Judicial Supremacy and Federalism: A Closer Look at *Danforth* and *Moore*

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I. Introduction

Following the close of the Supreme Court's most recent term, Seattle University law professor Andrew Siegel wrote:

> To a degree that current political and judicial rhetoric masks, all of the current Justices share a conception of the judicial role that gives Courts the right and the obligation to independently assess the meaning of ambiguous constitutional rights guarantees and then follow their own best judgment, letting the chips fall where they may. The Justices have differed in their vision of the society that the Constitution's rights provisions are designed to protect, not on their vision of the judicial role.[1]

Siegel went on to suggest that this shared vision of the Court's role will eventually show that ''the gap between the reality of constitutional law (in which two groups of judges committed to a broad judicial role battle over the substance of the rights to be jealously protected) and the rhetoric of constitutional politics (in which liberal 'activists' battle conservatives committed to 'judicial restraint') has grown untenable.''[2] These observations may sound like high-minded academic talk to be appreciated only by tenured professors, but they accurately describe a fundamental (and very real) shift in the Court's understanding of its constitutional role.

*At the time this *Review* goes to press, I am due to assume a new position as a trial attorney in the Criminal Division at the U.S. Department of Justice. I would like to thank Andrew Coan for his comments on a later draft. All views expressed herein should be attributed to me alone.

[1] A Shared Vision of the Judicial Role, ProfsBlawg, http://prawfsblawg.blogs.com, (June 26, 2008, 2:28 p.m.).

[2] *Id*.

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The doctrine of ''judicial supremacy'' is nothing new. James Madison was skeptical about the Supreme Court's role as the ultimate arbiter of matters of federal constitutional interpretation, stating initially that judicial supremacy ''was never intended and can never be proper.''[3] By 1785, however, he came to understand, if not fully embrace, the notion that

> [i]t is the Judicial department in which questions of constitutionality, as well as of legality, generally find their ultimate discussion and operative decision: and the public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities implied in its members; by the gravity and deliberation of their proceedings; and by the advantage their plurality gives over the unity of the Executive department, and their fewness over the multitudinous composition of the Legislative department.[4]

Marbury v. Madison, with its pronouncement that ''[i]t is emphatically the province and duty of the judicial department to say what the law is,''[5] was a significant step for the Court. But it was not until the landmark decision in *Cooper v. Aaron*[6]—in which the Court asserted its interpretive supremacy as against the state of Arkansas—that the Court made major strides toward establishing itself as the Constitution's ultimate interpreter. *Cooper* presented a claim by the Arkansas governor and legislature that state officials had no duty to obey federal court orders attempting to implement the Court's decision in *Brown v. Board of Education*.[7] Explaining that Arkansas officials were bound by its federal constitutional decisions, the Court stated that ''[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and

[3] See Larry D. Kramer, The Supreme Court 2000 Term Foreword: We the Court, 115 Harv. L. Rev. 4, 90 (2001) (quoting Madison's Observations on Jefferson's Draft of a Constitution for Virginia, in 6 The Papers of Thomas Jefferson 315 (Julian P. Boyd ed., 1952)).

[4] *Id*. at 90 (quoting Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 Papers of Madison 349, 349–50 (Philadelphia, J.B. Lippincott & Co. 1865)).

[5] 5 U.S. (1 Cranch) 137, 177 (1803).

[6] 358 U.S. 1 (1958).

[7] 347 U.S. 483 (1954).

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country as a permanent and indispensable feature of our constitutional system.''[8]

Since *Cooper*, the Court has repeatedly asserted its interpretive supremacy vis-à-vis the other federal branches.[9] The Court's increasing willingness to assert itself as the ultimate authority on constitutional concerns has been the focus of modern constitutional law scholarship,[10] and this fundamental shift in the Court's perception of its constitutional role has been criticized at different times by the right[11] and

[8] Cooper, 358 U.S. at 18.

[9] See, e.g., Rachel E. Barkow, More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237, 241 (2002) (''The seeds for this vision of the Supreme Court's [one-sided supremacy] can be found in *Cooper v. Aaron* and its proclamation that the Court is 'supreme in the exposition of the law of the Constitution.'''); (internal citation omitted) but see Michael Stokes Paulsen, Nixon Now: The Courts and The Presidency After Twenty-Five Years, 83 Minn. L. Rev. 1337, 1346 (1999) (''*Cooper v. Aaron*'s assertion of judicial supremacy (1958) was directed at the power of states, and can be read as an assertion of federal supremacy, not judicial supremacy.'').

[10] See Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Mark Tushnet, Taking the Constitution Away from the Courts (1999); Adrian Vermeule, Judicial Review and Institutional Choice, 43 Wm. & Mary L. Rev. 1557 (2002); Barry Friedman, The Politics of Judicial Review, 84 Tex. L. Rev. 257 (2005).

[11] In his famous 1986 speech, Attorney General Edwin Meese III stated:

> Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction, once we comprehend that these decisions do not necessarily determine future public policy, once we see all of this, we can grasp a correlative point: constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.
>
> The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions. In fact, every official takes an oath precisely to that effect.

Edwin Meese III, The Law of the Constitution, 61 Tul. L. Rev. 979, 985–86 (1987); see also Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 Iowa L. Rev. 1267 (1996).

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by the left.[12] Yet it is difficult to deny that a shift has taken place in the last several decades.[13]

Siegel anticipates a time when the old labels of ''judicial activism'' and ''judicial restraint'' will no longer adequately describe the justices' approach to constitutional decisionmaking, but this has been the reality for many justices for quite some time. Like their liberal colleagues, conservative justices have shown themselves to be judicial supremacists but to different effect. Stanford Law School Dean Larry Kramer pointed out as early as 2001 that far from relinquishing its interpretive supremacy, the Rehnquist Court showed itself to be ''able and willing to be as activist in the domains it care[d] about as the liberal Court had been in protecting individual rights.''[14] Indeed, the Rehnquist Court's harnessing of interpretive superiority to promote a federalism agenda has been well-documented.[15] Thus,

[12] See, e.g., Jack M. Balkin, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045, 1051 (2001) (discussing Bush v. Gore, 531 U.S. 98 (2000), in the context of ''a fundamental shift in constitutional thought and constitutional doctrine'' toward judicial supremacy).

[13] New York University law professor Rachel Barkow describes the shift as follows:

> In the past few decades, however, the Supreme Court has become increasingly blind to its limitations as an institution—and, concomitantly, to the strengths of the political branches—and has focused on Marbury's grand proclamation of its power without taking that statement in context. The modern Supreme Court—beginning with the Warren Court, continuing through the Burger Court, and exponentially gaining strength with the Rehnquist Court—acknowledges few limits on its power to say what the law is.

