AMERICA'S OTHER SEPARATION OF POWERS TRADITION

JONATHAN L. MARSHFIELD†

ABSTRACT

As the Supreme Court returns many critical issues to the states, the structure of state government is increasingly significant to the American constitutional order. From redistricting to reproductive rights, battles are raging over which state institutions should decide these important issues. Yet there is surprisingly little scholarship dedicated to the separation of powers under state constitutions. Instead, state doctrine and commentary tend to mimic themes in federal constitutional law and parrot Madisonian ideas of constitutional design. On this view, the separation of powers is based on carefully balanced intragovernment rivalries fueled by the private ambition of government officers. This competition within government is part of a broader Madisonian strategy to protect against abusive popular majorities and prop up representative institutions. Although this approach is criticized, it is at the core of the federal Constitution's design, and it remains the dominant lens through which American courts and scholars view the separation of powers.

This Article provides a novel assessment of whether state constitutions incorporate a wholly different approach to the separation of powers. I argue that viewing state constitutions exclusively through a Madisonian lens provides an incomplete and misguided account. Drawing on largely neglected state constitutional history, an original hand-coded database of state constitutional texts from 1776 until 2022, and an extensive review of state constitutional convention debates, I argue that state constitutions insist on the separation of powers—not

† Associate Professor of Law, University of Florida Levin College of Law. I am grateful for helpful comments from Rick Hills, Robert Schapiro, Miriam Seifter, John Dinan, Fred Smith Jr., Robert F. Williams, The Honorable David Nahmias, Jonathan Nash, Erin Ryan, Lawrence Friedman, Karen Burke, Christopher Hampson, Alan Rozenshtein, Daniel Schwarcz, Elizabeth Bentley, Bert Kritzer, Peter Molk, Dan Rodriguez, Evan Zoldan, Quinn Yeargain, and Lyrissa Lidsky. I presented this research at the Emory Center on Federalism and Intersystemic Governance and at the University of Minnesota Law School. I am thankful for excellent research assistance from Mayme Medlock and Scott Davis. I owe a great debt to the *Duke Law Journal* editors. Their careful and thoughtful edits significantly improved this Article. All errors are mine.

primarily to pit ambition against ambition within *government—but to enhance the public's ability to monitor government from the* outside. *To be sure, state constitutions leverage internal checks and balances, but this is not the only (or even the primary) logic underlying the separation of powers in state constitutions. A fundamental reason that state constitutions separate power is to address the concern that self-interested officials are likely to collude across branches rather than compete; thereby short-circuiting intragovernment checks. The best antidote for this is to increase the quality of direct popular oversight. By clearly organizing and separating government into discrete departments and subdepartments, the public is better equipped to monitor government because responsibility is more isolated. This approach to the separation of powers, which I call the "popular accountability" rationale, is at the core of state constitutional design and government structure.*

Consequently, state constitutions do not depend on an archetypal tripartite division of government power or vigilant judicial maintenance of internal checks and balances because they do not expect that government will self-regulate without persistent and pervasive popular involvement. Instead, state constitutions work to separate government along lines that allow the public to track and respond to malfeasance on salient issues. Those lines are often highly contextual and reactive. That is why state constitutions boldly ascribe to the separation of powers while simultaneously creating myriad ad hoc elected offices and specialized departments that blend and obfuscate the traditional tripartite model. This Article concludes by sketching the beginnings of a more authentic state separation-of-powers jurisprudence that views the doctrine principally as a tool in service of popular accountability rather than a constraint on democratic outputs. It also illustrates how this approach would restructure and improve outcomes in fundamental areas such as the nondelegation doctrine and administrative deference while enhancing the democratic commitments at the core of state constitutional design.

TABLE OF CONTENTS

INTRODUCTION

The structure of state government is increasingly significant to the American constitutional order. The Supreme Court's ruling in *Dobbs*

v. Jackson Women's Health Organization,[1] for example, has reignited interest in how state courts and constitutions can protect reproductive rights from state legislatures.[2] Frustration with partisan gerrymandering by state legislatures has also ignited fresh calls for state redistricting reform, the use of more independent commissions, and the liberal application of state constitutional voting rights.[3] The Court's recent brush with the independent-state-legislature theory has also fueled new interest in how states structure their federal election powers.[4] Less recently, the lead-contamination tragedy in Flint, Michigan stoked interest and outrage regarding the arcane laws structuring state executive power, state-local relations, and the structure of state criminal prosecutions.[5] In addition to these national-headline issues, there are myriad idiosyncratic structural disputes within states that affect a wide range of important policies.[6]

---

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

2. Meryl Chertoff, *After* Dobbs*, State Constitution and Court Roles To Be Amplified in Reproductive Rights Cases*, SLOGLAW (May 6, 2022), https://www.sloglaw.org/post/after-dobbs-state-constitution-and-court-roles-to-be-amplified-in-reproductive-rights-cases [https://perma.cc/4EVC-VWQK].

3. *The Fight for Fair Maps*, BRENNAN CTR. (June 7, 2023), https://www.brennancenter.org/issues/gerrymandering-fair-representation/redistricting/fight-fair-maps [https://perma.cc/4YK6-3DLQ].

