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Aaron J. Saiger
Fordham University School of Law

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CONSTITUTIONAL PARTNERSHIP AND THE STATES

Aaron Jay Saiger*

INTRODUCTION

Lawrence Sager's and Larry Kramer's new volumes both endeavor, to borrow Sager's term, to redefine the American constitutional "partnership," those structures through which courts and others influence the shape and content of constitutional commitments. Each evokes an ideal constitutional partnership importantly different from the one we live today. Sager argues that constitutional judges should seek justice as "partners" of the founding generations; Kramer contends that legislators, executive officials, and lay citizens should reassert interpretive parity with constitutional courts in the task of constitutional interpretation.¹ This brief Essay seeks to illuminate these evocative arguments in light of another feature of the American constitutional partnership: its federal nature. What are the implications of Sager's and Kramer's thinking for our federalism? And what does thinking about federalism tell us about Sager's and Kramer's arguments?

I approach Sager's and Kramer's accounts in this way not because they are somehow incomplete; neither author, after all, asserts any intention of writing about federalism. Nor are the states absent from either volume; indeed states are prominent in both. Particular state actions and policies naturally appear as the repeated objects of federal constitutionalism, because so many of the most difficult constitutional problems of the past and present are cast in terms of how the Constitution constrains state action. The states also play a role as constitutionally important institutions. Sager explicitly notes that "our constitutional text and jurisprudence respond in part to concerns of political justice by architecting and protecting structural features of government—the horizontal separation of powers and the vertical distribution of authority within a federal structure."² Kramer, to take

* Associate Professor of Law, Fordham University School of Law. I owe thanks to Martin Flaherty, Abner Greene, Thomas Lee, and especially to Larry Sager and Larry Kramer for helpful conversations.


2. Sager, supra note 1, at 154-55.
but one set of examples, discerns some of the roots of our national acquiescence to judicial supremacy in an earlier willingness to permit supreme federal judicial review of state legislative action\(^3\) and in later efforts to block exactly this sort of review.\(^4\) And in both volumes, the states frequently appear as comparative cases. Because the histories, values, and political cultures of the various states overlap with those of the Union, state constitutional commitments shed important light upon their federal analogues.\(^5\)

Nevertheless, at key points in the authors’ arguments there is more to say about the states. Sager, for example, argues that federal courts properly “underenforce” many of the value-bearing provisions of the Constitution, in part because federal judges leave the job of enforcing constitutional rights to their fullest extent to the Congress and to the executive.\(^6\) Should not this list include the states? What duties do the states bear regarding underenforced rights? What duties do state court judges have?

These queries lead in turn to another question. The Federal Constitution governs a polity simultaneously governed by state constitutions, with their own rights-bearing provisions. Does Sager’s argument suggest that American states’ constitutional practices should themselves be understood as justice-seeking partnerships between state founders and state judges?

And this inquiry, which casts states as the subject rather than the object of constitutional theory, raises a parallel question for Kramer: Should nonjudicial actors in the states assert a role in state constitutional interpretation similar to the one Kramer advocates on the national stage? Here I offer a very brief sketch of contemporary developments in the states to complement Kramer’s historical comparison of state and nation; for in the states today, we see noticeably more movement than at the federal level towards the sort of polyarchic constitutionalism Kramer advocates. The real world expressions of such constitutionalisms suggest, I think, some lessons regarding the national practice Kramer prefers.

I make no claim that the failure to exhaust the topic of federalism is a flaw in either Sager’s or Kramer’s worthy volumes. Rather, the balance of this short Essay seeks simply to raise some aspects of the

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4. *Id.* at 152-53.
5. Kramer, for example, analyzes debates in the states during the founding period regarding the proper role of their own judiciaries to illuminate parallel controversies at the federal level. *Id.* *passim.* Sager similarly analogizes state high courts and the Supreme Court of the United States in noting that judicial norms constrain high court judges even absent routine enforcement of such norms. Sager, *supra* note 1, at 88-89. To take one more example, Sager identifies the policy of inoculating constitutions against easy amendment as present and potentially problematic in both federal and state constitutions. *Id.* at 161-62.
federalism question that I think both challenge and extend the positions and arguments that Sager and Kramer put so provocatively before us.

I. JUSTICE SEEKING IN A FEDERAL SYSTEM

Sager identifies the gravest challenge to his justice-seeking account as the gap between political justice and justice as dispensed by constitutional judges: the courts offer substantially less justice than reasonable conceptions of political justice demand. Sager’s towering example, his gnawing problem, is “the Constitution’s pointed indifference to poverty.” To Sager, a guarantee that “persons who are willing to make reasonable efforts on their own behalf enjoy the ability to secure the minimum necessities of a decent life” is a self-evident, necessary component of political justice; equally self-evident, the constitutional courts of the United States guarantee no such rights. Sager responds with his underenforcement thesis: The Constitution does, as a justice-seeking document must, include a right to minimal material welfare; but this constitutional right is not enforced by constitutional judges.

Such abstention, Sager says, is reasonable as a matter of comparative institutionalism; that is to say, rights whose realization require complex strategic and bureaucratic decisions and permit a range of politically contested approaches are bad candidates for judicial enforcement even when constitutionally guaranteed. Abstention is also a matter of principle: Underenforcement gives additional weight to nonjudicial institutions’ obligations to seek justice under the Constitution. If the constitutional judge abstains when to guarantee a constitutional right requires strategic implementation and permits political choice, then a constitutional Congress, on its own, has real and unduckable obligations to make choices and select strategies that ensure that right’s just realization.

Sager’s exposition of underenforcement focuses on the relationship between the federal courts and the Congress, but it is just as germane if applied to the states. Sager’s underenforcement thesis implies that the states bear important—and too often unfulfilled—obligations under the Federal Constitution. Sager recognizes this implication, although he does not dwell upon it. Thus he defines the underenforcement thesis as a “general premise of divided constitutional labor” under which the “judiciary is constrained... from fully enforcing the Constitution” and “other governmental

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7. Id. at 85.
8. Id. at 79, 149.
9. Id. at 79.
10. Id. at 84-128.
11. Id. at 87-88, 140-42.
actors” therefore must give life to unenforced rights.¹² And Sager includes states among such “other governmental actors”; for example, he explains the rational basis test at the heart of the Supreme Court’s equal protection jurisprudence as a policy of “self-conscious deference to state legislatures and to Congress.”¹³

Sager, though, says that the underenforcement thesis “is especially important with regard to Congress’s authority to enforce the Reconstruction Amendments.”¹⁴ Indeed, on Sager’s understanding of the Federal Constitution, but for underenforcement, the Congress and the states would have complementary roles. To the Congress would fall the duty to enforce all Reconstruction-amendment-based rights, leaving “the states somewhat free to develop their own normative visions in the substantial space not covered by the Constitution.”¹⁵