Barkow, *supra* note 9, at 301–02.

[14] Kramer, Foreword, *supra* note 3, at 130; see also *id*. at 129.

[15] See, e.g., United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating the Gun Free Zones Act on the ground that it exceeded congressional power and invaded the state's regulatory domain); Printz v. United States, 521 U.S. 898, 935 (1997) (invalidating provisions of the Brady Act requiring state and local government officials to execute a federal regulatory program); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding obligations on state and local governments in the Religious Freedom Restoration Act unconstitutional, largely on separation-of-powers grounds); United States v. Morrison, 529 U.S. 598, 602 (2000) (invalidating portions of the Violence Against Women Act as an attempted exercise of legislative power reserved to the states). See Richard H. Fallon, Jr., The ''Conservative'' Paths of the Rehnquist Court's Federalism Decisions, 69 U. Chi. L. Rev. 429 n.2 (2002); see also Neal Devins, Congress, The Supreme Court, and Enemy Combatants: How Lawmakers Buoyed Judicial Supremacy by Placing Limits on Federal Court Jurisdiction, 91 Minn. L. Rev. 1562, 1584 (2007) (discussing the Rehnquist Court's federalism decisions).

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we are right to ask ourselves not whether the Chief Justice and his conservative colleagues will follow the Rehnquist Court's brand of federalism-based judicial supremacy, but when.[16]

To be sure, one should be careful about trying to extrapolate too much from one or two isolated cases.[17] But while Chief Justice John Roberts's ability to push the Court in a more conservative direction has not been fully revealed, the Court's recent decisions are not as inconclusive as some may think. *Danforth v. Minnesota*[18] and *Virginia v. Moore*[19] provide important insight. When taken individually, each case is hardly a groundbreaking constitutional decision. When studied together, however, the cases suggest the sort of impact the Chief's leadership may have on the Court. Moreover, the two cases suggest that Chief Justice Roberts is, like his predecessor and former boss, committed to a judicial supremacy that not only asserts the Court's interpretive primacy in matters of federal constitutional law, but also respects the role of states to provide greater protection in the context of individual rights than does the federal Constitution.

Both *Danforth* and *Moore* involved issues relating to federal criminal procedure that required the Court to consider the relationship between federal and state law in protecting the rights of criminal defendants. *Danforth* was handed down on February 20, 2008. Joined by Justice Anthony Kennedy, Chief Justice Roberts dissented from Justice John Paul Stevens's opinion permitting state courts to give newly established federal rules of criminal procedure broader retroactive effect than that given by the U.S. Supreme Court. Invoking *Marbury*, the Chief Justice understood *Danforth* as implicating the Court's fundamental authority to say what federal law is. He believed that the majority's decision ran afoul of ''[the Court's] role under the Constitution as the final arbiter of federal law, both as to its meaning and its reach, and the accompanying duty to ensure

[16] See Siegel, *supra* note 1 (discussing the Court's decision in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), as evidence of the Court's shared commitment to judicial supremacy).

[17] As Dahlia Lithwick wisely suggested, ''I think you have to be very, very careful when you're talking about a handful of cases.'' See Panel II, Scholars & Scribes Review the Rulings: The Supreme Court's 2007–2008 Term, The Heritage Foundation, July 8, 2008 (available at http://www.heritage.org/Press/Events/ev070808a.cfm).

[18] 552 U.S. ____, 128 S.Ct. 1029 (2008).

[19] 553 U.S. ____, 128 S.Ct. 1598 (2008).

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the uniformity of that federal law.''[20] The Chief Justice's dissent articulated a bold federalism to the other members of the Court—one that jealously guards the Court's interpretive supremacy on federal constitutional matters and exercises that authority to maintain a separation and balance between federal and state law.

Decided on the heels of *Danforth*, *Moore* was issued on April 23, 2008. The near unanimity of the Court's decision (Justice Ruth Bader Ginsburg concurred in the result) suggests that the Chief Justice's views regarding the Court's constitutional role were more convincing the second time around. In *Moore*, the Court emphatically rejected the notion that state law arrest standards could define the scope of the Fourth Amendment. In an opinion authored by Justice Antonin Scalia, the Court held that an arrest based on probable cause but in violation of state law, did not violate the Fourth Amendment. Applying an analytical framework that is remarkably similar to the Chief Justice's *Danforth* dissent, Scalia explained that the Supreme Court's constitutional decisions (not decisions by state courts or legislatures) define Fourth Amendment protections, and that the need for easily administrable rules and uniformity in federal law counseled against incorporating state laws into the Fourth Amendment.

In this article, I will analyze the Court's decisions in *Danforth* and *Moore*. I will show that although the individual members of the Roberts Court may disagree about whether a particular case raises a federal constitutional question, most of the justices favor exclusive federal judicial authority over the interpretation of federal law when it is clear that a federal question is presented.

II. The *Danforth* Decision

A. Background

The issue in *Danforth* was whether state courts can give broader retroactive effect to ''new'' rules of federal criminal procedure than is required by the Supreme Court.

In 1996, Stephen Danforth was convicted in Minnesota state court of first-degree criminal sexual conduct with a minor.[21] During trial, the government did not call the six-year-old victim to testify but

[20] Danforth, 128 S.Ct. at 1058.

[21] See Minn. Stat. § 609.342, subd. 1(a) (1994).

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instead showed the jury a videotaped interview of the child. Danforth appealed his conviction on the ground that the admission of the videotape violated his confrontation right under the Sixth Amendment. Applying the rule of admissibility set forth in *Ohio v. Roberts*,[22] the Minnesota Court of Appeals concluded that the tape ''was sufficiently reliable to be admitted into evidence,'' and affirmed the conviction.[23] The Minnesota Supreme Court denied review and Danforth's time for filing for a writ of certiorari eventually elapsed.

After Danforth's conviction had become final, the U.S. Supreme Court decided *Crawford v. Washington*,[24] in which it established a ''new rule'' for evaluating the reliability of testimonial statements in criminal trials. The decision held that ''[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is the one the Constitution actually prescribes: confrontation.''[25] Contending that he was entitled to a new trial because the admission of the taped interview violated the *Crawford* rule, Danforth filed a state post-conviction petition.

