# State Courts CP

## NEGATIVE

#### To be read against Supreme Court affs…

### 1nc

#### Text: The Fifty United States State Supreme Courts should <plan>

#### That solves the aff – state courts can interpret the constitution and sufficiently check expansive domestic surveillance

Gardner ’03 --- professor of law @ State University of New York (James A, “State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions,” Georgetown Law Journal, June 2003, 91 Geo. L.J. 1003)//Mnush

When we think about tyranny perpetrated by the national government, we tend to think about rights-invasive congressional measures, such as the Alien and Sedition Acts of 1798, n143 or presidential high-handedness, such as the military internment of Japanese-Americans during World War II n144--abuses, that is to say, by the legislative and executive branches. But liberty can also be abused by the judicial branch, most notably when federal courts refuse to acknowledge and protect individual rights. Abusively stingy readings of the U.S. Constitution not only may deny litigants their rights in individual cases, but generally also authorize other organs of government to invade liberties that they should be required to respect. While a state might combat this brand of judicial tyranny by invoking any of the forms of resistance mentioned earlier, state courts are especially well-suited to play a role in resisting abuse of national judicial power, and to do so through entirely peaceful and fully legal means. A powerful weapon state courts may wield in such a struggle is their authority to interpret state constitutions to provide more generous protection for individual rights than the U.S. Supreme Court has chosen to provide under the national Constitution.

### 2nc Solvency – General

#### State court interpretation of the constitution resists federal power and tyranny

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Let me briefly review my argument. I have claimed to this point that state courts are capable of serving as agents of federalism. Should they occupy such a role, state courts would stand alongside the state executive and legislative branches when necessary by deploying judicial power for the purpose of resisting national tyranny. The principal tool that state courts possess to resist national power is their superintendency of the state constitution -that is, their power to interpret its provisions. State courts can wield this power against the national government by interpreting the state constitution both to assure vigorous, effective resistance to national power by the state executive and legislative branches, and to provide more protection for individual rights than does the national Constitution. Thus, my account of state judicial power is "functional" n280 in that it conceives of state judicial power as serving a distinct purpose in a complex federal system of overlapping powers and responsibilities. I have defended this account of state judicial power against strict constructionist theoretical objections, and I have shown that the actual record of state courts in resisting national power, supplemented by any of a range of reasonable assumptions about institutional constraints on judicial power, provides a sound basis for a state polity to invest its courts with a degree of trust or distrust that might reasonably vary across a broad range. This degree of trust or distrust in turn prompts a state polity to charge its courts-or not to charge them, or to charge them only to some limited degree, as the case may be-with serving as agents of federalism.

#### State courts, specifically those as agents of federalism are best at securing liberty

Gardner ’03 --- professor of law @ State University of New York (James A, “State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions,” Georgetown Law Journal, June 2003, 91 Geo. L.J. 1003)//Mnush

In contrast, courts that have been authorized to serve as strong agents of federalism will have been given a special kind of institutional responsibility to oversee the state constitution for the purpose of assuring that it serves as an effective charter for the deployment of state power to resist invasions of liberty by the national government. Judges who possess this responsibility would then have some degree of freedom to consult their own views about how state power and effective state public policy can best be structured and deployed to serve the protection of liberty. Courts operating under such instructions would thus be authorized, in appropriate circumstances, to engage in a comparatively open, free-wheeling kind of constitutional interpretation n281 that might more closely resemble the process of state common-law adjudication than it would th

e strict originalism to which their distrusted counterparts would be confined. n282 The state polity would still retain ultimate responsibility for the content of the state constitution, but [\*1798] this responsibility would in all likelihood be exercised infrequently, and invoked for the most part to correct judicial interpretations of the constitution that stray too far afield from the rough plan of state self-governance contemplated by the state polity.

### 2nc Solvency – Aerial Surveillance

#### The state courts should restrict domestic drone use

Hudson 2/1 --- professor of law @ Vanderbilt University (David L, “How should states regulate drones and aerial surveillance?” ABA Journal, February 1st, 2015, <http://www.abajournal.com/magazine/article/how_should_states_regulate_drones_and_aerial_surveillance/>)//Mnush

