issues such state-law reversals.²²³ Under this proposed retreat from *Murdock*, the justices will issue state-law reversals only when necessary to avoid novel and contentious federal constitutional pronouncements. This is only a small

²²¹ Field, 99 Harv L Rev at 921 (cited in note 62) ("It is thus because of *Murdock* that the whole concept of state law as distinct from federal law is a meaningful one.").

²²² See notes 78–90 and accompanying text.

²²³ See Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 Duke L J 1143, 1191 (2005) ("The trick, then, is to allow enough federal oversight to foreclose hostile state courts from manipulating state law to thwart federal rights, but not so much federal second-guessing as to eliminate state court supremacy over state law.").

step beyond its current practice, which rejects a state supreme court's interpretations of state law when it frustrates a litigant's efforts to vindicate federal rights in state court. And in all events, the Supreme Court will be unable to take over state law even if it wanted to; institutional constraints sharply limit the number of cases that it can decide each year, and the justices are unlikely to shift their attention away from the significant federal-law cases that they must resolve to delve into mundane state-law issues.

Those who fear that this proposal would give the Supreme Court too much power and influence over state law must bear in mind that the Supreme Court *already* enjoys the prerogative to reverse state supreme courts' interpretations of state law; the only limitation is that the justices rest their decisions on federal-law grounds rather than on state law. Cases such as *Boy Scouts*, *Bouie*, *Bush v Gore*, and *BMW* show how weak this constraint can be. The justices' interpretive power over the Constitution enables them to expand federal constitutional doctrines to justify their decisions to reverse unacceptable state-court decisions, and the Court's equal-protection, First Amendment, and substantive-due-process doctrines are sufficiently capacious to enable litigants and justices to find federal constitutional rationales capable of reversing many state-law rulings of which five justices disapprove. The *Murdock* regime therefore does little to ensure Supreme Court deference to the state supreme courts' state-law pronouncements; it simply shunts the Supreme Court's reasoning into federal constitutional law rather than state law, and induces the justices to devise new federal constitutional rights and doctrines to counter what they perceive as biased or erroneous state supreme court decisions. Indeed, it is somewhat ironic that the *Murdock* regime is so often defended as a doctrine that protects federalism and state autonomy²²⁴ when these *Murdock*-induced constitutional pronouncements do far more to restrict state prerogatives than a state-law reversal would have done. The Supreme Court's constitutional holding in *Boy Scouts*, for example, restricts the autonomy of all fifty states. A state-law reversal, by contrast, might have offended the New Jersey Supreme Court, but it

²²⁴ See, for example, Field, 99 Harv L Rev at 922 (cited in note 62) (describing *Murdock* as part of the "well-established foundation of the system on which many of our suppositions concerning federalism have been built"); Young, 54 Duke L J at 1191 (cited in note 223) (describing *Murdock* and the state courts' interpretive supremacy over state law as "one of the pillars of our federalism"). See also *Kansas v Marsh*, 548 US 163, 184 (2006) (Scalia concurring) ("When state courts erroneously invalidate actions taken by the people of a State . . . on *state-law* grounds, it is generally none of our business; and our displacing of those judgments would indeed be an intrusion upon state autonomy."); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 NYU L Rev 535, 550–52 (1986); David L. Shapiro, *Federalism: A Dialogue* 1–3 (Northwestern 1995).

would have preserved the option for state legislators in New Jersey and elsewhere to enact more expansive antidiscrimination laws if societal attitudes or mores change regarding the rights of homosexuals or the rights of organizations to exclude unwanted members. Now the states are unable to do this absent a constitutional amendment or a Supreme Court decision that overrules *Boy Scouts*.

The concern that Supreme Court review of state-law issues will cause the meaning of state law to vary from case to case is similarly overstated. It is doubtful that the Supremacy Clause can impose a binding legal obligation on state-court judges to follow the Supreme Court's interpretations of *state law*.²²⁵ Nevertheless, Article III empowers the Supreme Court to declare the law of the case whenever it reviews a state supreme court's ruling, and its appellate jurisdiction over the state supreme courts makes its state-law pronouncements "binding" in the legal-realist sense; the justices can quickly reverse a future state-court ruling that attempts to reinstate the interpretation of state law that they had repudiated. Of course, under Article III and Congress's jurisdictional statutes, the Supreme Court of the United States is powerless to review a state supreme court ruling that fails to present a federal claim, or that otherwise fails to qualify as an Article III "case" or "controversy." That seems to open the door, at least in theory, for a state supreme court to depart from the Supreme Court's state-law interpretations in later cases that fail to present a colorable federal claim, or involve requests for advisory opinions that fall outside the scope of Article III. But this proposal urges the Supreme Court to reverse on state-law grounds only to avoid reversals that would otherwise rest on novel and contentious federal constitutional pronouncements. These state-law issues will *always* give rise to a federal claim that triggers the Supreme Court's appellate jurisdiction if a state supreme court attempts to reinstate its repudiated interpretation. No state supreme court will be able to reassert the controversial interpretations of state law from *Boy Scouts*, *Bouie*, *Bush v Gore*, or *BMW* without simultaneously creating a colorable federal constitutional claim for one of the litigants. By limiting its intervention to cases where the state supreme court's disputed state-law pronouncement will give rise to a federal constitutional claim in *any* factual context, the Supreme Court can assure its ability to police the state supreme courts in future cases presenting the same state-law issue. And if a