Applying the retroactivity standard set forth in *Teague v. Lane*,[26] the Minnesota trial and appellate courts concluded that *Crawford* did not apply to Danforth's case. The Minnesota supreme court affirmed the appellate court's decision. It rejected Danforth's contention that the lower courts erred in determining that the holding in *Crawford* did not apply retroactively and that Minnesota courts could not give broader retroactive effect to the *Crawford* rule than that required by the U.S. Supreme Court. The Minnesota supreme court recognized that some states have held that *Teague* does not apply to state court proceedings,[27] but concluded that it was not free to give a U.S. Supreme Court decision broader retroactive application than that given by the Court itself.[28]

B. The Court's Precedent

The Court's precedent did not require state courts to apply the *Crawford* holding to cases that were final when *Crawford* was

[22] 448 U.S. 56 (1980).

[23] See State v. Danforth, 573 N.W.2d 369, 375 (Minn. Ct. App. 1999).

[24] 541 U.S. 36 (2004).

[25] *Id*. at 68–69.

[26] 489 U.S. 288 (1989).

[27] Danforth, 128 S.Ct. at 1034 n.3 (listing state court decisions).

[28] Danforth v. State, 718 N.W.2d at 456 (Minn. 2006).

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decided.[29] But it was not clear whether federal law prohibited them from doing so.

As the Court explained in *Danforth*, the term ''retroactivity'' is somewhat confusing. Because the source of the ''new'' rule is the Constitution (not some sort of judicial power to create new rules of law), a determination that a new rule is ''non-retroactive'' does not imply that the rule was not in existence before the decision in which the new rule was announced. Rather, what the Court is ''actually determining when [it] assess[es] the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.''[30]

The Court first addressed the issue of retroactivity in *Linkletter v. Walker*.[31] The issue in that case was whether the exclusionary rule announced in *Mapp v. Ohio*[32] should be given retroactive effect. The Court adopted a practical approach that required courts to make a case-by-case determination each time a new rule was announced. This approach required examination of the purpose of the rule, the reliance of the states on the prior law, and the effect retroactive application would have on the administration of justice.[33] Applying that standard, the Court concluded that the *Mapp* rule would not be applied to convictions that were final before the date of the *Mapp* decision.[34]

Because the *Linkletter* standard produced divergent results, the Court eventually rejected application of *Linkletter* to cases pending on direct review.[35] In *Teague*, Justice Sandra Day O'Connor articulated a general rule of non-retroactivity for cases on collateral review, stating that ''[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules

[29] Danforth, 128 S.Ct. at 1034.

[30] Danforth, 128 S.Ct. at 1035.

[31] 381 U.S. 618 (1965).

[32] 367 U.S. 643 (1961).

[33] Linkletter, 381 U.S. at 629.

[34] *Id*. at 636–40.

[35] See Griffith v. Kentucky, 479 U.S. 314 (1987).

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are announced.''[36] *Linkletter* and *Teague* dealt with the standard for determining what constitutional violations may be remedied on federal habeas, but they had no occasion to address whether states can provide remedies for federal constitutional violations in their own post-conviction proceedings.

Some of the Court's decisions, however, suggested that states were precluded from applying retroactivity rules different from those announced by the U.S. Supreme Court. In *Michigan v. Payne*,[37] for instance, the Court considered the retroactivity of the rule against ''vindictive'' resentencing that had been announced in *North Carolina v. Pearce*.[38] The Michigan supreme court had applied *Pearce* to the appeal ''pending clarification'' by the U.S. Supreme Court concerning whether *Pearce* applied to resentencing proceedings that occurred before *Pearce* had been decided. Applying the *Linkletter* standard for retroactivity, the Court held that *Pearce* did not apply retroactively, reversed the judgment of the Michigan supreme court, and remanded for further proceedings.

Against this background, the Court decided *Danforth*.[39]

C. Justice Stevens's Opinion

Justice Stevens's majority opinion began by recognizing that ''[n]either *Linkletter* nor *Teague* explicitly or implicitly constrained the authority of the States to provide remedies for a broader range of constitutional violations than are redressable on federal habeas.''[40] ''A close reading of the *Teague* opinion,'' Stevens wrote, ''makes clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion.''[41]

[36] Teague, 489 U.S. at 310. The exceptions included rules that render types of primary conduct ''beyond the power of the criminal law-making authority to proscribe'' and ''watershed'' rules that ''implicate the fundamental fairness of the trial.'' *Id*. at 311–12.

[37] 412 U.S. 47 (1973).

[38] 395 U.S. 711 (1969).

[39] For a more thorough discussion of *Teague*, see 7 Wayne R. LaFave, et al., Criminal Procedure § 28.6, at 241–62 (3d ed. 2007).

[40] Danforth, 128 S.Ct. at 1038.

[41] *Id*. at 1039.

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The Court made three observations concerning Justice O'Connor's discussion in *Teague*. First, it pointed out that ''not a word . . . asserts or even intimates that her definition of the class eligible for relief under a new rule should inhibit the authority of any state agency or state court to extend the benefit of a new rule to a broader class than she defined.''[42] Second, it narrowed the grounds on which *Teague* was decided, stating that ''*Teague*'s general rule of nonretroactivity was an exercise of this Court's power to interpret the federal habeas statute.''[43] It then reasoned that ''[s]ince *Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts.''[44] Finally, it limited the scope of the decision, observing that ''the [*Teague*] rule was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions.''[45] Discussing Justice O'Connor's concern for comity and finality of state convictions, Stevens stated that those considerations are ''unique to *federal* habeas review of state convictions.''[46] If anything, he reasoned, ''comity militate[s] in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*'' and ''[finality of state convictions] is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts.''[47] Stevens concluded:

> In sum, the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ''nonretroactive'' under *Teague*.[48]

[42] *Id*.

[43] *Id*. at 1039–40.

[44] *Id*. at 1040.

[45] *Id*.

[46] *Id*. at 1041 (emphasis in original).

[47] *Id*.

[48] *Id*. at 1042. As for the Court's civil retroactivity decisions such as *Payne*, the majority determined that they supported the conclusion that states can decide what remedy to provide its citizens for violations of the U.S. Constitution. It recognized that ''[a]t first blush'' *Payne* appears to suggest that states may not give new rules broader retroactive effect than that given by the Court. It pointed out, however, that

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Justice Stevens ended his opinion by emphasizing that the Court's retroactivity decisions are primarily concerned with ''the availability or nonavailability of remedies,'' not ''whether a constitutional violation occurred.''[49] As he put it, ''[a] decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas court.''[50]

D. Chief Justice Roberts's Dissent

Chief Justice Roberts saw the matter differently. He did not see retroactivity as a ''remedial question,'' but rather as an issue involving ''the nature of the substantive federal rule at issue.''[51] It was his belief that, at bottom, *Danforth* presented a federal question that motivated his dissent.