The Congress would enforce the core principle of distributive justice; the states would be permitted to tinker at the margins, where reasonable people differ. States might choose, for example, to enforce a “more robust right of material well-being”¹⁶ than that defined by the minimal standards of adequacy guaranteed by the Congress.¹⁷

But it is not the case that just because the scope of state policy choices exceeds that of the Congress, there is a “federal division of normative labor”¹⁸—if Sager means by “division” a discrete partition. Whatever normative vision a state might embrace on its own, it will share with the Congress the duty to give life to the rights-bearing provisions of the Federal Constitution. As Sager argues, a city council that restricts pornographic speech and a federal court that considers the constitutionality of its action have both undertaken to determine what is required and what is permitted by the guarantees in the United States Constitution of free speech and equal protection.¹⁹

Similarly, Sager states that the federal “constitutional right to an adequate education” that he postulates relies for its implementation “in the first instance . . . on local, state, and federal legislators.”²⁰

Recognizing that states have the same duty as the Congress to give life to the justice-seeking requirements of the Federal Constitution is fully consistent with Sager’s justification of judicial underenforcement.

¹². Id. at 102; see also id. at 158 (“[P]rimary responsibility for the maintenance of constitutional guarantees like the right to minimum welfare must lie with our popular political institutions.”).
¹³. Id. at 116.
¹⁴. Id. at 102.
¹⁵. Id. at 115.
¹⁶. Id. at 152.
¹⁷. Sager’s comment that extensive welfare rights might interfere with the Constitution’s pluralist and democratic commitments, however, suggests that he might find that a truly robust state welfare guarantee raises federal constitutional problems of its own. See id. at 152-53.
¹⁸. Id. at 115.
¹⁹. Id. at 73.
²⁰. Id. at 96; see also infra notes 21–22 and accompanying text.
To the extent that underenforcement is desirable because it requires the Congress as well as the courts to take independent responsibility as a guardian of constitutional rights, so too the states. And to the extent underenforcement is motivated by the Congress's comparative institutional advantage over the judiciary in making effective strategic decisions and trade-offs in the service of welfare rights, states share those advantages and then some. For one, unlike the Federal Constitution, state constitutions are not silent with respect to rights to minimum welfare. Sager repeatedly claims, for example, that the unarticulated constitutional guarantee of minimum material welfare necessarily subsumes a right to primary and secondary education;\(^2\) but such a right is explicit in all fifty state constitutions.\(^2\) Several state constitutions also guarantee rights to material well-being beyond education.\(^3\) The explicit commands of state constitutions position states better than the Congress successfully to enforce the unwritten parallel terms of the Federal Constitution.

Perhaps even more important than the particular commitments of state constitutional texts are the innumerable commitments associated with the states' police powers. These place states in a position to ensure a right to minimum material welfare dramatically more effectively than the Congress can. The extraordinary generality of the police power, essentially a general grant of authority to further the general welfare, stands in sharp contrast to the federal government's limited scope. Moreover the police power is lived day-to-day, as policy on the ground. The states, unlike the Congress, are neck-deep in the quotidian work of policing streets, educating children, feeding the hungry, sheltering the homeless, and protecting the public health.\(^4\) Why not emphasize the duty of those who discharge these functions routinely to exercise their associated discretion consistent with the Federal Constitution, regardless of the enforcement policies of the federal courts?

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21. See Sager, supra note 1, at 96, 126.
24. See Lawrence Gene Sager, Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law, 63 Tex. L. Rev. 959, 975 (1985) ("It is important to remember that we are still a federation and that most of the legal events that touch the lives of people from day to day still emanate from state and local governments."); accord Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 220 (2000) ("[M]ost governing in America—including almost everything that really matters to people in their daily lives—is still done by state officials.").
As I have suggested, it seems unlikely that Sager would object to doing so. He clearly agrees that enforcing the Constitution is a duty shared by all government officials, state, local, and federal. Therefore, Sager’s argument that there are underenforced federal constitutional rights like that to minimum welfare, compelled not by constitutional text but by elementary political justice, requires significant change in the ways that state officials discharge their police powers. These changes, I think, are somewhat more extensive than Justice in Plainclothes recognizes. A vast swath of state and local actions in policy areas much more diverse than those addressed by the Congress must be developed and implemented in light of federal constitutional obligations themselves defined by the demands of political justice. The scope of this assertion is belied in part by Sager’s focus on congressional powers and duties.

Two things, I think, account for Sager’s emphasis. The first is Sager’s explicit effort to argue against the line of Supreme Court doctrine that rejects congressional authority to enforce the Reconstruction Era amendments under interpretations thereof more capacious than those the Court itself endorses. Sager argues convincingly that if the underenforcement thesis is true, then this line of cases cannot be justified. More broadly, though, I think that Sager’s rhetorical and analytic focus upon the Congress rather than the states flows from the rather dismal record of the states as agents of political justice. It is the Congress, not the states, that legislated against private discrimination in the real estate market, offered a private right of action to the victims of gender-motivated violence, sought to protect religious practices from regulation, and restricted the ability of employers to penalize women burdened by family responsibilities. In the states, by contrast, we see efforts to exclude undocumented children from public schools, to burden access to welfare payments for the desperately poor, and to deny accommodation to disabled state employees—this last refusal one that

25. See supra notes 12-13 and accompanying text. Such objection would be inconsistent with Sager’s view that state courts may, notwithstanding federal courts’ unwillingness to do so, enforce constitutional norms to their fullest extent. See Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1248 (1978); see also infra note 50 and accompanying text.
27. Id. at 105 (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)).
28. Id. at 109 (citing United States v. Morrison, 529 U.S. 598 (2000)).
29. Id. at 117 (citing City of Boerne v. Flores, 521 U.S. 507 (1997)).
30. Id. at 124 (citing Nev. Dep’ t of Human Res. v. Hibbs, 558 U.S. 721 (2003)).
31. Id. at 95 (citing Plyler v. Doe, 457 U.S. 202 (1982)).
32. Id. at 98 (citing Saenz v. Roe, 526 U.S. 489 (1999); Goldberg v. Kelly, 397 U.S. 254 (1970)).
the Congress sought to reverse through federal legislation.\textsuperscript{33} State
courts have been similarly viewed as only "grudging" guarantors of
federal rights.\textsuperscript{34}

None of this is unreasonable in light of Southern segregationists'
devotion to "states' rights" in the previous generation. Their
rearguard action against civil rights tarred federalism so thoroughly
that it can be difficult for us today to think of states as agents of,
rather than obstacles to, realizing political equality and fairness, much
less minimal material well-being for the poor. That states might
become agents of a right to economic welfare is further belied by the
observation widely accepted in contemporary political science that
wealth redistribution—necessary to any serious attempt to mitigate
poverty—is, as both a positive and normative matter, best left to the
largest national government rather than to states and localities where
citizen and business exit is straightforward (indeed constitutionally
protected), where interjurisdictional competition looms large, and
where business interests have particular political strength.\textsuperscript{35}