4. *See* Vikram David Amar, *The* Moore *the Merrier: How* Moore v. Harper*'s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators*, 22 CATO SUP. CT. REV. 275 (2023). For other perspectives that view *Moore* as leaving room for future federal court involvement, see Richard H. Pildes, *The Supreme Court Rejected a Dangerous Elections Theory. But It's Not All Good News*, N.Y. TIMES (June 28, 2023), https://www.nytimes.com/2023/06/28/opinion/supreme-court-independent-state-legislature-theory.html [https://perma.cc/CG23-WA3V]; Richard L. Hasen, *There's a Time Bomb in Progressives' Big Supreme Court Voting Case Win*, SLATE (June 27, 2023, 12:44 PM), http://slate.com/news-and-politics/2023/06/supreme-court-voting-moore-v-harper-time-bomb.html [https://perma.cc/4DY6-L2BA].

5. Luke Vander Ploeg & Mitch Smith, *Indictments in Flint Water Crisis Are Invalid, Michigan Supreme Court Finds*, N.Y. TIMES (June 28, 2022), https://www.nytimes.com/2022/06/28/us/flint-water-crisis-charges.html [https://perma.cc/LY7S-5HKD].

6. Bush v. Schiavo, 885 So. 2d 321, 324 (Fla. 2004) (holding that a Florida statute requiring life-sustaining treatment for Maria Schiavo, who had been in a persistent vegetative state for fourteen years, was unconstitutional because it violated the state separation of powers); Thom v. Barnett, 967 N.W.2d 261, 264 (S.D. 2021) (finding separation-of-powers issues after a South Dakota governor instructed a state highway patrolman to initiate a challenge to an already-ratified constitutional initiative legalizing marijuana); Cal. Bus. & Indus. All. v. Becerra, No. G059561, 2022 Cal. App. LEXIS 576, at *1 (Ct. App. June 30, 2022) (holding that California's private-attorney-general scheme did not violate separation-of-powers principles under the California constitution). More recently, a Texas state judge held that SB8, the state's abortion ban with a private enforcement scheme, was unconstitutional based on the separation of powers

Despite the significance of state government structure, there is surprisingly little scholarship dedicated to studying the separation of powers under state constitutions.[7] Instead, the doctrine and commentary tend to mimic themes in federal constitutional law and rely on Madisonian ideas of constitutional design.[8] On this view, the separation of powers is based primarily on the creation and maintenance of carefully balanced intragovernment rivalries that are fueled by the private ambition of government officers.[9] This competition within government is desirable because it can protect

under the state constitution. Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179, at 1 (Tex. Dist. Ct. Dec. 9, 2021).

7. The most notable works seeking to theorize a state approach to the separation of powers are John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993); Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079 (2004); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999). *See generally* JEFFREY S. SUTTON, WHO DECIDES? (2022) (taking state separation-of-powers law seriously).

8. James A. Gardner, *The Positivist Revolution That Wasn't*, 4 ROGER WILLIAMS L. REV. 109, 130 (1998). This is not to say that state courts blindly follow federal holdings. They have not. SUTTON, *supra* note 7, at 184. However, state jurisprudence in this area is almost entirely reactive and cognate to federal precedent and theory. State courts reach different results, but they do so with the same concepts, rationales, theories, and doctrines as federal courts. Daniel Ortner, The End of Deference: How States Are Leading a Revolution Against Administrative Deference Doctrines 1, 71–72 (Mar. 11, 2020) (unpublished manuscript), https://papers.ssrn.com/abstract=3552321 [https://perma.cc/QLL6-MDBS] (identifying seventeen different approaches to administrative deference in states but documenting all of them as variations on federal doctrine; for example, some states follow *Auer* but not *Chevron*, etc.); *see also* Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law*, 43 RUTGERS L.J. 573, 580 (2013) (exploring the political question doctrine in state constitutional law and finding "[t]here is not, as best I can see, a great deal of imagination in how state courts conceive of the doctrine. The vocabulary of the cases is drawn squarely from the key federal cases"). A more recent illustration of this is the uncritical and rapid migration of the "major question doctrine" from federal jurisprudence into state administrative law. *See* Evan C. Zoldan, *The Major Questions Doctrine in the States*, WASH. U. L. REV. (forthcoming 2023) (manuscript at 13–14), https://papers.ssrn.com/sol3/abstract_id=4440630 [https://perma.cc/H7LD-VMKR] (finding that the Arizona Supreme Court relied on the major question doctrine announced in *West Virginia v. EPA* one week after the Supreme Court decided that case and finding other examples). Thus far, there is no truly independent engagement with state separation-of-powers theory and jurisprudence.

9. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 517 (2015) (describing the American story of governance as "a story that recognizes and endorses a deep and enduring commitment to separating, checking, and balancing state power in whatever form that power happens to take"); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 957 (2005) [hereinafter Levinson, *Empire-Building*]; Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 729 (2011) [hereinafter Levinson, *Parchment and Politics*].

against tyranny and improve government decision-making.[10] Most importantly, the separation of powers is part of a broader Madisonian strategy to protect against abusive popular majorities by deeply entrenching constitutional norms and prioritizing representative policymaking.[11] There is great debate regarding how the federal Constitution incorporates and implements this model, but the dominant American perspective on the separation of powers focuses on issues within the Madisonian tradition and the federal Constitution's "undemocratic" features.[12]

In this Article, I argue that the Madisonian approach offers an incomplete and misguided account of state constitutions because it fails to address their deep commitment to majoritarianism and direct popular involvement in governance.[13] These commitments not only challenge the assumptions and goals underlying Madisonian theory, but they have also generated a highly complex, ad hoc, cross-cutting, and imbalanced arrangement of powers that beg for a more nuanced and convincing explanation.[14]

---

10. Michaels, *supra* note 9, at 522.

11. *See* Levinson, *Parchment and Politics*, *supra* note 9, at 669; Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* JACK N. RAKOVE, DECLARING RIGHTS 160, 161–62 (1998).

12. Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517, 1526 (2018) (surveying major disputes in American separation-of-powers theory and jurisprudence and noting few "exogenous models" and none that offer an alternative positive account). An important exception is a work of analytical philosophy by Professor Jeremy Waldron that seeks to disaggregate various concepts embedded within the separation of powers. Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433, 433 (2013). Professor Sanford Levinson has characterized this aspect of Madison's constitutional design as producing an "Undemocratic Constitution" at the federal level. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 1 (2006). Indeed, there is growing concern about the undemocratic features of federal constitutional design. *E.g.*, Garrett Epps, *How To Fix the Senate by Essentially—Though Not Quite—Abolishing It*, WASH. MONTHLY (Jan. 3, 2022), https://washingtonmonthly.com/2022/01/03/how-to-fix-the-senate-by-essentially-though-not-quite-abolishing-it [https://perma.cc/292H-GJU7]. But, as argued below, the states provide a vivid contrast in theory and practice because of their emphasis on majoritarian policymaking. The core of this Article is dedicated to exploring how the separation of powers operates within this contrasting approach.

13. Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 909 (2022) [hereinafter Marshfield, *Misunderstood Rights*] (arguing that these commitments frame the deep structure of state constitutional theory); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 859 (2021) (explaining that state constitutions are "commit[ted] to popular sovereignty, majority rule, and political equality").

14. Zasloff, *supra* note 7, at 1084 (lamenting structural complexities under the California constitution); Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537,

My core claim is that state constitutional history, text, and practice suggest that state constitutions separate powers—not primarily to unleash intragovernment rivalries and prop up representative institutions but to enhance the public's ability to directly monitor and control government from the outside.[15] Unlike Madison's theory, state constitutions reflect great suspicion of representative government and great trust in popular majorities. A fundamental reason that state constitutions separate power is to address the concern that self-interested government officials will often collude across branches rather than compete, thereby short-circuiting intragovernment checks and exaggerating democratic deficiencies. The best antidote for this is to increase the quality of direct popular oversight. By clearly organizing and separating government into specialized departments and subdepartments, the public is better equipped to monitor government because responsibility is more isolated. Consequently, the separation of powers under state constitutions does not depend on an archetypal tripartite division of government power or vigilant judicial maintenance of internal checks and balances because state constitutions do not expect that government will self-regulate. What matters most under state constitutions is that government is separated along lines that allow the public to track and respond to malfeasance. I call this the "public accountability" rationale for the separation of powers under state constitutions, and it is at the core of state constitutional design.

To substantiate this claim, I offer three core arguments. First, the separation of powers in state constitutions has a different conceptual origin than the Madisonian theory that later shaped the federal Constitution and eventually merged with state constitutional development.[16] Early state constitutionalists rejected the idea that the separation of powers was only synonymous with intragovernment checks designed to mitigate abusive majorities. Indeed, the best historical accounts emphasize that state constitutions first adopted the separation of powers as a populist tool intended to extricate state

1543 (2019) [hereinafter Seifter, *State Agency Independence*] (surveying state agencies and concluding that the landscape of agency independence is complex, contextual, and shifting); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 235–313 (2009) [hereinafter WILLIAMS, STATE CONSTITUTIONS] (surveying complexities in state governmental structure).

15. *See infra* Part III (describing and substantiating this claim).

16. *See infra* Part III.A.

governments (especially legislatures) from capture by political elites.[17] Colonial governors, for example, often used their appointment powers to influence local legislators by giving them lucrative government posts or licenses.[18] Governors would then use their role in the legislative process to lock-in a favorable legislature, thereby eliminating it as a check on colonial power.[19] As a result, early state constitutionalists viewed the interconnectedness of government branches as feeding the collusive tendencies of political elites. To solve this, early state constitutions used the separation of powers to organize government in ways that more tightly aligned voters with decision-makers.[20] The main idea was to separate government along lines that would empower voters to hold officials accountable for a limited and identifiable set of responsibilities. This is how the separation of powers began in state constitutionalism, and, as I show below, it remains a meaningful logic undergirding state constitutions notwithstanding the incorporation of some internal checks and balances.

Second, the evolution of text in state constitutions reflects how the public-accountability rationale has persisted over time. Drawing on an original hand-coded database of state constitutional texts from 1776 to 2022, I show that state constitutions have preserved and developed this approach to the separation of powers by adopting carefully crafted provisions that tie the separation of powers to popular accountability and deprioritize concerns about internal checks and balances.[21] Indeed, my review of these provisions shows that when state constitutions refer to the separation of powers, it is highly unlikely that they are

17. *See infra* notes 229–37 (describing historical literature in support of this account).