In the Chief Justice's view, the case implicated a fundamental feature of our constitutional system: the Court's supreme authority to interpret the Constitution. He stated:

> [T]he question whether a particular ruling is retroactive is itself a question of federal law. It is basic that when it comes

(1) ''[t]he Michigan Court did not purport to make a definitive ruling on the retroactivity of *Pearce*'' or ''to apply a broader state rule of retroactivity than required by federal law''; (2) *Payne* ''remanded for further proceedings after providing the clarification that the Michigan Court sought''; and (3) ''not a word in [the] *Payne* opinion suggests that the Court intended to prohibit state courts from applying new constitutional standards in a broader range of cases than [the Court] require[s].'' *Id*. at 1042–43.

[49] *Id*. at 1047.

[50] *Id*.

[51] *Id*. at 1054. Understanding the difference between the way the majority and the dissent conceptualized the case is crucial. If one understands *Teague* as establishing a ''choice of law'' rule rather than a limit on the habeas remedy, then one is likely to agree with Chief Justice Roberts's view that *Danforth* implicates the Court's supreme authority to interpret federal law. See James S. Liebman and William F. Ryan, ''Some Effectual Power'': The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696, 837–43, 855–57 (1998). But if one understands *Teague* as concerned primarily with establishing a limit on the habeas remedy, then one is likely to agree with Justice Stevens's view that states can use their own laws to overprotect beyond the Constitution. See Kent S. Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 922–25 (1998). See also Kent Scheidegger, Retroactivity, Remedies, and AEDPA, Crime and Consequences, http://www.crimeandconsequences.com/2008/02/retroactivity_remedies_and_aed.html (February 20, 2008, 9:13 a.m.).

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> to any such question of federal law, it is ''the province and duty'' of this Court ''to say what the law is.'' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). State courts are the final arbiters of their own state law; this Court is the final arbiter of federal law. State courts are therefore bound by our rulings on whether our cases construing federal law are retroactive.[52]

The Chief Justice explained that the majority's decision was based on a misunderstanding of precedent. He recognized that the Court's retroactivity decisions were silent regarding the states' power to give broader retroactive effect than the Supreme Court. But he pointed out, ''[b]ecause the question of retroactivity was so tied up with the nature and purpose of the underlying federal constitutional right, it would have been surprising if any of our cases had suggested that States were free to apply new rules of federal constitutional law retroactively even when we would not.''[53]

The Chief's dissent was not motivated by an empty faith in the Court's role as the ultimate court in the land. Instead, it was guided by a basic understanding that it was the Court's duty to ensure uniformity—and therefore fairness—in matters of constitutional interpretation. Early in the dissent, he made the point:

> The majority contravenes [*Marbury*'s] bedrock propositions. The end result is startling: Of two criminal defendants, each of whom committed the same crime, at the same time, whose convictions became final on the same day, and each of whom raised an identical claim at the same time under the Federal Constitution, one may be executed while the other is set free—the first despite being correct on his claim, and the second because of it. That result is contrary to the Supremacy Clause and the Framers' decision to vest in ''one supreme Court'' the responsibility and authority to ensure the uniformity of federal law. Because the Constitution requires us

[52] Danforth, 128 S.Ct. at 1047.

[53] *Id*. at 1049; see also *id.* at 1049–50 (Because ''[the Court's] early retroactivity cases nowhere suggested that the retroactivity of new federal constitutional rules of criminal procedure was anything other than a matter of federal law,'' it was not surprising ''that when [the Court] held that a particular right would not apply retroactively, the language in [its] opinions did not indicate that [the] decisions were optional.'').

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> to be more jealous of that responsibility and authority, I respectfully dissent.[54]

As he saw it, the Court's obligation to reduce ''the inequity of haphazard retroactivity standards'' and ''disuniformity in the application of federal law'' is ''the very interest that animates the Supremacy Clause and [the Court's] role as the 'one supreme Court' charged with enforcing it.''[55]

Chief Justice Roberts's dissent defended the Court's interpretive authority to define federal constitutional protections, but it also recognized that under their own laws states may provide greater protections than those afforded by the Constitution. Indeed, the dissent suggests that it is the Court's failure to assert its supremacy on matters of federal law that ultimately disrupts the balance between federal and state governments:

> States are free to announce their own state-law rules of criminal procedure, and to apply them retroactively in whatever manner they like. That is fully consistent with the principle that ''a single sovereign's law should be applied equally to all.'' But the Court's opinion invites just the sort of disuniformity in federal law that the Supremacy Clause was meant to prevent. The same determination of a federal constitutional violation at the same stage in the criminal process can result in freedom in one State and loss of liberty or life in a neighboring State. The Court's opinion allows ''a single sovereign's law''—the Federal Constitution, as interpreted by this Court—to be applied differently in every one of the several States.[56]

Thus, Chief Justice Roberts championed a federalism-based approach to the *Danforth* case that advocated on behalf of the Court's

[54] *Id*. at 1047–48.

[55] *Id*. at 1053; see also *id.* at 1058 (''This dissent is compelled not simply by disagreement over how to read [the Court's retroactivity cases], but by the fundamental issues at stake—our role under the Constitution as the final arbiter of federal law, both as to its meaning and its reach, and the accompanying duty to ensure the uniformity of that federal law.'')

[56] *Id*. at 1053–54; see also *id.* at 1049 (''Our precedents made clear that States could give greater substantive protection under their own laws than was available under federal law, and could give whatever retroactive effect to *those* laws they wished.'')

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interpretive supremacy on federal constitutional questions and signaled to the states that they should feel free to provide greater substantive and remedial protections under their own laws.[57] The Chief may have been unable to convince his colleagues in *Danforth*, but *Moore* presented a second opportunity for the Court to follow this approach.

III. The *Moore* Decision

A. Background

The issue presented in *Moore* was whether a search incident to an arrest based on probable cause, but in violation of a state law prohibiting arrest, violated the Fourth Amendment.