One question that may arise from drone regulation is the difference between state and federal privacy protection. For example, the New Mexico Court of Appeals interpreted the state constitution as more protective of privacy than the U.S. Constitution. “It would be better for states to legislate in this area,” says Vacek. “Perhaps we will have a conflict that could eventually wind up before the U.S. Supreme Court. Current Supreme Court law says surveillance from the public airspace is OK. But the court could provide a different answer with respect to drones.” Adds Chemerinsky: “It is unclear how the Fourth Amendment applies to drones. The technology is too new for the courts to have ruled.” In Florida v. Riley, the Supreme Court ruled in 1989 that the police may use low-flying aircraft to gather information without a warrant or probable cause. The court said that this was not a search within the meaning of the Fourth Amendment, Chemerinsky says. “If the court follows this with regard to surveillance by drones, there would be no constitutional limit on their use.” “Technology has outpaced law in this area,” Whitehead says. “Traditional search warrants won’t work with drones. They have the ability to hack into Wi-Fi and use scanning devices from airspace. They represent the essence of a surveillance-police state.” Experts are still unclear how often drones are now being used. “We haven’t been able to determine the amount of domestic drone use. Much of that information is confidential,” Morris says. “Many police departments have bought drones and many of them are ramping up for their use in the future,” he says. “I think the trend is going to continue. I don’t know if I have ever seen such a hot-button issue with the public—as far as law enforcement surveillance with drones. People are really concerned about it.” “Domestic drones are being used,” says Whitehead. “We don’t know how many, but we know that the Department of Homeland Security has used them and some police departments have used them. They will be used far more frequently in the near future.” Whitehead is dubious about the future. “The Fourth Amendment is on life support,” he asserts. “The [National Security Agency] is downloading 227 million text messages a day. This violates the Fourth Amendment. We have moved into a new paradigm. Many sci-fi movies are coming true. “Nearly every technology in the [2002] movie The Minority Report is available today. It’s like those guys are prophets. By 2025 to 2030, we are going to be in a cyborg kind of reality. It sounds preposterous to most people, but it is reality.”

#### The state courts should restrict aerial surveillance

Olivito ’13 --- J.D. candidate @ Ohio State University (Jonathon, “Beyond the Fourth Amendment: Limiting Drone Surveillance Through the Constitutional Right to Informational Privacy,” Ohio State Law Journal, June 26th, 2013, <http://moritzlaw.osu.edu/students/groups/oslj/files/2013/12/8-Olivito.pdf>)//Mnush

To remedy these privacy concerns, courts should adjudicate cases involving drone surveillance under the constitutional right to informational privacy. As already recognized by most courts applying the right, the constitutional right to privacy creates a right of action against the government.177 This right of action stands independent of the Fourth Amendment, augmenting the Fourth Amendment’s protections rather than replacing them.

When courts confront the claim that drone surveillance has invaded an individual’s constitutional right to privacy, courts should apply the following test. First, courts should require a claimant to establish a threshold requirement: that a government action has implicated a privacy interest. Once this threshold criterion is met, the court should engage in a balancing test that weighs the individual’s privacy interests against the government’s interests in conducting the challenged drone surveillance. Courts should consider five factors when applying the balancing test: (a) the duration of the surveillance; (b) the invasiveness of the technologies used; (c) the thoroughness of the surveillance; (d) the individualized nature of the surveillance; (e) and the presence of a warrant or probable cause. If the individual’s privacy interests outweigh the government’s interests, then the court would, as a remedy, prohibit the government from storing, aggregating, transferring, or distributing any information gathered in the challenged surveillance. The court’s remedy would apply both to any information that the government had already gathered and to information that the government might observe through the challenged drone surveillance in the future.179 The subsequent discussion elucidates the elements of this balancing test.

### 2nc Federal Follow-On

#### The Supreme Court models state court decisions \*\*\*do not read if going for a “court stripping” net benefit

Gardner ’03 --- professor of law @ State University of New York (James A, “State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions,” Georgetown Law Journal, June 2003, 91 Geo. L.J. 1003)//Mnush

State judicial rejection of excessively narrow Supreme Court precedents concerning the scope of individual rights helps check national power in at least four ways. First, whenever a state court dissents from the reasoning of a U.S. Supreme Court decision, it offers a forceful and very public critique of the national ruling, which can in the long run influence the formation of public and, eventually, official opinion on the propriety of the federal ruling. Second, state rulings that depart from or criticize U.S. Supreme Court precedents can contribute to the establishment of a nationwide legal consensus at the state level, a factor which the Supreme Court sometimes considers in the course of constitutional decision making. Third, generous state interpretations of individual rights can more directly check national power by prohibiting state and local governments from exercising authority permitted them under the U.S. Constitution to suppress certain kinds of private behavior. In so doing, state courts create spaces in which otherwise prohibitable behavior may flourish. Finally, rights-protective rulings by state courts can help ameliorate the harm to liberty caused by narrow national rulings by providing protection for second-best alternatives to the types of behavior that such national rulings permit governments to suppress.