18. *See infra* Part III.A.2 (providing examples of using power to influence local legislators); *see, e.g.*, *Intelligence Extraordinary*, BOS. GAZETTE No. 631, May 4, 1767, at 642 ("Commissions are shamefully prostituted to obtain an Assembly that shall be subservient to [the governor's] Designs.").

19. *Infra* Part III.A.2; *see, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 146 (1998) ("Men who drank of 'this baneful poison' were enthralled by the ruling hierarchy and lost their concern for their country.").

20. As Samuel Williams concluded in 1794 regarding the Vermont constitution, "[T]he security of the people is derived not from the nice ideal application of checks, ballances [sic], and mechanical powers, among the different parts of the government; but from the responsibility, and dependence of each part of the government, upon the people." SAMUEL WILLIAMS, THE NATURAL AND CIVIL HISTORY OF VERMONT 343 (1794) [hereinafter WILLIAMS, HISTORY OF VERMONT].

21. *Infra* Part III.B (describing how states use the separations of powers in their constitutions "to reinforce and facilitate direct popular control over government"); *infra* Appendix (illustrating this approach in each state).

referencing an exclusive Madisonian theory of internal checks and balances. Rather, these provisions reflect a persistent commitment to the idea that the separation of powers is also built to facilitate popular control over government.

Third, my review of state constitutional convention debates shows that the states have a long history of practicing the public-accountability approach to the separation of powers.[22] Indeed, the states have developed various techniques to leverage the separation of powers as a tool in service of popular accountability. I document and describe three: first, separating powers to isolate specific decision-makers for voters (the divided executive is one example);[23] second, separating powers to isolate specific policies for public transparency (constitutionalizing subject-specific agencies is one example);[24] and third, separating powers to create redundancies in favor of popular accountability (gubernatorial line-item and amendatory vetoes are examples).[25]

This Article concludes by sketching the beginnings of a more authentic, state-oriented separation-of-powers jurisprudence.[26] I argue that in cases where constitutional text is unclear about the allocation of power, state courts should give priority to the location where voters can most easily track responsibility. This shifts the analysis away from state judges as institutional technicians who deftly calibrate powers to foster competitive tension and more properly empowers state courts to focus on bringing government decision-making to the fore for voters. In state separations-of-powers cases, this should be an explicit polestar because majoritarianism and popular accountability are core state constitutional commitments that have deeply influenced the evolution of state government structure. Applying only a Madisonian approach without regard to the public-accountability rationale risks turning state constitutions on their head and ignores history, text, and practice. I also show how incorporating the public-accountability rationale in state structural disputes would produce more predictable outcomes in many cases and would restructure fundamental areas such as the

22. *Infra* Part III.C (explaining "that the public-accountability rationale for the separation of powers is grounded in state constitutional history and text" and that the "rationale has remained . . . critical").

23. *Infra* Part III.C.1.

24. *Infra* Part III.C.2.

25. *Infra* Part III.C.3.

26. *Infra* Part V.

nondelegation doctrine and *Chevron* deference to better align with state constitutional theory and structure.

At this point, a few qualifications are warranted. First, the public-accountability rationale has limitations and pitfalls. For example, it is unclear as an empirical matter to what degree and under what conditions functional subdivision of government actually enhances popular oversight.[27] Vast and robust political science literatures exploring voter behavior and public choice likely shed light on these questions, but that analysis is beyond the scope of this project. Second, the public-accountability rationale runs hand-in-hand with majoritarianism, which can present real risks for rights and political minorities (two issues that the Madisonian model aims to address).[28] I do not defend this tradeoff on normative grounds. My claim is that, for better or worse, the states have pursued an alternative set of priorities and assumptions about democracy in this context. A full normative assessment of the accountability rationale as deployed by the states is also beyond the scope of this project. Third, I do not claim that all state constitutions embrace the popular-accountability rationale equally nor that it is the only theme in the state tradition. My claim is that state constitutional history, text, and practice generally reflect an alternative separation-of-powers rationale that manifests in varying degrees across states and time and that runs in tandem with traditional check-and-balances ideas. The states have certainly incorporated elements of the Madisonian approach, and most state constitutions probably present a hybrid. My point is not that we should ignore the influence of Madisonian ideas on state constitutionalism. I intend only to define and validate a different and independent rationale for the separation of powers that state courts should consider on a case-by-case basis using all the usual modalities of constitutional construction.

This Article proceeds in four parts. Part I briefly outlines the core aspects of Madison's separation-of-powers theory and argues that it does not adequately explain state constitutional structure, theory, and practice. Part II examines existing judicial and academic approaches to state separation of powers and shows that they largely follow or assume

27. *See* David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 764 n.2 (2017) (noting that fewer than half of voters know which party controls their state legislature); STEVEN ROGERS, ACCOUNTABILITY IN STATE LEGISLATURES 2 (2023) ("Over 80 percent of voters do not know who their state legislator is, 40 percent of voters do not know which political party controls their legislature, and over a third of incumbent legislators regularly do not face a challenger."). Part IV.D.1 engages with these issues.

28. *See infra* Part IV.D.2.

Madison's checks-and-balances theory. Part III argues that state constitutional history, text, and practice reveal an underappreciated state rationale for the separation of powers, which I call the popular-accountability rationale. Part IV explores how this new approach would improve and reorient state separation-of-powers jurisprudence and also engages with potential criticisms and limitations.