Under Virginia law, driving on a suspended license is a misdemeanor offense, punishable by a year in jail and a $2,500 fine.[58] The statute requires an officer to issue a summons and notice to appear in court, but with several exceptions.[59] An arrest is permitted if (1) the offender fails or refuses to discontinue the offense; (2) the officer believes that the offender is likely to disregard the summons; (3)

[57] To some, the majority's decision was itself a federalist victory. George Mason University law professor Ilya Somin perceives Justice Stevens's opinion as affirming the basic federalist principle that state courts can overprotect individual rights beyond what the federal Constitution allows. He writes, ''The Supreme Court should establish a floor for remedies below which states cannot fall. But there is no reason for it to also mandate a ceiling.'' Ilya Somin, A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in *Danforth v. Minnesota*, 102 Nw. U.L. Rev. Colloquy 365, 371–73 (2008) (contending that the majority's decision is defensible on policy-based grounds). Like the majority's decision, however, Somin's position is acceptable only if one understands *Danforth* as presenting a remedial question that is entirely removed from the Court's interpretive supremacy over federal law. As Columbia law professor Michael Dorf points out, ''*Danforth* was no ordinary application of the floor-but-not-a-ceiling principle, because the question in the case was not whether Minnesota could interpret its own *state* law more broadly than federal law. Everyone accepts that it (like every other state) can. The question in *Danforth* was whether Minnesota could overprotect *federal* law. Perhaps surprisingly, the Supreme Court said yes.'' Michael C. Dorf, Did Justice Stevens Pull a Fast One? The Hidden Logic of a Recent Retroactivity Case in the Supreme Court, FindLaw, http://writ.news.findlaw.com/dorf/20080225.html (February 25, 2008). Moreover, the same policy-based justifications endorsed by Somin apply when states experiment with substantive rights and remedies under their own law; states need not manipulate federal law to achieve those policy preferences.

[58] Va. Code Ann. §§ 18.2-11, 18.2-272, 46.2-307(c) (2004).

[59] *Id*. § 19.2-74.

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the officer reasonably believes the offender is likely to harm himself or others; or (4) prior approval to arrest has been granted by order of the state court.[60]

The case involved a stop of David Lee Moore for violating the Virginia law. Even though none of the exceptions for making an arrest applied, the officers decided to arrest Moore for the offense instead of issuing a summons. After arresting him, the officers took Moore to his hotel room, where they searched him and found crack cocaine on his person. Moore was charged with possession with intent to distribute cocaine. Following the trial court's denial of his motion to suppress the fruits of the search under the Fourth Amendment, he was convicted and sentenced to five years' imprisonment.

The case reached the Virginia supreme court. The court rejected the government's contention that the search fell within the search-incident-to-arrest exception. It emphasized that the exception does not apply when state law prohibits an officer from conducting an arrest for that particular offense.[61] Because Virginia law required the officer to issue a summons under the circumstances and officers are not permitted to conduct an arrest incident to the issuance of a citation, the court unanimously held that the officers' conduct violated the Fourth Amendment.[62]

B. The Court's Precedent

The Fourth Amendment protects individuals from ''unreasonable searches and seizures'' and thus generally prohibits warrantless searches. A long-standing exception, however, is that an officer may conduct a search incident to a lawful arrest.

The Court established the search-incident-to-arrest exception in *United States v. Robinson*, where it held that such a search was justifiable for two reasons: the need to disarm the suspect and the need to preserve evidence for later use at trial.[63] The Court eventually limited the exception in *Knowles v. Iowa*,[64] in which it held that the exception did not encompass a search in conjunction with the mere

[60] *Id*.

[61] Moore v. Commonwealth, 636 S.E.2d 395, 397–400 (Va. 2006).

[62] *Id.* at 400.

[63] 414 U.S. 218, 234 (1973).

[64] 525 U.S. 113 (1998).

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issuance of a citation. The Court reasoned that the *Robinson* justification of self-defense and evidence-gathering did not apply in that situation. The Court then clarified an officer's ability to conduct an arrest in the case of *Atwater v. City of Lago Vista.*[65] It concluded that an officer who has probable cause to believe that a suspect has committed a minor offense (in that case, a misdemeanor seat belt violation) may conduct a warrantless arrest without violating the Fourth Amendment. Taken together, the Court's decisions made it clear that an officer may conduct a search incident to an arrest for even a very minor offense. But they did not address the interesting twist presented in the *Moore* case—that is, the constitutionality of a search incident to an arrest that was itself in violation of state law.

Nor did those cases explain the significance of state law in defining Fourth Amendment protections. Two competing lines of cases provided insight into how the Court was likely to approach the issue. *United States v. Di Re*[66] is representative of the cases that suggest that state-law arrest provisions should be used to determine whether an arrest and attendant search violated the Fourth Amendment. In *Di Re*, the Court held that an arrest of a suspect for a federal offense and subsequent search ''were beyond the lawful authority of those who executed them,'' because the arrest was made in violation of a state-law arrest provision.[67] The Court reasoned that in the absence of a federal statute governing arrests, state-law standards determine the lawfulness of the arrest.[68]

Other decisions suggested that Fourth Amendment protections should not track state law standards. In *Cooper v. California*, the Court held that the officers' search of an impounded vehicle was constitutional, even though, as a matter of state law, the officers

[65] In a 5–4 decision, the Court held that the Fourth Amendment, as it was originally understood, did not forbid ''arrest without a warrant for misdemeanors not amounting to or involving breach of the peace.'' 532 U.S. 318, 340 (2001).

[66] 332 U.S. 581 (1948).

[67] *Id*. at 595.

[68] The Court added, however, that this rule should apply in all situations ''except in those cases where Congress has enacted a federal rule.'' *Id*. at 590. As discussed below, Justice Scalia understood this language to mean that *Di Re* was not decided on constitutional grounds, but rather on the Court's supervisory powers in federal criminal proceedings.

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were not permitted to conduct the search.[69] The Court explained, ''Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one.''[70] The Court pointed out that, when appropriate, states can choose to provide greater protection than the federal Constitution: ''Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.''[71]

In *California v. Greenwood*, the Court held that a person does not have a privacy expectation in garbage left for collection outside the curtilage of a home, even though California law prohibited warrantless searches of garbage placed there.[72] The Court rejected the notion that the Fourth Amendment should be used to vindicate state law violations, explaining that

> Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs.[73]

Finally, in *Whren v. United States*, the Court held that a stop of a motorist based on probable cause that he had committed a traffic violation did not violate the Fourth Amendment, despite state regulations limiting the arrest authority of plainclothes officers in unmarked vehicles.[74] The Court reasoned that Fourth Amendment protections should not ''vary from place to place and from time to time'' with ''police enforcement practices,'' or ''turn upon such trivialities.''[75]

Thus, *Moore* placed state law prerogatives at the heart of the controversy. The basic question was whether the Court would allow

[69] 386 U.S. 58 (1967).

[70] *Id*. at 61.

[71] *Id*. at 62.

[72] 486 U.S. 35 (1988).

[73] *Id*. at 43.

[74] 517 U.S. 806 (1996).

[75] *Id*. at 815.