But Sager's is a normative argument. Demurring to the states'
dismal record and acknowledging the political difficulties they face, if
there are federal constitutional rights of the sort Sager claims there
are, then states \textit{must} enforce them, even if—especially if—
constitutional courts \textit{underenforce} them. And states sometimes do
play precisely the role Sager assigns to the Congress in his analysis.
The recent University of Michigan affirmative action cases provide a
straightforward example. In \textit{Gratz v. Bollinger}\textsuperscript{36} and \textit{Grutter v. Bollinger},\textsuperscript{37} the justice-seeking right at issue is not the right to minimal
material welfare but what Sager calls "the repair of the harms of
historic injustice" to nonwhite citizens.\textsuperscript{38} Sager argues, just as he does
for minimum welfare, that such repair is "require[d]" under the
Federal Constitution but unenforced by the constitutional courts.\textsuperscript{39}
Michigan's affirmative action policies are efforts to repair such
"structural harms"\textsuperscript{40} in a fashion consistent with state officials' own,
arguably justice-seeking understanding of what the Fourteenth
Amendment demands. Just as in the cases Sager discusses, the United
States Supreme Court struggled to fit its limited conceptual toolkit of
"compelling interest" and "narro[w] tailor[ing]" to this phenomenon,\textsuperscript{41}
with only partial success. It seems far more reasonable to say that in

\textsuperscript{33} \textit{Id.} at 117 (citing Bd. of Transp. of Univ. of Ala. v. Garrett, 531 U.S. 356
(2001)).
\textsuperscript{34} \textit{See} Sager, \textit{supra} note 25, at 1243.
\textsuperscript{35} \textit{See generally}, e.g., Paul E. Peterson, \textit{City Limits} (1981).
\textsuperscript{36} 539 U.S. 244 (2003).
\textsuperscript{37} 539 U.S. 306 (2003).
\textsuperscript{38} Sager, \textit{supra} note 1, at 79.
\textsuperscript{39} \textit{Id.} at 79-80.
\textsuperscript{40} \textit{Id.} at 107.
\textsuperscript{41} \textit{Grutter}, 539 U.S. at 322.
such cases, a state, taking steps that the Court would decline to require, acts constitutionally when it legislates pursuant to its own constitutional duty to guarantee equal protection of the laws.42

Just as Sager argues vis-à-vis the Congress, underenforcement by the Court places upon state and local officials, especially those involved in exercising the police powers in ways that affect their citizens' material well-being, an obligation to re-understand their roles. They remain bureaucrats, they remain strategists, they remain agents of political and policy choice, but they also must labor under constitutional constraints dictated by the guarantee of minimal political justice.43 This conclusion has quite complicated implications, and I want to end this part of the discussion by just gesturing in the direction of two issues whose importance and complexity suggest the need for further theorizing and analysis.

The first is the question, familiar especially from international and comparative human rights law, of what it means to guarantee substantive rights like a right to minimal material well-being. Sager recognizes this problem, of course, but underestimates somewhat the extent to which his argument makes its resolution so pressing. Sager defends underenforcement itself by noting that in enforcing substantive rights, "decisions of strategy and responsibility remain on the table even after we have accepted the basic norm of a right to minimum welfare."44 But the problem is more vexing than Sager admits. To explain why he finds in the Constitution only a right to minimal material welfare rather than a mandate for a fully just regime of distributive justice, Sager notes not only disagreements among reasonable people as to what full distributive justice requires but also an "enormous range of hard choices":

Whose legitimate complaints do we address first: The worst off, or the larger group (we imagine) who are quite badly but not worst off?

... Fundamental structural features of our economy—for example, whether it is market-driven or centrally managed—... will have

The Court was not prepared to treat the minor children of illegal immigrants as a suspect class, nor to treat education as a fundamental right.... But [various Justices] focused on essentially the same thing: the great importance of education for the life prospects of the young, impoverished victims of Texas's exclusionary policy.

Sager, supra note 1, at 95.
43. See Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1132, 1156 (1999) ("Bound by an oath of office, state legislators must act in a situation of constrained discretion. Food and shelter are no longer merely aspirational goals of political justice; they are instead a part of the constitutional fabric and a nondiscretionary feature of the legal order.").

44. Sager, supra note 1, at 87. This sentence appears in Sager's discussion of the right to adequate medical care, which he believes, like education, to be a "critical component[ ]" of the constitutional welfare right. Id.
immediate and long-term consequences for distributive justice; these fundamental features and directions also have enormous consequences on many other fronts. To what degree does distributive justice govern or prevail against other strong reasons we have for making these fundamental choices?45

But these are not questions that arise only when one considers the full implementation of distributive justice; we face the same questions of “strategy and adequacy” when we try to guarantee merely minimal justice. Take Sager’s own examples of components of the basic welfare right, schooling and health care.46 The first quoted question, how to balance the needs of the very worst off and those only slightly better situated, has been a central dilemma of some efforts to guarantee all children minimally adequate education.47 The second, the interaction of justice-based rights with decisions about fundamental economic arrangements, is one of the most basic of the many conundrums that stymie efforts to provide all persons with minimally adequate health care.48