²²⁵ But see *Cooper v Aaron*, 358 US 1 (1958) (holding that the Supremacy Clause binds state officials to follow the Supreme Court's interpretations of *federal* constitutional provisions). The Supremacy Clause extends only to the Constitution, federal statutes made in pursuance thereof, and treaties made under the authority of the United States; it omits any reference to state law or to Supreme Court rulings. See US Const Art VI.

state supreme court tries to use advisory opinions that depart from the Supreme Court's state-law pronouncements, the Supreme Court will still retain the power to reassert its views in any state-court proceeding affecting the rights of litigants.²²⁶

Finally, many if not all state-court judges may believe that they have a legal obligation to follow the Supreme Court's interpretations of their states' laws, even without the threat of reversal under Holmes's bad-man theory. In the early 1980s, when Congress threatened to remove the Supreme Court's appellate jurisdiction over abortion-related controversies, the Conference of Chief Justices of state courts announced that state courts would continue to follow the Supreme Court's abortion pronouncements if Congress enacted such a law.²²⁷ And this is at least a plausible interpretation of their Article VI obligation to obey the Constitution. The Constitution describes the Supreme Court as the "one supreme court," which suggests that "inferior" courts and state courts should follow its holdings and reasoning even in the absence of penalties for noncompliance.²²⁸ I take no position on whether the Constitution actually imposes such an obligation on the state courts; the point is only that many state-court judges will act under the belief that it does, and that will reduce or eliminate the likelihood of state courts issuing state-law pronouncements that diverge from the Supreme Court's rulings.

B. Burkean Stare Decisis Concerns

Murdock has been on the books for 137 years. Yet Congress has never enacted legislation that explicitly overrules that decision, even as it has amended and reenacted the statutes governing the Supreme Court's appellate jurisdiction over the state courts.²²⁹ Some may think that this congressional passivity establishes a legal obligation to adhere to the *Murdock* regime. Another way to put this argument is that

²²⁶ See, for example, *ASARCO Inc v Kadish*, 490 US 605 (1989).

²²⁷ See Conference of Chief Justices, *Resolution Relating to Proposed Legislation to Restrict the Jurisdiction of the Federal Courts* (Jan 30, 1982), reprinted in 128 Cong Rec S 869 (Feb 4, 1982) (declaring that state-court judges have an "obligation[] to give full force to controlling Supreme Court precedents," and that if Congress were to enact legislation that repeals the Supreme Court's appellate jurisdiction over abortion-related controversies, the Supreme Court's earlier pronouncements "would remain the unchangeable law of the land, absent constitutional amendments, beyond the reach of the United States Supreme Court or state supreme courts to alter or overrule").

²²⁸ See, for example, Edwin Meese, III, *The Tulane Speech: What I Meant*, 61 Tulane L Rev 1003, 1003 (1987) (conceding that Supreme Court decisions "have general applicability" and that "[i]n addition to binding the parties in the case at hand, a decision is binding precedent on lower federal courts as well as state courts").

²²⁹ See, for example, Act of December 23, 1914, ch 2, 38 Stat 790; Act of June 27, 1988 § 3, 102 Stat at 662.

stare decisis should control, given that Congress has had opportunities to overrule *Murdock* explicitly via statute yet has declined to do so.²³⁰

None of this can impose a legal obligation on the Supreme Court to retain *Murdock* in the face of this normative case for abandoning it. The Supreme Court often repudiates longstanding interpretations of statutes even when Congress has been content to leave matters alone; this is especially true when the issues of statutory interpretation lack political salience with legislators and their constituents. Examples include *Erie Railroad Co v Tompkins*,²³¹ the decision in *Brown v Allen*²³² to overrule earlier cases that limited federal habeas corpus relief to “jurisdictional” errors, and numerous decisions overruling earlier interpretations of the Sherman Antitrust Act.²³³ All of these rulings discarded prior statutory interpretations in favor of new ones when there were compelling normative arguments to do so; any contention that congressional acquiescence establishes a legal duty to adhere to past statutory interpretations is untenable.²³⁴ Congress’s failure to enact legislation to overrule *Murdock* no more signifies a legal obligation to adhere to that decision than its failure to codify *Murdock* establishes a duty to abandon it. The Court’s stare decisis doctrines recognize changed circumstances as reasons to depart from earlier-decided cases,²³⁵ and post-*Murdock* developments such as the proliferation of certiorari jurisdiction and Supreme Court rulings that review and set aside state supreme court interpretations of state law have undermined *Murdock*’s holding that the Supreme Court lacks “jurisdiction” to review state-law issues decided by state courts.