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states to define the scope of Fourth Amendment protections.[76] As in *Danforth*, *Moore* implicated the Court's ultimate authority to define the scope of the Constitution and its related duty to ensure uniformity in the administration of federal law.[77]

C. Justice Scalia's Opinion

In a near unanimous opinion authored by Justice Scalia, the Court held that an officer does not violate the Fourth Amendment by making an arrest based on probable cause but prohibited under state law.[78] Justice Scalia began by analyzing whether there was any historical indication that the ratifiers of the Fourth Amendment had intended it ''as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted.''[79] Because the Court could find no case law, commentaries, or statutes suggesting that the Fourth Amendment was meant to incorporate subsequently enacted state laws—indeed, it determined that the evidence suggested ''if anything, that Founding-era citizens were skeptical of using rules for search and seizure set by government actors as the index of

[76] Moore's amici focused instead on the potential for abuse of police arrest power. The American Civil Liberties Union, for instance, argued that reversal of the Virginia decision would permit officers to conduct arrests for minor offenses as pretexts for evidence-gathering searches. See Brief of Amicus American Civil Liberties Union in Support of Respondent at 21–26, Virginia v. Moore, 128 S.Ct. 1598 (2007). Noticeably absent from the ACLU's brief was then-Justice Janice Rogers Brown's impassioned dissent in People v. McKay, 27 Cal. 4th 601 (Cal. 2002). There, she boldly criticized the California Supreme Court's decision to uphold a search under similar circumstances. As she understood it, equipping ''rummagers'' with discretion to conduct a full-blown arrest perpetuates racially discriminatory police practices. See McKay, 27 Cal. 4th at 631 (Brown, J., dissenting).

[77] After *Moore* had been briefed but before oral argument, I wrote that the Court's precedent made this an easy case to decide and that, after all, state legislatures (not courts applying the Fourth Amendment) are in a better position to craft remedies for violations of state arrest provisions. See Edward J. Loya, Jr., Fourth Amendment Protections Should Not Be [Strengthened] by State Laws, Los Angeles Daily Journal, Jan. 3, 2008. George Washington University law professor Orin Kerr's posts on the *Di Re* case, however, made it clear that this was not an open-and-shut case. See Kerr, *infra* note 87.

[78] Moore, 128 S.Ct. at 1607 (''We conclude that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections.'').

[79] Moore, 128 S.Ct. at 1602.

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reasonableness''[80]—the Court concluded there was no clear answer that existed in 1791 and that had been adhered to ever since.[81]

Turning to the traditional reasonableness analysis, Scalia explained, ''we have said [in a long line of cases] that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt.''[82] In such a situation, the answer is clear: ''The arrest is constitutionally reasonable.''[83] Moreover, Scalia concluded that its precedent ''counsel[ed] against changing this calculus when a State chooses to protect privacy beyond the level that the Fourth Amendment requires.''[84] Pointing to *Cooper*, *Greenwood*, and *Whren*, he stated that it has consistently treated ''additional protections [under state law] exclusively as matters of state law.''[85]

Justice Scalia's opinion recognized that earlier decisions beginning with *Di Re* excluded evidence obtained in violation of state law, but distinguished them on the ground that ''those decisions rested on [the Supreme Court's] supervisory power over the federal courts, rather than the Constitution.''[86] Scalia explained that the rule in *Di Re* requiring an arrest for a federal offense to be judged according to state-law standards in the absence of an applicable statute was ''plainly not a rule derived from the Constitution,'' because the Court made it clear that Congress could change it by statute. He rejected the notion that state law provisions providing greater protection should be incorporated into the Fourth Amendment:

[80] *Id*. at 1603. The Court recognized that perhaps no such constitutional claims were raised because ''actions taken in violation of state law could not qualify as state action subject to Fourth Amendment constraints.'' *Id*. at 1604 (citing Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 660–63 (1999)).

[81] Moore, 128 S.Ct. at 1604. In her concurring opinion, Justice Ginsburg found more support for *Moore's* historical analysis than did the majority. She stated, ''Under the common law prevailing at the end of the 19th century, it appears that arrests for minor misdemeanors, typically involving no breach of the peace, depended on statutory authorization.'' *Id*. at 1609.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *Id*. at 1605.

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> Neither *Di Re* nor the cases following it held that violations of state arrest law are also violations of the Fourth Amendment, and our more recent decisions [in *Cooper*, *Greenwood*, and *Whren*] have indicated that when States go above the Fourth Amendment minimum, the Constitution's protections concerning search and seizure remain the same.[87]

With the arrest being constitutional, and in this sense ''lawful,'' he determined that the search that followed fell within the search-incident-to-arrest exception.

Justice Scalia summed up the opinion: ''We reaffirm against a novel challenge what we have signaled for more than a half century. When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.''[88]

D. The Significance of the Moore *Decision*

The majority's opinion in *Moore* resonates with Chief Justice Roberts's views in *Danforth* on judicial supremacy and the need for uniformity in the administration of federal law. Of course, the extent of the Chief Justice's influence on the other members of the Court is difficult to discern, particularly in a case in which he did not write the majority opinion. But the tone, near unanimity, and concerns in the *Moore* opinion suggest that the Chief Justice's dissent in *Danforth* influenced the way the justices approached the case.[89] Justice Scalia's

[87] *Id*. The Court's quick work with *Di Re* was no doubt surprising to many. Before *Moore* had been handed down, law professor Orin Kerr wrote several thoughtful posts on the significance of the case. He contended that ''the *Di Re* precedent pretty much answers *Virginia v. Moore*,'' Orin Kerr, Why the Defendant Should Win in *Virginia v. Moore*, The Volokh Conspiracy, http://volokh.com/posts/1199753815.shtml (Jan. 7, 2008), and that *Di Re* was not a supervisory-power decision, see Orin Kerr, Why *United States v. Di Re* Clearly Was *Not* a Case on the Federal Supervisory Power, The Volokh Conspiracy, http://volokh.com/posts/1199922681.shtml (Jan. 10, 2008).

[88] Moore, 128 S.Ct. at 1608.

[89] This is not to suggest, of course, that the Chief Justice is the first member of the Court to advocate in favor of the Court's primacy in federal constitutional interpretation, or that the Chief Justice is the leading proponent of the use of judicial supremacy to further the Court's federalism jurisprudence. Indeed, the reader will note that much of the Chief Justice's rhetoric is reminiscent of Justice Kennedy's majority opinion in *City of Boerne v. Flores*, 521 U.S. 507 (1997). I am less concerned, however, with establishing the Chief Justice as the leading conservative proponent of judicial supremacy as I am with showing that this doctrine was an important concern for a majority of justices in both cases.

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opinion makes it clear that the Court will exercise its interpretive supremacy to establish administrable and uniform constitutional rules that have the same meaning in every state. It also demonstrates the Court's respect for state law regimes that provide greater protection for individual rights beyond what is required by the Constitution by leaving it to the states to remedy state-law violations under their own laws.