45. Id. at 140.
46. Id. at 87, 96.
47. See, e.g., Abbott v. Burke, 575 A.2d 359 (N.J. 1990) (“Abbott II”). The Abbott II court pronounced itself “unable to conclude that most districts are failing to deliver the educational opportunity required by our State Constitution.” Id. at 393. Its finding of constitutional violation was confined to approximately thirty of the state’s very poorest districts, and the state was ordered to make per-pupil funding available to them comparable to that available the state’s thirty-odd richest districts. See id. at 408-09. This leapfrogs the poorest over the next-poorest, in whose plight the court has signaled relatively little interest. As the court stated, “[w]e realize there will undoubtedly be concern on the part of those districts that share similar characteristics but do not fit within our definition and that therefore will not receive the aid provided for.” Id. at 409. It continued, “[w]e suggest that in most cases such districts will also prove to have advantages over those we are targeting . . . . [G]iven the limitation of judicial power, we recognize that the kind of equity that can be done in this area by the Legislature cannot be accomplished by judicial order.” Id.
48. In 2000, it was estimated that guaranteeing universal coverage might cost more than $300 billion in additional public funds. See Steven A. Schroeder, Health Policy 2001, 349 New England J. Med. 847, 848 (2001). Such expenditure would have raised the ratio of health care expenditure to gross domestic product from about 13.5% to 16.5%, and would have represented an increase in public sector health expenditure of about 50% and in total national health expenditure of almost one-quarter. See Cynthia Smith et al., Health Spending Growth Slows in 2003, 24 Health Aff. 185, 186 & tbl. 1, 188 & tbl. 3 (2005) (reporting annual figures for GDP, national health expenditures, and health expenditure of public sector funds). Cf. Jonathan Oberlander, Are Americans Closer Than We Think to National Health Insurance?, 21 Health Aff. 103, 104 (2002). Oberlander lists obstacles to the adoption of single-payer insurance in the United States beyond increased public expenditures, including overcoming . . . the political power of health insurers and medical providers vested in maintaining a profitable status quo; the numerous hurdles that fragmented U.S. political institutions throw in the way of any comprehensive reform; the reticence of the public to create a public monopoly in health insurance; [and] cultural ambivalence about the scope of government power. Id.; see also Sherman Folland et al., The Economics of Health and Health Care 409 (4th ed. 2004) (choices regarding health care “funding mechanism[s] could have large
Constitutional courts avoid these difficulties through underenforcement. The Congress avoids them in some part and on some occasions because of the limited scope of congressional authority. But state and local elected and appointed officials, whose daily bread involves providing services that directly interact with citizens' welfare, cannot avoid them at all. If Sager has correctly found in the Constitution rights to political justice, then he has made urgent the very difficult task of being much more specific about what such officials have a duty to do. When must they act? When do they retain discretion? And when are they constrained? Answering these questions is all the more pressing because the job will not be taken up by the underenforcing constitutional courts. The rest of us must undertake to help state and local officials do it themselves.

Another fascinating and thorny issue that the application of Sager's theory to the states raises is how to define the proper role of the state courts in enforcing federal constitutional norms, and how then to define the proper understanding by federal courts of what state courts have done in enforcing federal rights. When he introduces his argument that there is light between the full scope of constitutional rights and their judicial enforcement, Sager asks his reader to "[c]onsider the case of the judges of the highest court of a state when they rule on a matter of state law, or of the justices of the Supreme Court of the United States when they address matters within the federal sphere." Here, I want to think about the case that Sager omits: a state court confronting a claim of federal constitutional right. In his pathmarking Fair Measure article, Sager argues that state courts may "voluntarily" enforce federal constitutional rights to their fullest extent, federal underenforcement notwithstanding (and that the United States Supreme Court should let such decisions rest undisturbed unless "competing constitutional concerns are at stake"). Justice in Plainclothes resurrects these questions as normative ones: Should state courts follow the lead of the federal courts and underenforce federal constitutional rights? Should they underenforce them to the same extent?

It is tempting to answer affirmatively. The task of constitutional interpretation that faces state judges in this position is the same as that before federal judges. Both have a duty to act as a "robust constitutional judiciary" and both confront the difficulties of doing so effectively. The Constitution before them describes the rights it impacts on the resources allocated to health and on the possible redistributions as from rich to poor and young to old.

49. Sager, supra note 1, at 88.
50. Sager, supra note 25, at 1248-49; see also id. at 1259 ("If a state court is moved to give broader scope to a particular constitutional value . . ." (emphasis added)).
51. Sager, supra note 1, at 72.
52. Cf Hon. Margaret H. Marshall, "Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence,
guarantees in abstract and general terms—often so abstractly that particular rights must be inferred in the face of textual silence. Effective enforcement of such rights admits a range of political choices and requires political savvy. Sager’s resolution of these perplexities, through the underenforcement principle and the cabining of the breadth of constitutional justice relative to political justice, seems to apply to state and federal judges equally. This is consistent with Sager’s typical descriptions of justice seeking and underenforcement in federally neutral terms, as, for example, where he contrasts “judicially articulated constitutional law” with the duties of “nonjudicial political actors” to justify “the judiciary’s secondary role.”

One might, however, challenge the premise that state courts are in fact properly thought of as part of our “robust constitutional judiciary.” Though perhaps jarring, for the purposes of Sager’s constitutional partnership it may be more accurate to characterize state judges as “nonjudicial political actors.” A variety of reasons offer themselves, the most important of which is that state court judges are generally elected (in a few states appointed) to limited terms, while Article III judges serve for life. State court judges do not share the structural protections that make federal judges, for Sager, such attractive interpretive partners:

Judges are considerably more detached from the pressure of public opinion than are regularly elected public officials. Many judges are appointed for life, and most enjoy reasonably substantial job security; federal judges, with the guarantee of service for life at an undiminished salary are the model in this regard. The comparative independence of judges frees them from the potentially distorting influence of public will.

A similar analysis leads Professor Helen Hershkoff to note that “[t]he fact of judicial election . . . alter[s] the political vulnerability of state judges, subjecting them to a kind of popular veto that in theory sets a boundary or tether on judicial decisionmaking,” and complementarily, that a “state court’s decision, which binds only the people of that state, enjoys a greater perception of democratic

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79 N.Y.U. L. Rev. 1633, 1641 (2004) (Chief Justice of Supreme Judicial Court of Massachusetts stating that, “[a]s state court judges, we know that we owe our allegiance to both the state and the federal constitutions”).

53. Sager, supra note 1, at 76.
54. Id. at 143.
55. Id. at 143.
56. Id. at 102.
57. Id. at 74.
58. Hershkoff, supra note 43, at 1158. The United States Supreme Court recently decided that in important ways, state high court judges are more like politicians than like United States Supreme Court Justices. See Republican Party v. White, 536 U.S. 765, 781-82, 784 (2002).
legitimacy and local responsiveness than that of an unelected Article
III [judge]."  

The politicized and popularized context of state judges’ work—
judges who are of course still bound by the duty to faithfully interpret
the Constitution—suggests that the (dutiful) state court judge, lacking
salary protection or a life term to insulate her from the political
jungle, must enforce constitutional rights up to their “outermost
margins.” The best analogue to the state judge in Sager’s normative
vision of the constitutional partnership thus remains one he first
suggested in the more descriptive context of Fair Measure: not the
federal judge but the conscientious member of Congress. Neither may
underenforce; both are obliged to seek justice, despite being—indeed
precisely because of being—immersed in politics nonetheless.

This understanding of the obligations of the state judge is, I think,
theoretically compelling. Nevertheless, it assigns to state judges a
difficult, indeed a perilous, role. Their duty is to give life to the full
extent of federal constitutional rights, constrained simultaneously by
most of the institutional limitations of judging that make
underenforcement so attractive to federal courts and by the pressures
of popular politics from which federal judges are largely inoculated.