I. THE FEDERAL APPROACH AND STATE CONSTITUTIONS

In this Part, I first describe the core of the federal approach to the separation of powers. I then argue that this approach does not adequately explain the realities of state constitutional structure, design, and development.

A. The Core of the Federal Approach

There is no singular federal approach to the separation of powers.[29] Over time and in different contexts, the Supreme Court, Congress, and the president have understood the details, purpose, and nature of the separation of powers differently.[30] Even at the Founding (and before), there was a dizzying array of perspectives on the separation of powers.[31] Contemporary scholars have likewise offered varied critiques and theories.[32] It is not my purpose to summarize all this material. Rather, my claim is that it is possible to identify certain core features of the federal approach that largely transcend major disagreements but starkly contrast with state constitutions.[33]

In this regard, there are two key aspects of the federal model. First, it is based on the creation and maintenance of carefully balanced intragovernment rivalries that are fueled by the private ambition of government officers. Second, those rivalries can have various benefits,

29. Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2022 (2022) ("There is no 'single canonical version' of the separation of powers.").

30. This is the central theme of Professor M.J.C. Vile's masterwork on the separation of powers. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 3–4 (2d ed. 1998) [hereinafter VILE, CONSTITUTIONALISM].

31. *See id.* at 23–130 (tracing influences of Locke, Montesquieu, British parliamentary theory, and more in creating the collage of concepts that orbit the idea of separation of powers).

32. Huq, *supra* note 12, at 1517.

33. M. Elizabeth Magill, *The Real Separation in the Separation of Powers*, 86 VA. L. REV. 1127, 1132 (2000) (surveying leading formalists and functionalists and finding the consensus position that emphasizes the Madisonian notion of checks and balances).

but a core idea is that intragovernment competition can help mitigate majority faction and reinforce representative governance.

1. *Intragovernment Competition.* In Federalist 47, Madison famously wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[34] To prevent this, Madison argued that the solution was "in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[35] This required that the Constitution carefully construct the branches with unique characteristics so that they would "harbor conflicting agendas" and thereby "sharpen institutional rivalries."[36] The federal Constitution aspires to do this by making each branch "answerable to different sets of constituencies," "subject to different temporal demands"[37] and by varying each branch's structure, authority, and terms of office for personnel.[38] To breathe life into these institutions and to sustain their rivalries, Madison further relied on the private ambition of government officials.[39] According to Madison, "personal motives" would drive officials to use their branch's unique characteristics for self-advancement.[40]

Various theorists and empirical scholars have shown that aspects of Madison's theory are largely fanciful.[41] Professor Daryl Levinson, for example, concludes that the idea of "structure-preserving competition among units of government is largely a product of constitutional law's Madisonian imagination."[42] In reality, ambitious officials pursue whatever paths are available for achieving their goals, which often includes cooperation or collusion across branches.[43] Professor Richard Pildes (together with Levinson) has also argued that

34. THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009) (1788).

35. THE FEDERALIST NO. 51, *supra* note 34, at 264 (James Madison) (1788).

36. Michaels, *supra* note 9, at 526.

37. *Id.* at 525.

38. Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 771 (2012).

39. THE FEDERALIST NO. 51, *supra* note 3435, at 264 ("Ambition must be made to counteract ambition.").

40. *Id.*; Levinson, *Parchment and Politics*, *supra* note 9, at 666 n.12 (explaining this theory).

41. Levinson, *Parchment and Politics*, *supra* note 9, at 724.

42. *Id.*; *see also* Levinson, *Empire-Building*, *supra* note 9, at 950.

43. Levinson, *Parchment and Politics*, *supra* note 9, at 670.

"Madison's design was eclipsed almost from the outset by the emergence of robust democratic political [party] competition."[44] Professors Curtis Bradley and Trevor Morrison have similarly shown that institutional rivalries are ineffective during periods of "unified government."[45] Still other scholars have argued that Madison's approach did not account for the necessity of the administrative state or the overall dynamic nature of government institutions.[46]

Despite these critiques, Madison's approach remains at the center of federal separation-of-powers theory and jurisprudence.[47] For better or worse, federal courts tend to view their role as ensuring a balance of power between branches so that government will remain in "competitive tension."[48] Theorists (whether formalists or functionalists) also tend to emphasize that the separation of powers is about preserving (or calibrating) a competitive tension within government.[49]

Indeed, as Professor M. Elizabeth Magill has argued, there is consensus amongst formalists and functionalists.[50] Leading formalists and functionalists agree on both the separation-of-powers' "principal objective" and the "means to achieve it."[51] The consensus objective, Magill explains, is that the "system of separation of powers is intended to prevent a single governmental institution from possessing and

---

44. Richard H. Pildes & Daryl J. Levinson, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2319 (2006).

45. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 443 (2012). There are other much deeper critiques. Huq, *supra* note 12, at 1535–39.

46. Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 953 (1997); Michaels, *supra* note 9, at 515–16 (concluding that the administrative state "toppled" the Founders' tripartite regime but nevertheless finding a continuity in the underlying logic of the separation of powers).

47. As NYU Law Professor Daryl J. Levinson explains:

> If separation of powers jurisprudence is the "incoherent muddle" that commentators bemoan, at least working agreement exists on the need for maintaining a balance of power between the branches by encouraging the interbranch rivalry and competition for power that is supposed to be a natural outgrowth of the constitutional design.