1. The Court's Interpretive Supremacy

Moore is remarkable for its lack of deference to the states in matters of *federal* constitutional interpretation. The decision emphatically rejects the idea that the scope of the Fourth Amendment should depend on the intricacies of state law violations.

In the context of the Fourth Amendment, the need for easily administrable rules is particularly important. In *Atwater*, the Court had previously rejected the defendant's contention that the Court should adopt a modern arrest rule forbidding an arrest ''when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention.''[90] The Court concluded that the rule permitting an arrest based on probable cause should extend even to minor misdemeanors, such as an arrest for a misdemeanor seat belt violation, because of the need for clear rules capable of being applied in the spur of the moment.[91] The Court explained that the constitutionality of an arrest should not turn on judgments concerning whether an offense was ''jailable'' or ''fine-only,'' or whether there was a ''risk of immediate repetition,'' because ''an officer on the street might not be able to tell'' and this predicament might deter officers from making legitimate arrests.[92]

[90] Atwater, 532 U.S. at 346.

[91] *Id*. at 347–50.

[92] *Id*. at 348–350. *Atwater*'s principal contention was that the Fourth Amendment incorporated common law arrest restrictions that forbade warrantless arrest for misdemeanor offenses that do not involve a ''breach of the peace.'' *Id*. at 326–27. See also Brief of Amicus Cato Institute in Support of Petitioners at 5, Atwater v. City of Lago Vista, 532 U.S. 315 (2001) (''Typically, the Fourth Amendment assures protection of the common liberties of citizens that were guaranteed at the time of the Founding. In this case, the common law could not be more clear or straightforward: warrantless arrests for minor offenses are prohibited unless they involve a breach of the peace.''). The *Atwater* majority's discussion of Framing-era common law protections has been severely criticized. See Thomas Y. Davies, The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in *Atwater v. Lago Vista*, 37 Wake Forrest L. Rev. 239 (2002). But since the

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Justice Scalia concluded that ''[i]ncorporating state-law arrest limitations into the Constitution would produce a constitutional regime no less vague and unpredictable than the one we rejected in *Atwater*. The constitutional standard would be only as easy to apply as the underlying state law, and state law can be complicated indeed.''[93]

Virginia's amici emphasized the need for uniformity in Fourth Amendment protections. In particular, the brief filed by the Office of the Solicitor General warned that constitutionalizing state-law restrictions would ''balkanize'' Fourth Amendment protections.[94] As the solicitor general explained, protections under the Fourth Amendment would vary from state to state. While the Fourth Amendment would protect individuals in Virginia, New Mexico, and Massachusetts, where states generally prohibit warrantless arrests for driving on a suspended license, individuals in Arizona, Washington, and Maine would not be protected, because those states permit warrantless arrests for that offense.[95] In other words, citizens in some states would be entitled to greater protections under the Federal constitution than citizens in other states.[96] Fourth Amendment protections would also vary within the same state. Because Virginia law permits warrantless arrests for driving on a suspended license in jurisdictions where a state court has granted approval, an arrest in such jurisdictions would not violate the Fourth Amendment even though individuals would be protected in the rest of the state.[97] Finally, Fourth Amendment protections would vary over time as states established non-arrestable offenses.[98]

Court had already held in *Atwater* that the Fourth Amendment permits warrantless arrest for non-felony offenses that do not constitute breach of the peace, it was easier for it to conclude in *Moore* that the Fourth Amendment does not protect against the small subset of misdemeanor arrests for which ''the State ha[d] already acted to constrain officers' discretion and prevent abuse.'' 128 S.Ct. at 1607.

[93] Moore, 128 S.Ct. at 1606–07.

[94] Brief of Amicus Curiae the Office of U.S. Solicitor General in Support of Appellee at 13, Virginia v. Moore, 128 S.Ct. 1598 (2007).

[95] *Id*. at 14–15.

[96] See Brief of Eighteen States and Puerto Rico in Support of Appellee at 23, Virginia v. Moore, 128 S.Ct. 1598 (2007).

[97] See Brief of U.S. Solicitor General, *supra* note 94, at 15.

[98] *Id*. The solicitor general suggested that another oddity in constitutionalizing state-law restrictions is that it would put courts in the awkward position of using the federal Constitution to tell state officials how to conform their conduct to their own laws. *Id*. at 20.

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Obviously aware of these concerns, Justice Scalia stated that ''linking Fourth Amendment protections to state law would cause them to 'vary from place to place and from time to time.'''[99] He pointed out yet another disturbing scenario, stating: ''Even at the same place and time, the Fourth Amendment's protections might vary if federal officers were not subject to the same statutory constraints as state officers.''[100] The Court would not sanction such an odd result. As Scalia put it, ''It would be strange to construe a constitutional provision that did not apply to the States at all when it was adopted to now restrict state officers more than federal officers, solely because the States have passed search-and-seizure laws that are the prerogative of independent sovereigns.''[101]

From a federalism standpoint, *Moore* could not have been written more persuasively had Chief Justice Roberts penned it himself. The decision is striking for its refusal to defer to the states in matters of federal constitutional interpretation. In this sense, it is a strong defense of a constitutional system in which federal and state governments separate and share responsibilities to protect individual rights.

2. The State's Role in Providing Greater Protection

The analytical framework articulated in Chief Justice Roberts's dissent, and applied in *Moore*, considers federal constitutional rights as distinct from and independent of state policies that may provide increased protections. The benefit of this framework is that it respects the state's interest in protecting individual rights under state law by leaving it to them to implement remedies for violations of their own laws.

Justice Scalia rejected Moore's contention that the Fourth Amendment should be used to remedy state law violations because a state that has enacted a policy prohibiting an arrest for a particular offense has no interest in such an arrest. He found that a state retains an interest in the arrest ''because arrest will still ensure a suspect's appearance at trial, prevent him from continuing his offense, and enable officers to investigate the incident more thoroughly.''[102] Scalia explained:

[99] Moore, 128 S.Ct. at 1607 (quoting Whren, 517 U.S. at 815).

[100] Moore, 128 S.Ct. at 1607.

[101] *Id*.

[102] *Id*. at 1605.