Nor do the complexities end there. Recasting Sager’s analogy of
the state court judge to the member of Congress from one about the
permissible scope of their power (either might choose to enforce a
constitutional norm more broadly than the underenforcing federal
courts) to one about their normative duties (both must enforce
constitutional norms to their outer limit) raises an additional
complication. In the context of the descriptive analogy, the state
court’s role as an interpreter of state constitutions might be thought to
offer an alternative route to full enforcement of the Federal
Constitution, one that would not involve opening a federal courts can
of worms. “State courts... have state constitutional provisions upon
which to draw. If a state court is moved to give broader scope to a
particular constitutional value, why not simply do so through the
exclusive or concurrent medium of the state constitution... ?”

Sager responds in Fair Measure by noting that parallel provisions are

59. See Helen Hershkoff, State Courts and the “Passive Virtues”: Rethinking the
Judicial Function, 114 Harv. L. Rev. 1834, 1902 (2001). Hershkoff makes this latter
point in the context of state court adjudication of state constitutions, but I think it
applies as well to state court interpretation of the Federal Constitution. See also
Christine M. Durham, Speech, The Judicial Branch in State Government: Parables of
nods in the same direction, noting that “some state courts may well perceive
themselves as occupying constitutional roles vis-à-vis state and local legislative and
administrative bodies within their jurisdictions quite different than that accepted by
the federal courts.” See Sager, supra note 25, at 1256.

60. See Sager, supra note 1, at 94.

not always available in state constitutions, and that "state courts may find it desirable to speak in a federal constitutional tongue." The normative analogy, by contrast, raises the possibility that state courts might be obligated to seek justice in their interpretation of their own constitutions as well as in their interpretation of the federal one. When the Texas Court of Appeals decided *Lawrence v. Texas*, for example, its duty might have extended beyond the need to decide whether the Federal Constitution permits a state to "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime" in light of "principles of liberty and equality rooted in [national constitutional] jurisprudence, spawned in the course of decades of its justice-seeking enterprise." The Texas court might also have been obliged to void such legislation in light of what it acknowledged to be the state's own, "more extensive" and more "specifically protective" constitutional guarantee of equal rights for all. The role of the state courts in a justice-seeking federal constitutional partnership, then, interacts with how justice is to be sought in states' own constitutional partnerships. I turn to that question next.

**II. JUSTICE SEEKING IN THE STATES**

Are state court judges, when interpreting state constitutions, properly thought of as participating in a "transtemporal partnership" between themselves and "those persons in the founding or amending generations who participate in the utterance of the Constitution's text," with the object of bringing the state's "political community better into conformity with fundamental requirements of political justice"?

Sager offers some good reasons to think not. As noted above, state judges differ from federal judges in ways that Sager thinks relevant. Limited terms and periodic elections deprive state judges of the distance from politics that permits their Article III cousins to engage in the kind of justice-seeking interpretation Sager favors. "Deliberation," says Sager in a somewhat different context, when "compromised by a thick overlay of political caution is in danger of losing much of its value as deliberation."

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62. *See id.*
63. *Id.* at 1260.
67. Sager, *supra* note 1, at 76.
68. *See supra* notes 57-59 and accompanying text.
69. Sager, *supra* note 1, at 212.
Then there are the differences between state and federal constitutions. Sager makes much of the parsimonious phrasing of the rights-bearing sections of the Federal Constitution, and even more of the obduracy of that constitution to amendment.\textsuperscript{70} That the supermajority requirements of Article V are so difficult to meet generates "constitutional choices of the right kind, . . . that is, the choice of widely acceptable, general, and abstract precepts."\textsuperscript{71} Generality and abstraction in turn "create[ ] space for deliberation by constitutional courts."\textsuperscript{72} Sager contrasts these characteristics of national constitutionalism with those of the states:

Consider a governmental regime in which there is a constitution, but it is relatively easy to amend. The constitution in this regime, not surprisingly, is relatively prolix and detailed, reflecting both the availability of amendment and actual frequent resort to amendment by plebiscite and/or legislation. We do not have to conjure such a regime from whole cloth: Many state constitutions bear at least some resemblance to this stylized regime. California's constitution, for example, has been amended over five hundred times and runs to some four thousand pages. In such a regime, the line between constitutional provisions and ordinarily legislation remains, but is blurred; and in such a regime, electoral participation in the shaping of constitutional content is greatly increased. But in such a regime the range of judicial judgment over questions of constitutional substance is substantially foreshortened, and so too is deliberative participation. There is nothing abstract about the trade-off between electoral and deliberative participation here.\textsuperscript{73}

Notwithstanding these differences, I see in Sager a strong argument for insisting upon justice-seeking interpretation on the part of state court judges, in partnership with that state's founding generations. Early in his analysis, Sager offers an "emphatic" denial that his account is universal. He does not claim that American constitutional "practice is . . . ideal for any other of the world's peoples," only that it "represents a reasonably good choice for a people such as ourselves—a plural people for whom justice matters."\textsuperscript{74} But this particularist disclaimer is directed at peoples situated quite differently from us Americans, perhaps because they have an entirely different religious and cultural heritage, or because they are emerging from colonial domination. State polities are composed of people "such as

\textsuperscript{71} Sager, \textit{supra} note 1, at 77.
\textsuperscript{72} \textit{Id.} at 218.
\textsuperscript{73} \textit{Id.} at 218-19; \textit{cf.} Hershkoff, \textit{supra} note 43, at 1163 ("Perhaps the most acute divergence between Article V and many state constitutional amendment procedures is the citizen initiative, which allows a minority of a state's voters to place a proposed constitutional change on the ballot for consideration by the electorate as a whole.").
\textsuperscript{74} Sager, \textit{supra} note 1, at 10.
ourselves” as no other polities could be; they are ourselves. The people of each of the American states are “a plural people for whom justice matters,” and even if they might be somewhat less “plural” than the people of the Union, justice matters to them no less. This is an argument long ago suggested, though not explicitly endorsed, by Sager himself: “[M]ost state constitutional provisions address essentially the same issues of political morality as do their federal constitutional counterparts.”

If we embrace each of the states as a justice-seeking constitutional partnership of its own, notwithstanding their phonebook-size constitutions with their metastasizing amendments, and further notwithstanding the incentives for their elected judges continually to test the political winds, we come to an overall vision of American justice seeking somewhat different from the one Sager’s own volume seems to envision. Consider Sager’s account of Plyler v. Doe, which held unconstitutional Texas’s policy of excluding children not legally present in the United States from its public schools. Sager understands Plyler as a case about a federal constitutional right—his posited right to a minimally adequate education—that the Court ordinarily declines to enforce. The Court was able to abandon its policy of underenforcing educational rights in Plyler because, by choosing to operate free public schools, the Texas “legislature had already resolved the questions of social strategy and responsibility from which the Court has shied, and what remains for adjudication is the claim of constitutional right shorn of its massive entailments of social strategy and responsibility.”