A more measured stare decisis argument might invoke Burkean skepticism toward judicial decisions that unilaterally abandon longstanding practices. Proponents of this argument might view the Supreme Court’s deep-seated unwillingness to reverse state-court decisions solely on state-law grounds as reflecting the accumulated wisdom of past generations, and be reluctant to replace that settled practice

²³⁰ See generally *Flood v Kuhn*, 407 US 258 (1972); Adrian Vermeule, *Interpretive Choice*, 75 NYU L Rev 74, 143–45 (2000) (advocating an absolute rule of statutory stare decisis).

²³¹ 304 US 64 (1938) (overruling the longstanding interpretation of the Rules of Decision Act, 28 USC § 1652).

²³² 344 US 443 (1953).

²³³ See, for example, *Leegin Creative Leather Products, Inc v PSKS, Inc*, 551 US 877 (2007) (overruling a longstanding interpretation of the Sherman Antitrust Act).

²³⁴ See Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L J 1665, 1679–80 (2002) (noting that the Supreme Court regularly “dump[s] traditional practices overboard when their claims on our rational or normative allegiance wear too thin”).

²³⁵ See, for example, *State Oil Co v Khan*, 522 US 3, 20 (1997) (recognizing that statutory stare decisis may be overcome by the interest in “recognizing and adapting to changed circumstances and the lessons of accumulated experience”).

with a novel and untested regime.²³⁶ Some Burkeans regard adherence to traditional practices as intrinsically valuable; others defer to traditions out of epistemic humility, a distrust of abstract theorizing, or for other consequentialist reasons.²³⁷ Either way, Burkeanism might counsel in favor of retaining the *Murdock* regime as a matter of prudence, even if the case was wrongly decided and has produced undesirable consequences for Supreme Court decisionmaking.

But on closer examination, such Burkean arguments offer little, if any, support for retaining the status quo *Murdock* regime. To begin, the empirical claim that the *Murdock* regime embodies a common stock of accumulated wisdom is doubtful. The original *Murdock* decision was decided under circumstances that are much different from those existing today. State-court litigants no longer have a right to Supreme Court review, so *Murdock*'s emphasis on docket-control concerns cannot support the *current* Supreme Court's refusal to assert appellate jurisdiction over ancillary state-law issues.²³⁸ And the early Court decisions that followed *Murdock* lacked a perspective of its unintended consequences, which have produced a regime that has needlessly expanded the scope of federal constitutional law. Indeed, few, if any, of the Court decisions (or denials of certiorari) that apply *Murdock*'s jurisdictional rule consider or analyze the reasons that support it. Rather, they instinctively adhere to *Murdock* on stare decisis grounds, further undermining the proposition that the status quo regime reflects the contributions of many minds over time.²³⁹

Second, this proposal to abandon *Murdock* is hardly a radical departure from the Supreme Court's current practices. As mentioned earlier, the justices already review and reverse state supreme court interpretations of state law in cases that *enforce* federal rights against the states; examples include *NAACP v Patterson*, the early twentieth-century Contracts Clause jurisprudence, and the justices' continued willingness to disregard state-court interpretations that lack "adequate" or "fair and substantial" support when necessary to ensure the efficacy

²³⁶ See Edmund Burke, *Reflections on the Revolution in France* 74 (Yale 2003) (Frank Turner, ed) (originally published 1790). For efforts to apply Burkean thought to Supreme Court decisionmaking, see Cass R. Sunstein, *Burkean Minimalism*, 105 Mich L Rev 353, 353 (2006); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877, 894 (1996); Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 NC L Rev 619, 688–697 (1994).

²³⁷ See Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 Colum L Rev 1482, 1486–87 (2007) (describing these two different strands of Burkean thought).

²³⁸ See notes 75–77 and accompanying text.

²³⁹ See Vermeule, 107 Colum L Rev at 1498–99 & n 53 (cited in note 237) (describing the "Burkean paradox," which arises when judges rely on a precedent to reduce the costs of information gathering and decisionmaking, but in doing so the practice becomes less likely to reflect the accumulated wisdom of many independent minds over time or to contain any epistemic value).

of federal rights litigated in state-court proceedings. Extending this prerogative to cases where state-law reversals will avoid reversals that would otherwise rest on a novel and contentious constitutional pronouncement is only an incremental change from the status quo. And this minor shift in jurisdictional understandings will help reconcile the Court's jurisprudence with another tradition with an impressive Burkean pedigree: the need for the Supreme Court to avoid issuing contentious federal constitutional pronouncements wherever possible.²⁴⁰ Finally, *Murdock* has induced the Court to announce novel and un-Burkean constitutional doctrines as a result of its belief that it lacks power to issue state-law reversals in cases such as *Boy Scouts*, *Bouie*, *Bush v Gore*, and *BMW v Gore*. This makes efforts to defend the status quo *Murdock* regime on Burkean grounds self-defeating; even the most committed Burkean should seriously question the value of retaining it.