### AT: Circumvention

#### State court rulings don’t get circumvented

Gardner ’03 --- professor of law @ State University of New York (James A, “State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions,” Georgetown Law Journal, June 2003, 91 Geo. L.J. 1003)//Mnush

It is true, of course, that a more rights-protective state constitutional ruling cannot prevent federal FBI and DEA agents operating in the state from using the looser, federally authorized search practices. Nevertheless, the impact of the state ruling may be considerable. In most states, the likelihood that any person will come in contact with federal law enforcement officials is minuscule in comparison to the likelihood of contact with state or local police who are subject to the restrictions of the state constitution. n232 The state constitutional ruling, then, creates a space--a public sphere of potentially considerable scope--in which citizens of the state may enjoy a freedom from police searches that, in the view of the state polity, creates a more appropriate relationship between private conduct and official power.

### AT: Signal/Perception Solvency Deficits

#### State court rulings solve *better* than the Supreme Court – constitutional rejectionism influences the public’s understanding of the constitution

Gardner ’03 --- professor of law @ State University of New York (James A, “State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions,” Georgetown Law Journal, June 2003, 91 Geo. L.J. 1003)//Mnush

Whenever a state's highest court, by constitutional ruling, recognizes a level of protection for individual rights that exceeds levels of protection for those rights established under parallel provisions of the national Constitution, it registers a forceful and often very public dissent from rulings of the U.S. Supreme Court. This kind of state constitutional rejectionism makes news--not merely among members of the bar or those who follow legal affairs, but in the mainstream press as well--and such publicity inevitably influences long-term public understandings of the appropriate content of constitutionally guaranteed rights.

### AT: Supreme Court Key

#### State courts can check back national power

Gardner ’03 --- professor of law @ State University of New York (James A, “STATE COURTS AS AGENTS OF FEDERALISM: POWER AND INTERPRETATION IN STATE CONSTITUTIONAL LAW,” William & Mary Law Review, March 2003, 44 Wm. & Mary L. Rev. 1725)//Mnush

I think not. State law is capable of controlling something poten-tially significant to any struggle by states to resist national power: other state officials. Through their control over state law, and in particular through their control over the state constitution, state [\*1731] courts are capable of exercising some influence over the manner and forcefulness with which state governments may wage the kinds of struggles against national authority contemplated by federalism. By construing the provisions of the state constitutions that both empower and restrict the state legislative and executive branches, state courts can influence the facility with which state government responds to threats originating at the national level; the tools that state actors have at their disposal to resist encroachments by national power; and the ways in which state officials may deploy those tools in intergovernmental power struggles.

#### State courts check national courts – state constitution implementation leads to resistance of national power

Gardner ’03 --- professor of law @ State University of New York (James A, “STATE COURTS AS AGENTS OF FEDERALISM: POWER AND INTERPRETATION IN STATE CONSTITUTIONAL LAW,” William & Mary Law Review, March 2003, 44 Wm. & Mary L. Rev. 1725)//Mnush

In a recent article, I explain how state courts can resist and counteract liberty-invasive abuses of national judicial power by giving a more generous construction to individual rights found in the state constitution than national courts give to similar provisions appearing in the Constitution. n93 Here, I want to focus on a different [\*1751] method by which the state constitution can be deployed to resist national power. This method derives its force from the fact that the state constitution is the legal document that ultimately grants, allocates, and structures any powers possessed by state officials in other branches of state government. To put this proposition in its bluntest form, state courts may participate in state resistance to national power by construing the state constitution in such a way as to assure, insofar as possible, that the state legislative and executive branches have powers adequate to resist abuses of national authority.

## AFFIRMATIVE

### Permutation

#### The permutation is preferable – lockstep agreement on constitutional questions solves best

Gardner ’03 --- professor of law @ State University of New York (James A, “State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions,” Georgetown Law Journal, June 2003, 91 Geo. L.J. 1003)//Mnush

In any event, there is a more benign way to understand lockstep analysis. Lockstep analysis, one might say, does not necessarily reveal an abandonment by state courts of their responsibilities to protect liberty and to reflect meaning-fully upon the best ways to do so. On the contrary, it might well represent a discharge of those responsibilities, but in circumstances where the state court feels that the national government is already doing a reasonably good job. In those circumstances, a state court might reasonably conclude that there is no need, at least for the moment, to explore in any greater depth the possibilities presented by the state constitution to protect liberty any more or less vigorously than it is already protected by the national judicial analysis. Lockstep analysis thus need not represent an absence of independent constitutional judgment; it can just as easily represent the outcome of a fully-informed exercise of independent state judicial judgment.