This will be precisely the state of affairs in a great deal of state court litigation about rights to minimal material well-being. Had Plyler originated in the Texas state courts rather than the federal district court, the state judges would not have needed to reach the federal question. Instead, the Texas courts would likely have viewed the state constitution itself as having sufficiently resolved the questions of “social strategy and responsibility” by declaring that “it shall be the

75. Id.
76. Sager, supra note 24, at 961. This statement appears with several others that together constitute an argument that state judges should “feel obliged to defer to the constitutional judgments of the [United States] Supreme Court in the name of a common tradition of political morality.” Id. at 973. Sager characterizes this argument in its entirety as “plausible but erroneous.” Id. at 961. But Sager says nothing about the truth of its constituent claims. I agree that state court deference to federal rights jurisprudence is not advisable. I argue that Justice in Plainclothes implies that there is a political/constitutional morality common to the states and the nation, but this shared character in no way implies that state courts should defer to federal ones in determining its contours.
78. See Sager, supra note 1, at 95-97.
79. Id. at 96.
80. Id. at 97.
duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." I say "would" rather than "could" because this position was in fact taken in the first Edgewood Independent School District v. Kirby case ("Edgewood I"), in which, seven years after Plyler, the Texas Supreme Court held that the constitutional terms "suitable" and "efficient" define standards that limit the discretion of the legislature to establish an unequal system of educational finance. This is precisely the sort of judicial move that Sager lauds the United States Supreme Court for making in Plyler: Although a reviewing court might properly decline to use naked judicial power to demand that the legislature create a school system, once the decision had been made to establish it, the court can readily demand that the system be fair. And it is a judicial move made in a similar jurisprudential context: State constitutions may lack the parsimony of the Federal Constitution, but the particular constitutional provision upon which the Edgewood I court relies is only slightly more specific than the federal Equal Protection Clause and clearly leaves plenty of "space for deliberation by constitutional courts." The most striking difference may be that state court judges, by virtue of their relatively closer involvement in politics noted above, may be somewhat more willing than a federal court would be to decide that sufficient strategic and political decisions have been taken by others to permit judicial rights-enforcement in the service of justice. Where Plyler on Sager's account derives its willingness to enforce an otherwise underenforced

83. Had the Texas Constitution omitted the requirements of suitability and efficiency, the Edgewood I court implies that it might have held the bare remaining legislative duty to "provide...[the] public free schools" to be "committed unconditionally to the legislature's discretion" with no possibility of judicial review. Id.
84. Sager, supra note 1, at 218. So too California. That state's supreme court held that there is a judicially enforceable constitutional duty upon the legislature to establish an equitable system of school finance. See Serrano v. Priest, 557 P.2d 929, 949 (Cal. 1976) ("Serrano II"). Serrano II relied upon the California Constitution's equal rights guarantee: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Cal. Const. art. 1, § 21 (in effect at the time of Serrano II, but since recodified and amended slightly as Cal. Const. art. 1, § 7(b)). Whatever the proximity of the California Constitution as a whole, the rights-bearing provision the Serrano II court deemed relevant is no less general and abstract than its federal counterpart. See also Sager, supra note 24, at 961 (discussing similarities in "language, history, or structural attributes" of state and federal constitutional provisions). This is not to say, of course, that specificity and proximity are not present in the rights-bearing sections of the California Constitution. See, e.g., Cal. Const. art. 1, § 7(a) (restricting, in considerable detail, the application of state equal protection guarantees to the areas of public school student assignment and transportation).
right from legislative action, *Edgewood I* does so based merely upon the particular articulation of a duty in the state constitution.

State courts, of course, have not unanimously adopted the *Edgewood I* approach; many have abstained precisely because they see school finance as an area commended to the political and strategic discretion of their elected branches. An argument could be made that these courts are also behaving consistently with Sager’s vision. They do not deny a legislative duty to educate children, but they find that duty not susceptible to the judicial power. In other words, they underenforce. But I think Sager’s account, especially in light of his understanding of *Plyler*, is more consistent with those states that do assert judicial power over school finance; underenforcement is hard to justify in light of the explicit state constitutional guarantees that states operate adequate public schools. Moreover, on Sager’s account, the federal courts do not get justice seeking correct every time either; his argument, rather, is that justice seeking plus underenforcement offers an attractive normative understanding of constitutional practice with enough positive echoes in federal constitutional case law to seem plausible. The same is true for state constitutional justice.

All this implies, I think, that the primary address for the vindication of the unarticulated positive rights so central to Sager’s understanding of political justice should be not the national legislature, but the justice-seeking judiciaries of the states. To be sure, Sager’s framework remains important at the federal level. It governs the actions of a responsible Congress and leaves room for federal courts to enforce positive rights in a wide range of circumstances (when, for example, cases involve acts of Congress, or when states have failed in their own justice-seeking obligations). But Sager’s book, which seeks a place for political justice at the center of the particular enterprise of federal constitutional law, has convinced me rather of the centrality of justice seeking to American constitutionalism generally; it is an argument for a constitutional partnership where justice-seeking states are central. The states, because they exercise police powers, would typically be the appropriate (or at least the first appropriate) port of call for those who seek policies that will guarantee their rights to material well-being. If, in those states, these claimants find not only an administrative and political apparatus geared towards providing the police power services necessary to realize such rights, but also find a justice-seeking constitutional judiciary centered upon state constitutions sometimes more explicit about justice than the federal

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86. See Edgar, 672 N.E.2d at 1192-93, 1196; Pawtucket, 662 A.2d at 57-58.
87. See supra note 24 and accompanying text.
88. See supra note 24 and accompanying text.
one, and find further that that judiciary is led by state judges structurally less divorced than federal judges from politics and therefore less prone to underenforcement, then states are the natural place to realize the kind of political justice Sager demands of the American constitutional system.

Although this state-centered view may not be what Sager has in mind, I think it is consistent with his views. Consider this account, relatively late in *Justice in Plainclothes*, of the right to minimum economic well-being:

> These immediate times aside, we have at least aspired to secure the right to minimum welfare. There has been a pervasive social and political recognition of the need for a safety net, and efforts to implement a base of public support that satisfies the limited promise of that metaphor. Public or publicly supported education has not flourished in our time, but neither, emphatically, has it perished; we would, I strongly hope and believe, never retreat from our sustained commitment to a free basic education. Even in the face of our inability to rationalize the distribution of medical care, most if not all urban centers provide a network of public hospitals or some other mechanism by which the most urgent medical needs of the poor are met.

Who is the “we” that “aspires” to minimum welfare? It is all of us Americans—but it is we, not primarily in our capacity as Americans, but as Texans or Californians or New Yorkers. It is the states, much more than the federal government, that have prevented (considerably prodded by their own constitutional courts) the withering of public education in our time. The states are nearly equal partners of the federal government in meeting the most urgent medical needs of the poor. The communities in which we conduct our daily lives are the polities that provide the basic services and protections that Sager places at the core of America’s political and constitutional commitments. Sager’s theory demands that in those constituent polities of the Union, as much if not more than in the Union itself, constitutional partnerships should seek justice.