C. Principled-Judging Concerns

A final concern with this proposal is that empowering the justices to issue state-law reversals may encourage opportunistic and unprincipled Supreme Court decisionmaking. When the justices must establish a constitutional principle to justify their decision to reverse a state supreme court ruling, they know that such principles will be valid in future cases with different parties, and this veil of uncertainty can encourage impartial and evenhanded treatment of litigants.²⁴¹ A holding from the Supreme Court declaring that the Boy Scouts have a First Amendment right to exclude homosexuals as Scoutmasters will apply to similarly situated organizations, even if they lack the resources and influence of the Boy Scouts. By contrast, enabling the justices to reverse solely on state-law grounds might lead to case-specific rulings that have little prospect of affecting future Supreme Court decisionmaking. A holding in *Boy Scouts* resting solely on state-law grounds would have no bearing in future cases brought by organizations raising challenges to other jurisdictions' antidiscrimination laws; this could open the door to unprincipled or preferential treatment of litigants.

²⁴⁰ See cases cited in note 6. See also *Ex parte Randolph*, 20 F Cases 242, 254 (CC Va 1833) (Marshall) (“[I]f the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.”).

²⁴¹ See, for example, Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L J 399, 416–17 (2001) (noting that stare decisis can cause judges to “reason impartially if they anticipate that the decision may be invoked in future cases whose valence in terms of the decisionmakers’ future interests is unpredictable”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1 (1959) (arguing that constitutional adjudication “must rest on reasoning and analysis that transcend the immediate result”).

But it is a mistake to assume that federal constitutional reversals are inherently more principled than reversals that rest solely on state-law grounds; none of the Court's *Murdock*-induced constitutional pronouncements in *Boy Scouts*, *Bouie*, *Bush v Gore*, or *BMW* appears to be more neutral or impartial than state-law holdings in those cases would have been. In *Boy Scouts*, for example, the Court recognized that "States have a compelling interest in eliminating discrimination against women in public accommodations"²⁴² yet held without explanation that no such compelling interest supported the New Jersey Supreme Court's efforts to eliminate discrimination against homosexuals. *Bush v Gore* attempted to limit its equal-protection holding "to the present circumstances." And *Bouie* and *BMW* established loose standards for determining the constitutionality of state-court interpretations of criminal statutes or the size of punitive-damage awards; these will do little to prevent arbitrary and inconsistent treatment of future litigants. What is more, decisions that reverse state supreme courts solely on state-law grounds can rest on neutral interpretive principles, such as textualism, that could establish rule-bound precedents for future cases that confront either federal constitutional or state-law issues. Reversing a state supreme court that departs from state election statutes to benefit a Democratic candidate establishes a precedent that will allow future justices to reverse state supreme courts that twist election statutes to benefit Republican candidates. Such state-law reversals will be far from the type of "low-visibility techniques" or "passive virtues" mechanisms that facilitate unprincipled or arbitrary dispositions of Supreme Court cases.²⁴³

CONCLUSION

Article III and 28 USC § 1257 empower the Supreme Court to review and reverse a state supreme court's interpretation of state law in any case presenting a colorable federal claim. And the justices exercise this prerogative in cases where such state-law pronouncements frustrate a litigant's efforts to vindicate federal rights in state court; the Court's holdings in *NAACP v Patterson* and the Contracts Clause cases reject a state supreme court's interpretation of state law without declaring it preempted by any provision of federal law. Yet the justices issue such state-law reversals only in cases where they wish to *enforce* federal rights against the states. For more than a century the justices

²⁴² *Boy Scouts of America v Dale*, 530 US 640, 657 (2000).

²⁴³ Vermeule, *Mechanisms of Democracy* at 93 (cited in note 219). See also Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum L Rev 1 (1964).

have labored under the *Murdock*-inspired notion that they cannot reverse a state supreme court ruling solely on state-law grounds, as a means to avoid deciding the federal questions presented in a case.

The justices should, however, consider such state-law reversals in cases that would otherwise rest on novel and contentious federal constitutional pronouncements. This will alleviate the hydraulic pressure that the status quo *Murdock* regime imposes on federal constitutional doctrine, and prevent situations in which the justices must choose between affirming what they perceive as a biased or erroneous state-court ruling and reversing on controversial federal constitutional grounds that promise to impose high decision costs on future courts and high error costs if the justices' views turn out to be mistaken.