#### Perm solves best

Bennett ’15 --- fellow in national security law @ the Brookings Institution and managing editor of Lawfare (Wells C, “Civilian drones, Privacy, and the Federal-State Balance,” Brookings, 2015, http://www.brookings.edu/research/reports2/2014/09/civilian-drones-and-privacy)//Mnush

We thus can review the bidding: states have a loose, largely untested framework in place for regulating nongovernmental, aerial surveillance. This in turn is supplemented by tiny pockets of federal activity, which have expanded modestly since 2012. The nascent trend is to tinker with this arrangement rather than to reshape it radically—say, by enacting an all-encompassing, state-law-preempting privacy statute. Exhibit A is Congress’s command to the FAA to study privacy issues further, following the agency’s issuance of FAA-enforced privacy rules for test sites; Exhibit B, the White House’s order and forthcoming NTIA principles. The latter reportedly will not address all privacy dilemmas associated with all forms of unmanned surveillance. Instead, after consulting with various stakeholders, NTIA eventually will issue voluntary privacy guidelines, which in turn will apply to commercial drone operations only, and which, as before, will reserve the defense of “private” privacy largely to background law.43¶ It is easy to imagine policy ideas that would keep the above architecture intact. By way of example, Congress could condition authorization to fly on a pledge to respect privacy. The FAA might insist that before receiving permission to operate an unmanned aircraft, a business or individual first would have to commit to observing applicable privacy laws.44 Thereafter, the FAA would have discretion to rescind the operator’s flight credentials, upon submission of proof that a court or similar body has faulted the operator for serious privacy violations under state law. The “seriousness” criterion here also could—and, so as not to jack up the cost of deploying a critical technology too much, likely should—be made stiff enough so as to capture only the worst varieties of unmanned aerial surveillance.45¶ How you feel about the evident regulatory gap probably has to do with how you feel about likely sources and locations of unmanned aerial surveillance.¶ Keep in mind the scope. The FAA’s regulatory powers don’t extend everywhere and to every mode of unmanned flight. The limitation has implications for any FAA measure affecting privacy. For example, hobbyists’ “model aircraft” are mostly exempted from FAA regulation.46 Going forward, how you feel about the evident regulatory gap probably has to do with how you feel about likely sources and locations of unmanned aerial surveillance. Thus, if you worry most about rampant Quadcopter eavesdropping, then the above proposal might not do that much to assuage you; such machines seemingly can be operated as “model aircraft,” and thus require no FAA license. Conversely, an FAA-based oversight approach to privacy might help considerably, if you predict that the most intrusive surveillance technologies will be paired with larger-sized drones—that is, drones likely to come within the FAA’s jurisdiction, and to require operator certification and training.47 ¶ A proposal like the above (or one like it) would mean only incremental change. After all, the FAA already exercises a comparable authority over operators of the six test ranges established under FMRA. It wouldn’t take too much to have the FAA carry forward, on a permanent basis and with respect to unmanned aircraft within its jurisdiction, a variant of the humble privacy responsibilities it already has taken on unilaterally. Doing so would not obligate the FAA to “regulate privacy” in some broad or agency-inappropriate fashion, either. Instead the states would do the regulating, and afterwards, private litigants and state regulators would do the litigating and state courts the adjudicating. The FAA would only get into the mix afterwards, and only in the most deserving of cases. ¶ Of course, that the above or any other policy change would fit nicely with existing institutional arrangements does not justify that policy’s adoption. But there are good reasons to extend federal oversight of drones and “private” privacy, while the adequacy of the underlying state law framework comes into sharper focus. Take the idea sketched out above. The largest companies have the greatest ability to acquire the most sophisticated unmanned aircraft, and thus also to engage in the most far-reaching surveillance. It happens that those same companies could be best situated to withstand the kinds of ex post remedies courts typically impose upon rampant privacy violators—injunctions, money damages, and the like. In that respect, the scheme above might prove helpful, by deterring the worst privacy violations—not the marginal or the really bad, but the worst—in advance of wholesale domestic drone integration, and in advance of long and uncertain litigation in state courts. But whatever the policy might ultimately look like, the federal government’s competence in civilian drones and privacy, such as it is, should be brought to bear