### III. Popular Constitutionalism in the States

Whether state constitutional partnerships should be justice seeking, in Sager’s sense, brings me finally to the question of whether they should also be “popular,” in Kramer’s sense. Have the state courts,

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89. See supra notes 22-23 and accompanying text.
90. See supra text accompanying note 60.
91. Sager, supra note 1, at 159.
92. In 2003, states spent $109.9 billion under the Medicaid program and the federal government spent $158.7 billion. See Smith et al., supra note 48, at 188 tbl. 3. Medicaid is “the largest source of funding for medical and health-related services for America’s poorest people.” Folland, supra note 48, at 462.
like the United States Supreme Court of Kramer's account, "made [their] grab for power" in matters of state constitutional law? Will "we the people" of the states "let them get away with it?" And, if not, "[h]ow are we supposed to stop them"? 93

A full resolution of the first of these questions—have state high courts made their "grab for power"?—would require an analysis of similar or even greater complexity than Kramer's federal one. *The People Themselves* does not provide it; although Kramer begins his analysis with a rich account of state practices of judicial supremacy, his interest in states is instrumental, confined to the light that the states shed upon evolving federal political and legal institutions. As, over time, central authority becomes more dominant and its legal culture more independent, the states lose their relevance for Kramer. Thus Kramer retells the fascinating history of state legislative resistance to state supreme court authority in Ohio and Kentucky in the early 1800s, which included the legislative abolition of the Kentucky Supreme Court and a two-year period in which "two high courts sat in Kentucky" like competing medieval papacies; 94 but Kramer offers no agenda for those who might want to unseat the state, as opposed to the federal, judicial aristocracies of today. The last mention Kramer makes of state court judicial review is of a "general quiescence on constitutional matters" in the "antebellum era," notwithstanding a "slight upsurge in state court constitutional activity in the 1840s and 1850s, facilitated by the fact that the state judiciaries had become electorally accountable." 95

In hazarding an answer of my own, I think it safe to say that nowadays, the direction of influence characteristic of the colonial and early national periods has reversed: Citizens' and lawyers' norms and expectations around state judicial review are heavily influenced by their expectations about federal judicial review, which are shaped by general, state-independent trends in the national political and intellectual culture. 96 Therefore, in the minds of many, state courts are the authoritative interpreters of state constitutions exactly as the federal courts have final say over the national Constitution.

Consider, for example, the school finance cases alluded to in the previous section. 97 State judges prepared to take upon themselves the job of determining whether a legislative school finance scheme is constitutional inevitably meet arguments (sometimes from their colleagues) that engineering the state budget is the exclusive province

93. Kramer, supra note 1, at 249.
94. Id. at 151-52 (citing, inter alia, Theodore W. Ruger, "A Question Which Convulses a Nation": The Early Republic's Greatest Debate About the Judicial Review Power, 117 Harv. L. Rev. 826 (2004)).
95. Id. at 209.
96. See id. at 232.
97. See supra notes 82-86 and accompanying text.
of the legislature and executive. They often respond by saying emphatically that it is their judicial duty to say what the law is. Another even more telling example is the recent judicial reaction to the refusal of the Mayor of San Francisco to honor the requirement of a California statute that marriage licenses be granted only to opposite-sex couples. The California Supreme Court responded with a vigorous assertion of judicial primacy:

Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as constitutional and legal, until their unconstitutionality or illegality has been judicially established, for, in all well regulated government, obedience to its laws by executive officers is absolutely essential, and of paramount importance. Were it not so the most inextricable confusion would inevitably result...

This is a fine example at the state level of what Kramer describes as "the tendency to minimize moments of popular constitutionalism, to portray opposition to the Court as something rare, exceptional, dangerous, and revolutionary: an act of civil disobedience to properly constituted authority."

Although I think the California court's understanding of judicial primacy is the dominant view in the states, a counternarrative is substantially more audible in state constitutional culture than in its federal counterpart. This stems in part from the structural differences between state and federal constitutions already noted. "Because state constitutional amendments are relatively ordinary events in a state's political life," Professor Hershkoff writes, "state court judges can demonstrate a greater willingness to experiment with legal norms, on the assumption that their judgments comprise only the opening

98. See, e.g., Sheff v. O'Neill, 678 A.2d 1267, 1275 (Conn. 1996) (holding that except for matters that the state constitution has "textually ... reserved to the legislature,... it is the role and the duty of the judiciary to determine whether the legislature has fulfilled its affirmative obligations within constitutional principles," and citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1203 (Ill. 1996) (Freeman, J., concurring in part and dissenting in part) (citing Marbury, 5 U.S. (1 Cranch) at 137); DeRolph v. State, 677 N.E.2d 733, 737 (Ohio 1997) (citing Marbury, 5 U.S. (1 Cranch) at 137)). But see City of Pawtucket v. Sundlun, 662 A.2d 40, 59 (R.I. 1995) (rejecting the idea that Marbury supports judicial intervention in school finance).

99. See Lockyer v. City & County of San Francisco, 95 P.3d 459 (Cal. 2004). The court put the issue before it this way: [W]hether a local executive official who is charged with the ministerial duty of enforcing a state statute exceeds his or her authority when, without any court having determined that the statute is unconstitutional, the official deliberately declines to enforce the statute because he or she determines or is of the opinion that the statute is unconstitutional.

Id. at 462.

100. Id. at 490.
101. Kramer, supra note 1, at 229.
102. See supra notes 57-59, 68-73 and accompanying text.
statement in a public dialogue with the other branches of government and the people.”

Hershkoff also quotes Chief Judge Judith S. Kaye of the New York Court of Appeals as saying, in a similar vein, that because “state courts are generally closer to the public, ... any erroneous assessments they may make [are] more readily redressable by the People.” Amendment, experimentation, judicial elections, and relatively small scale all make state constitutionalism inherently more popular than federal constitutionalism.

More interesting in light of Kramer’s argument are cases where the citizens of a state have opposed judicial supremacy through vigorous, grass-roots assertions of popular power rather than merely by availing themselves of judicial election and amendment. In the peroration to *The People Themselves*, Kramer offers a list of strategies for resisting judicial supremacy that he views as fully legitimate, but that are abhorred by the legal, judicial, and academic establishments: “The Constitution leaves room for countless political responses to an overly assertive Court: Justices can be impeached, the Court’s budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members,” and so on.