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> State arrest restrictions are more accurately characterized as showing that the State values its interests in forgoing arrests more highly than its interests in making them . . . or as showing that the State places a higher premium on privacy than the Fourth Amendment requires. A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.[103]

The Court's underlying concern, however, was the possibility that using the Fourth Amendment to remedy state law violations would usurp a state's authority to create remedies for violations of its own laws and thus upset the balance between federal and state authority. Justice Scalia stated that application of the federal exclusionary rule to remedy state law arrest violations ''would often frustrate rather than further state policy.''[104] He observed that many states like Virginia do not normally exclude from criminal trials evidence obtained in violation of state arrest laws;[105] and that, if the Fourth Amendment were used to remedy violations of state arrest law, ''States unwilling to lose control over the remedy would have to abandon restrictions on arrests altogether.''[106] As Scalia understood it, ''This is an odd consequence of a provision designed to protect against searches and seizures.''[107]

[103] *Id*. at 1605–06.

[104] *Id*. at 1606.

[105] See, e.g., Moore v. Commonwealth, 45 Va. App. 146, 161 (Va. App. 2005) (Annunziata, J., dissenting).

[106] Moore, 128 S.Ct. at 1606.

[107] *Id*. Louisville University law professor Luke Milligan writes that the Court's decision not to incorporate state-law violations into the Fourth Amendment creates a ''tax-free zone'' for states to develop their own search-and-seizure law. He explains:

> The Fourth Amendment provides an absolute floor on search and seizure rights. All observers, no matter their judicial philosophy, envision that the states, which are well-positioned to gauge the particular privacy and enforcement interests of their citizens, are free to enact extra-constitutional regulations to protect privacy rights beyond those guaranteed by the Fourth Amendment.
>
> Extra-constitutional regulations are more likely to be enacted, all things being equal, by legislatures with unfettered authority to select remedies (e.g., exclusion, civil liability, administrative sanctions, or, for that matter, no remedy at all). If the Court had, as Moore [advocated], pegged the ''search incident'' doctrine to state law rather than constitutional law, the Fourth Amendment (which is bound to the costly remedy of exclusion) would

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Justice Ginsburg agreed on this point. She observed that ''[t]he Fourth Amendment, today's decision holds, does not put States to an all-or-nothing choice in this regard. A State may accord protection against arrest beyond what the Fourth Amendment requires, yet restrict the remedies available when police deny to persons they apprehend the extra protection state law orders.''[108]

Chief Justice Roberts expressed a similar sensitivity to the integrity of state law schemes that provide increased protections. His lodestar was the basic federalist principle that just as the Supreme Court cannot subvert a state's decision to give retroactive effect to its own laws, a state should not be able to provide broader retroactive effect to a federal right than the Court has provided. He explained the point this way:

> Principles of federalism protect the prerogative of States to extend greater rights under their own laws than are available under federal law. The question here, however, is the availability of protection under the Federal Constitution—specifically, the Confrontation Clause of the Sixth Amendment. It is no intrusion on the prerogatives of the States to recognize that it is for this Court to decide such a question of federal law, and that our decision is binding on the States under the Supremacy Clause.
>
> Consider the flip side of the question before us today: If a State interprets its own constitution to provide protection beyond that available under the Federal Constitution, and has ruled that this interpretation is not retroactive, no one would suppose that a federal court could hold otherwise, and grant relief under state law that a state court would refuse to grant. The result should be the same when a state court is asked to give retroactive effect to a right under the Federal Constitution that this Court has held is not retroactive.[109]

> effectively impose an ''exclusion tax'' on those well-meaning legislatures that opt to enact extra-constitutional search and seizure regulations.

Luke M. Milligan, Virginia v. Moore: A Tax-Free Zone for the Development of Search and Seizure Law, University of Louisville Law Faculty Blog, http://www.law.louisville.edu/node/1788 (April 24, 2008).

[108] Moore, 128 S.Ct. at 1609.

[109] Danforth, 128 S.Ct. at 1057.

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Thus, Chief Justice Roberts and Justice Scalia took the position that our federalist form of government requires federal and state courts to respect the separation of federal and state law.

IV. Conclusion

Legal commentators frequently criticize both judicial supremacy and federalism—and especially federalism-based judicial supremacy. They criticize judicial supremacy as an attempt by the nine members of the Court to overrule the political will of the people themselves.[110] They criticize federalism as shorthand for a system dedicated to the elimination of rights.[111] And decisions resembling a federalism-based judicial supremacy are perceived as phony attempts to recapture the ''real'' Constitution.[112] *Danforth* and *Moore* offer an opportunity to rethink these ideas.

In *Danforth*, Chief Justice Roberts was not concerned with overruling state law prerogatives, defining the rights criminal defendants deserve, or pursuing a quest for original meaning. Rather, he was preoccupied solely with the rights afforded under the U.S. Constitution and the Court's authority to determine how those rights are applied. Moreover, he explained that the Court's interpretive supremacy in federal constitutional matters carries with it the related duty to ensure uniformity (and as I understand it, fairness) in the administration of federal law. To illustrate the importance of the question presented in the case, he posed the possibility that ''[o]f two criminal defendants, each of whom committed the same crime,

[110] See, e.g., Robert H. Bork, The Tempting of America 130 (Free Press 1997) (''What is worrisome is that so many of the Court's increased number of declarations of unconstitutionality are not even plausibly related to the actual Constitution. This means that we are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own.''). See also Tushnet, *supra* note 10, at 8 (describing the *Dred Scott* decision as an instance in which the Court asserted its judicial supremacy ''to take contention over slavery off the national political agenda in the 1850's'').

[111] See Mitchell F. Crusto, The Supreme Court's ''New'' Federalism: An Anti-Rights Agenda?, 16 Ga. St. U.L. Rev. 517, 520 (2000) (''Federalism that promotes states' rights arguably promotes democracy, which is by definition majority rule. However, majority rule can lead to oppression of minority interests and individual rights. Many of those rights are constitutionally protected. Hence, federalism encroaches upon constitutionally-protected rights.'').

[112] See Larry D. Kramer, Putting the Politics Back Into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 291 (2000).

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at the same time, whose convictions became final on the same day, and each of whom raised an identical claim at the same time under the Federal Constitution, one may be executed while the other is set free—the first despite being correct on his claim, and the second because of it.''[113] Understandably, he saw that as an outcome in which federal law should have no part.

Moore presented a second chance for the Court to apply the federalist framework that the Chief Justice had articulated in *Danforth*. The Court rejected the idea that state legislatures could define the scope of the Fourth Amendment. In doing so it did away with the possibility that Fourth Amendment protections might vary from state to state, within the same state, over time, or depending on whether the arrest involved a federal or state officer. And it put it to the state legislatures to decide for their own citizens what protections should apply when a state-law violation occurs. In this sense *Moore* affirms what should have been obvious in both cases: We have one Constitution but many state laws; and while states can create and administer greater protections than those provided in that Constitution, the application of the Constitution should remain the same in every state.

[113] Danforth, 128 S.Ct. at 1047–48.

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