### State Courts Fail

#### State courts can’t check national power

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Missing from this picture, however, is any obvious role for the state judicial branch in efforts by the state to resist abuses of national power. In a way, this gap is not surprising. Courts in the American tradition are essentially passive institutions, and their ability to participate in the resolution of political issues depends greatly on whether litigants bring such disputes before them. n34 Yet unlike federal courts, state courts are unlikely to adjudicate lawsuits attacking purported abuses of national power by national officials, or to have any legitimate and binding authority to resolve them. First, although state courts typically have jurisdiction to hear cases brought against organs of the national government, national officials have an absolute right to remove such cases to federal court, n35 a right which the United States Justice Department exer-cises routinely as a matter of basic policy. n36 Second, state courts are [\*1739] required to obey national law, n37 and are in any event subject to direct appellate oversight by the United States Supreme Court, n38 drastically limiting their ability to strike out at the national govern-ment. It is true, of course, that state courts could join the fray by defying federal law, as state legislative and executive branches have sometimes done, but this is a particularly unattractive option for courts, which are, after all, uniquely dedicated to upholding law, not defying it. n39 Thus, anything a state court might gain in successfully resisting national power through illegal means might in the long run work to that court's disadvantage by undermining its claim to legitimacy as an impartial instrument of the law.

#### State courts don’t have the power to enforce anything

Gardner ’03 --- professor of law @ State University of New York (James A, “STATE COURTS AS AGENTS OF FEDERALISM: POWER AND INTERPRETATION IN STATE CONSTITUTIONAL LAW,” William & Mary Law Review, March 2003, 44 Wm. & Mary L. Rev. 1725)//Mnush

State courts obviously cannot serve as agents of federalism in the same way as federal courts because they have no ability to control the content of national law or to enforce it against national actors. Assuming, then, that a state court does have authority to act as an agent of federalism, how might it assert that authority? What tools, in other words, might a state court employ to resist national power? State courts, it must be conceded, possess far fewer resources to deploy against national power than do the state executive and legislative branches. State courts typically lack binding authority over organs of the national government n91 and are subject to direct national judicial oversight on questions of national law. n92 Further-more, although state courts are typically more active and involved in policy formation than federal courts, they still are relatively passive institutions. Unlike the governor and state legislature, state courts cannot simply voluntarily insert themselves into pressing disputes, but must ordinarily wait for problems to come to them before acting. Nevertheless, state courts do have one fairly powerful tool at their disposal: their control over state law, and, more particularly, over the state constitutions.

#### The counterplan disrupts the SOP

Gardner ’03 --- professor of law @ State University of New York (James A, “STATE COURTS AS AGENTS OF FEDERALISM: POWER AND INTERPRETATION IN STATE CONSTITUTIONAL LAW,” William & Mary Law Review, March 2003, 44 Wm. & Mary L. Rev. 1725)//Mnush

Strict constructionists might first object that the self-consciously instrumental use of the power to interpret a constitution is by definition an abuse of judicial power. For a court to engage in result-oriented interpretation for the purpose of resisting national power or for any other purpose, it might be said, is deliberately to manipulate the document's meaning rather than to discern it, an approach inconsistent with a proper understanding of judicial power. Judicial power rightly understood, strict constructionists might say, cannot be used instrumentally because it is not a tool to be used self-consciously to achieve ends; rather, the judicial role is merely to apply the law. n135 A court that used its powers instrumentally would be making law rather than applying it, yet courts should never take it upon themselves to make law because doing so usurps power allocated to other organs of government. n136

### Links to Net Benefit

#### State court rulings incur *more* backlash than federal rulings

Gardner ’03 --- professor of law @ State University of New York (James A, “STATE COURTS AS AGENTS OF FEDERALISM: POWER AND INTERPRETATION IN STATE CONSTITUTIONAL LAW,” William & Mary Law Review, March 2003, 44 Wm. & Mary L. Rev. 1725)//Mnush

Nevertheless, these changes seem very far from having penetrated public consciousness. If actual litigation decisions are any guide, state courts today appear to be less trusted than federal courts when it comes to the protection of individual rights. Although evidence is difficult to come by, it appears that litigants, given a choice between suing in state and federal court, prefer to bring civil rights claims in a federal forum. n216 Even when they proceed in a state court, litigants tend overwhelmingly to raise civil rights claims under the United States Constitution rather than under their state constitution, n217 suggesting that they have more faith in the body of constitutional law developed by federal courts than in the similar body of law developed by state courts construing state constitutions.