Levinson, *Empire-Building*, *supra* note 9, at 951.

48. *Id.* at 951 (listing cases).

49. *Id.* at 951 n.136 ("Notwithstanding their many disagreements, 'formalist' and 'functionalist' judges and scholars seem to agree that an important purpose of separation of powers jurisprudence is to maintain this competitive tension.").

50. Magill, *supra* note 33, at 1147–52.

51. *Id.* at 1149.

exercising too much power."[52] The "consensus position" is to provide branches of government with the powers and features necessary to perform "their own functions and check the exercise of the functions by the others."[53] When this is achieved, "[t]his system will facilitate competitive tension among the branches which, in theory, yields an equilibrium among them."[54]

To be sure, there are theories that look to move past this approach,[55] but federal separation-of-powers law and theory continues to be controlled by the idea of suspending government in a state of public-regarding internal equipoise.[56]

2. *Majority Faction and the Separation of Powers.* If we agree with Madison's approach to the separation of powers, it is easy to imagine a variety of benefits that might flow from it.[57] First, it prevents (or at least impedes) tyrannical officials from capturing all of government. Second, it can enhance the quality of government decision-making by passing actions through multiple, differently situated decision-makers.[58] Third, it can, ostensibly, protect entrenched constitutional norms (including individual rights) by incentivizing intragovernment monitoring for constitutional compliance.[59] Of course, there is meaningful empirical debate about whether the separation of powers is effective at achieving these goals, but, as a theoretical matter, they fit with Madison's theory of intragovernment competition.[60]

---

52. *Id.* at 1148.

53. *Id.* at 1149.

54. *Id.* The real difference between functional and formal approaches, according to Magill, involve methodologies for deciding particular cases and deeper disagreements about the nature of constitutionalism.

55. Huq, *supra* note 12, at 1535–39 (describing several "exogenous models" that look to explain the separation of powers without reference to function or competition but lamenting that these theories are either descriptive and nihilistic about the nature of constitutional law or largely inaccurate).

56. Levinson, *Empire-Building*, *supra* note 9, at 950–51.

57. Bowie & Renan, *supra* note 29, at 2032 ("The purposes underlying the separation of powers are equally sprawling and contradictory, ranging from promoting efficacy and ensuring political accountability to providing for impartial administration and advancing lawmaking in the public interest.").

58. *Id.*; Chafetz, *supra* note 38, at 771–72.

59. Levinson, *Parchment and Politics*, *supra* note 9, at 666–72 (exploring the coherence of Madison's theory on this point).

60. *But see id.* (arguing that Madison's theory falls in on itself).

In addition to these objectives, it is also important to recognize that the horizontal separation of powers was a critical aspect of Madison's plan to address the problem of "majority faction."[61] Madison was concerned about government tyranny and accountability, but he repeatedly emphasized that self-interested majorities were the primary threat to republican government.[62] His concern rested on two ideas. First, because "men were [not] angels," Madison expected popular majorities to coalesce around self-interested policies at the expense of political minorities and the public good.[63] Second, Madison recognized that if popular majorities were likely to coalesce in self-interest, then democratic government was especially vulnerable to their misuse. He wrote:

> [T]he real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.[64]

Consequently, Madison strongly opposed processes of direct democracy in federal constitutional structure.[65] He advocated instead for representative government drawn from large districts, bicameralism with an indirectly elected Senate, and the indirect election of the president.[66] Madison hoped that these structures would

61. SANFORD LEVINSON, FRAMED 229–30 (2012); Zasloff, *supra* note 7, at 1123 (connecting horizontal separation of powers to a constellation of countermajoritarian features in the federal Constitution); Levinson, *Parchment and Politics*, *supra* note 9, at 669. At one time, there was debate among political scientists over the extent to which Madison viewed the horizontal separation of powers as an important countermajoritarian constraint or whether he viewed it primarily as a tool mitigate agency costs. George W. Carey, *Separation of Powers and the Madisonian Model: A Reply to Critics*, 72 AM. POL. SCI. REV. 151, 152 (1978).

62. JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 55 (2d ed. 2002) [hereinafter RAKOVE, AMERICAN REPUBLIC]; Jack N. Rakove, *James Madison and the Bill of Rights*, 22 PRES. STUD. Q. 667, 672 (1992) (describing Madison's fear of "populist sources of unjust legislation" as an "obsession").

63. THE FEDERALIST NO. 51, *supra* note 34, at 264–66; RAKOVE, AMERICAN REPUBLIC, *supra* note 62, at 55.

64. Letter from Madison to Jefferson (Oct. 17, 1788), *supra* note 11, at 161–62.

65. *See* THE FEDERALIST NO. 10, *supra* note 34, at 50–51 (James Madison) (1787); JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 13–16, 33–38 (1994).