Strikingly, several of these tactics have been deployed in the states quite recently. Jurisdiction-stripping has appeared in the struggle over gay marriage, as Georgia voters in the November 2004 election amended their constitution to block any ability of state judges to preside over the dissolution of gay marriages performed elsewhere. The school finance cases (once again) offer several examples of nonjudicial elected officials who, with an eye on the ballot box, choose simply to evade judicial mandates. In state after state, education-finance plaintiffs have had to return to court repeatedly to enforce their early victories in the face of legislative and executive stonewalling; meanwhile legislators and governors willing

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104. *Id.* at 1168. Hershkoff also notes the literature on negative electoral consequences for judges who take positions unpopular with the voters. *See id.* at 1159-60 nn.161-62.
105. Fixed judicial terms and ease of amendment, precisely the features of state constitutionalism that Sager suggests complicate justice-seeking state constitutional partnerships, *see supra* notes 57-59, 70-71 and accompanying text, are identified by Kramer as desirable techniques for balancing political accountability and judicial independence, *see* Kramer, *supra* note 1, at 250.
107. Ga. Const. proposed amend. 1, ¶ 1.b (passed by initiative Nov. 2, 2004) (“The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties’ respective rights arising as a result of or in connection with such relationship.”).
109. *See, e.g.*, *id.* at 615.
to acquiesce to the judicial understanding of their constitutional duty have in some states been replaced by the electorate\textsuperscript{110} or at least targeted by well-financed opponents.\textsuperscript{111}

Nor has popular resistance been expressed only through pressure upon elected officials. In Vermont, resistance to a school-finance equity decision included efforts to encourage widespread statewide civil disobedience to property tax collection.\textsuperscript{112} Several towns withheld their taxes from the state education fund for a time, two capitulating only after the courts froze their town bank accounts.\textsuperscript{113} A more creative tax-avoidance strategy was subsequently embraced by Killington, Vermont, where a 2004 town meeting passed a resolution seeking secession from Vermont and union with New Hampshire\textsuperscript{114} that, in the view of one observer, "reads like a throwback to the 1700s, when the restive American colonies chafed under the rule of the British monarchy."\textsuperscript{115} Notwithstanding the town's noncontiguity with the Granite State, Killington continues to pursue its quixotic quest and has spurred interest in secession in several other wealthy Vermont communities.\textsuperscript{116}

Vermont is particularly striking because its popular constitutionalism has incorporated direct action. Wealthy local foundations protested the court's school finance decision by boycotting sectors of Vermont's economy\textsuperscript{117} and made direct donations to wealthy districts in order to circumvent the wealth-sharing requirements the legislature passed in response to the court's


\textsuperscript{112} See id.


\textsuperscript{114} Cf. Abner Greene, \textit{Can We Be Legal Positivists Without Being Constitutional Positivists?}, 73 Fordham L. Rev. 1401, 1413 (2005) (arguing that uncertainty over the demands of political justice should lead sovereign states to provide for robust exit rights, including "emigration, if a viable option").


\textsuperscript{117} See Act60.org, \textit{Another Lesson in Reality for Montpelier, at http://www.act60.org/ found.htm} (last visited Nov. 8, 2004) (stating that the Freeman Foundation of Stowe, Vermont is withdrawing tens of millions of dollars in annual support for Vermont land conservation except "in towns that are members of the Vermont Coalition of Municipalities," a group opposed to the finance-equalization legislation).
mandate. Kramer offers early in his book a fairly sympathetic account of the colonial practice of "mobbing," "an accepted, if not exactly admired, form of political action" in which groups "not of criminals or gangs or drunks and other riff-raff, but of what contemporaries referred to as the 'middling sorts'—shopkeepers, artisans, farmers, and laborers" expressed their political views through "[m]ob action [that] followed implicit, customary rules about how much violence was appropriate and which targets were permissible." Despite this warm description, Kramer is apparently not prepared to include mobbing in the above-noted list of tactics available to those interested in the popular displacement of today's judicial autocrats; but following the passage of Act 60, which implemented the Vermont Supreme Court's school finance decision, a "station wagon once owned by one of Act 60's chief sponsors was brought to the state capitol and destroyed by passers-by, who were urged to vent their anger using sledge-hammers." The anti-court rhetoric is pure Kramer too. A New York Times reporter on the story interviewed an auto mechanic who "sa[id] quietly: 'They're going to start a revolution. I think we should have another Boston Tea Party'" and a realtor, perhaps with mobbing on his mind, who called Act 60 "'[t]he great rape . . . . I think there will be blood in the streets.'"

It is in the states, then, that we find the closest thing to evidence that we have about what a contemporary The People Themselves-style popular constitutionalism might look like. That evidence suggests that Kramer's version of the constitutional partnership would not lead to a community of equal citizens reasoning about their constitution together. Nor would it lead to a descent into constitutional anarchy—court-ordered school finance reform in Vermont, as in other states, so far has survived its detractors. Nevertheless, these examples of real life popular constitutionalism make vivid the essential disagreement between Sager's and Kramer's understanding of the constitutional partnership. In the school finance cases, state high courts like Vermont's behaved just as Sager says justice-seeking courts should.

118. See Rebell & Metzler, supra note 111, at 183 n.106.
119. Kramer, supra note 1, at 27.
120. See id. at 249-50.
121. Rebell & Metzler, supra note 111, at 183. Kramer reports that mobs were "often led by local gentry." Kramer, supra note 1, at 27. Playing a modified version of that role in Vermont is novelist John Irving, a wealthy immigrant to the state, who gained widespread national attention for deriding the Vermont court's approach to school finance as "Marxism" and considerable statewide opprobrium for saying that he would not speak about the issue to local press lest he make his child "a target of trailer-park envy." See, e.g., Peter Kurth, Civil War: A Prayer for Owen Mean, Toronto Globe & Mail, July 4, 1998, at D2. (There is no evidence or suggestion anywhere that Irving had anything to do with the station wagon, sledge-hammers, or predictions of bloodshed.)
In light of an abstractly-worded state constitutional mandate to educate children, and given a prior legislative decision to put public schools in place, they have imposed upon those schools constitutional requirements of adequacy and fairness in order to secure to all a minimum level of material well-being. In response, politicians who move to redistribute educational funds more fairly are targeted and sometimes defeated at the polls, the wealthy refuse to pay their taxes, and anti-equity foundations organize in Vermont to make charitable donations to rich schools in order to evade the obligation to share excess tax revenue with the poor. How should we regard those Vermonters who, with writer John Irving, complain that the Vermont court has expressed nothing more than the state's "high degree of knee-jerk presumptions against the rich"? In them, Kramer, although perhaps demurring to the distastefulness of their politics, would still discern a faction of democrats battling for "popular rule" against the judiciary's elitist "forces of aristocracy." But Sager would see injustice in plainclothes.

123. Kurth, supra note 121, at D2.