66. Levinson, *Parchment and Politics*, *supra* note 9, at 668.

operate as checks on majoritarian impulses by "insulating these 'statesmen' from the heat of majoritarian political pressure."[67]

The horizontal separation of powers was part of this broader countermajoritarian Madisonian project.[68] Madison envisioned layers of separation between popular majorities and government outputs. One layer was the exclusion of direct democracy.[69] A second layer was the integration of bicameralism with a malapportioned Senate.[70] A third was the indirect election of the president.[71] There are more,[72] but after all these highly mediated democratic processes finally populated government with personnel, those officials were to be locked in tension with each other through the careful configuration of internal checks and balances. The combined effect of this was to perpetuate (and sometimes exacerbate) entrenchment of the constitution's undemocratic features.[73]

B. State Constitutions Are Not Well Explained by Madisonian Models

State government is not structured to function under a pure Madisonian separation of powers. There are, of course, basic similarities. All state constitutions create three conventional branches of government.[74] State courts exercise basic judicial functions (including the power of judicial review).[75] Governors have basic

67. *Id.*

68. Zasloff, *supra* note 7, at 1123.

69. THE FEDERALIST NO. 10, *supra* note 34.

70. THE FEDERALIST NO. 51, *supra* note 34. *But see* Lorianne Updike Toler, Un-Fathering the Constitution 36 (Sept. 16, 2023) (unpublished manuscript), https://papers.ssrn.com/abstract=4574078 [https://perma.cc/LC7U-QACC] (exploring how Madison initially championed proportional representation in the Senate and a legislative veto).

71. Madison's views on presidential selection were nuanced and changed over time. *See* Donald O. Dewey, *Madison's Views on Electoral Reform*, 15 W. POL. Q. 140, 140–45 (1962). Here, I have in mind his position against the direct election of the president because "if the people were entrusted with the power of choosing their Chief Executive, their response would be based too much upon emotion." *Id.* at 141.

72. *See generally* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 12 (referencing presidential terms, Article V, and other features as part of the U.S. Constitution's overall undemocratic structure).

73. Article V's arduous amendment rules also play a critical role.

74. *State and Local Government*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/state-local-government [https://perma.cc/ME8W-L9HM] ("All State governments . . . consist of three branches: executive, legislative, and judicial.").

75. WILLIAMS, STATE CONSTITUTIONS, *supra* note 14, at 288.

executive powers and veto authority.[76] Legislatures have general lawmaking powers subject to review by courts and veto.[77] This basic structure necessarily embeds various internal checks and balances and is dependent upon representative government to function. Indeed, a full understanding of state constitutions surely requires a healthy appreciation for the role of representative government and intragovernment checks.

But those surface-level similarities misrepresent state government and state constitutional design. State constitutions often do not create offsetting and balanced institutions suspended above popular impulse (nor do they aspire to do so).[78] To the contrary, state government is characterized by significant imbalances in power between branches, various forms of direct popular governance that operate on all parts of government, and sporadic and highly contextual improvisation with government institutions that defy the tripartite division of power.[79] These features suggest that Madisonian separation-of-powers models are unlikely to work well or fully account for state constitutional design. More importantly, they point toward a theory that prioritizes external checks on government more than internal checks.

1. *State Legislatures.* As Madison explained in Federalist 51, federal constitutional design explicitly aimed to control legislative power through internal checks. The Senate and the presidential veto were part of a plan to balance power between the branches and avoid the "inconveniency" of legislative "predomina[nce]."[80] This, of course,

76. *Id.* at 304–08.

77. *Id.* at 281.

78. *See, e.g.*, JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 99–123 (2006) [hereinafter DINAN, STATE CONSTITUTIONAL TRADITION] (summarizing state constitutional convention debates regarding the executive-veto power as a form of enhancing popular control over policy outputs and not primarily as an exercise in institutional balancing); G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 NYU ANN. SURV. AM. L. 329, 333–35 (2003) [hereinafter Tarr, *Separation of Powers*] (noting that, in response to institutional failures, the states "[f]or the most part" did not respond by rebalancing institutions but by creating more direct forms of popular accountability across all government departments).

79. Jonathan L. Marshfield, *Popular Regulation? State Constitutional Amendment and the Administrative State*, 8 BELMONT L. REV. 342, 351–72 (2021) [hereinafter Marshfield, *Popular Regulation?*].

80. As Madison wrote:

> The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their

fit within the larger goal of controlling the problem of majority faction and entrenching representative government.

State legislatures have a very different point of origin and evolution.[81] The "first wave" of state constitutions reflected the republican belief that power should be concentrated in state legislatures and that representatives should be the direct and faithful agents of popular preferences.[82] Thus, lower houses were very large, with representatives elected from very small districts, and a few states even adopted unicameral legislatures.[83] Legislative power was also overbearing. Legislatures not only passed laws, but appointed the governor, judges, and even local officials.[84] Some state legislatures also exercised quasi-judicial functions.[85] This phase of state constitutional development is universally recognized as a period of great imbalance in favor of legislatures.[86]

The consequences of this structure are well documented.[87] Corrupt legislators ran amuck on a variety of significant issues during

---

> common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions.

THE FEDERALIST NO. 51, *supra* note 34, at 264–65.

81. *See* WILLIAMS, STATE CONSTITUTIONS, *supra* note 14, at 247 (explaining the origins of state legislatures and several "waves" of development in state legislative theory).

82. Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 546–47, 571–81 (1989) [hereinafter Williams, Founding Decade].

83. G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, *in* DEMOCRACY: HOW DIRECT? VIEWS FROM THE FOUNDING ERA AND THE POLLING ERA 87, 89–91 (Elliott Abrams ed., 2002) [hereinafter Tarr, *For the People*] (Vermont and Pennsylvania adopted unicameral legislatures).

84. *Id.* at 90.

85. *Id.*; Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 726 (2012) ("[M]id-nineteenth century legislatures busied themselves with essentially adjudicatory adjustments of private needs such as the granting of divorces.").

86. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 82–90 (1998) [hereinafter TARR, STATE CONSTITUTIONS]; WILLIAMS, STATE CONSTITUTIONS, *supra* note 14, at 247–48 (explaining that the "first wave" of state constitution-making was characterized by "unfettered legislative power").

87. *See* TARR, STATE CONSTITUTIONS, *supra* note 86, at 93–135 (detailing nineteenth-century state constitutionalism); Jonathan L. Marshfield, *State Constitutions and the Interaction Between Formal Amendment and Unwritten Commitments*, *in* AMENDING AMERICA'S UNWRITTEN CONSTITUTION 121, 124–27 (Richard Albert, Ryan C. Williams & Yaniv Roznai eds., 2022) (exploring how public finance provisions were added to state constitutions as a result of legislative abuse and surveying literature on this point); Marshfield, *Popular Regulation?*, *supra* note 79, at 351–58 (listing examples and surveying literature on this phase of state constitutional development).

the nineteenth century.[88] This sent many states into fiscal and constitutional crisis, which trigged a wave of constitutional reforms to legislative power.[89] What is striking about these reforms is that they did not rely on enhancing internal checks on legislative power.[90] To be sure, these reforms added and buoyed intragovernment checks on legislatures (mostly by enhancing executive power to include veto authority and appointment powers).[91] But the main focus of these reforms was to curb legislative abuses by imposing more rigorous external checks on legislative power.[92]

For example, many states made changes to "increase the transparency of the legislative process, thereby facilitating popular control and deterring legislative misbehavior."[93] Several states adopted single-subject and title requirements to curb logrolling by legislatures.[94] States also adopted prohibitions on special legislation, which were designed to address problems of capture.[95] Some constitutionalized rules of legislative process to encourage transparency and popular oversight, and some limited legislative sessions and resources as an indirect control on legislative power.[96] Finally, reformers set in motion the now commonplace practice of constitutionalizing substantive policy through constitutional amendment processes to protect popular control of legislation.[97]

88. *See e.g.*, Marshfield, *Popular Regulation?*, *supra* note 79, at 354–55 (describing financial misconduct by the Indiana Board of Internal Improvements); TARR, STATE CONSTITUTIONS, *supra* note 86, at 107–08 (discussing targeted disenfranchisement efforts by state legislatures).

89. TARR, STATE CONSTITUTIONS, *supra* note 86, at 111–12.

90. Tarr, *Separation of Powers*, *supra* note 78, at 334 ("Although states did transfer some powers from the legislature to the executive, they were more likely to transfer those powers directly to the people than to the other branches of state government.").

91. TARR, STATE CONSTITUTIONS, *supra* note 86, at 123 ("By 1900, a number of states had given their governors the item veto, extended the governor's term of office, and/or had made governors eligible for reelection."); DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 78, at 112–13 (documenting the adoption of the executive veto in response to legislative overreach). On changes to early state legislative control over appointments, see *infra* Part III.C.1.

92. TARR, STATE CONSTITUTIONS, *supra* note 86, at 122–25.

93. Tarr, *For the People*, *supra* note 83, at 94.

94. *Id.*

95. Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 44–48 (2014).

96. Tarr, *For the People*, *supra* note 83, at 94.

97. *See* Mila Versteeg & Emily Zackin, *Constitutions Un-Entrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657, 664 (2016) (noting that this process is commonplace and likely began during the nineteenth century).

But the most dramatic and revealing reforms to legislative power were the adoption of the referendum, initiative, and recall.[98] Beginning in the Progressive Era, and in response to another round of dissatisfaction with legislative performance, more than half of the states adopted some form of initiative or referendum process.[99] These processes were explicit carveouts from the otherwise plenary and exclusive legislative power of state legislatures.[100] They allowed statewide majorities to bypass legislatures and directly adopt or veto laws.[101]

The frequency of initiative use varies between states, but initiatives are an undeniably significant political force in America. By one estimate, more than 70 percent of the U.S. population lives in a state that allows for at least one form of direct democracy.[102] And voters in many states take advantage of these processes. Between 1904 and 2019, there were more than 2,600 proposed statewide initiatives, with more 41 percent of those approved by voters.[103] Legislative-veto referenda are less common, but there have been 526 since 1906.[104] Legislator recalls are the least used of these processes, with only 136 recall efforts since 1913.[105] Political contributions provide another perspective on the significance of these processes. In 2020 alone, there was more than $1.24 billion in political contributions to committees registered to contest statewide ballot questions (initiatives, referenda, and recall questions).[106]

---

98. TARR, STATE CONSTITUTIONS, *supra* note 86, at 150–62.

99. M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 3–8 (2003) (charting the adoption of direct democracy devices by state).

100. *E.g.*, OR. CONST. art. IV, § 1 ("The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.").

101. The indirect initiative adopted in a handful of states is a nuanced exception to this characterization.

102. SHAUN BOWLER & AMIHAI GLAZER, DIRECT DEMOCRACY'S IMPACT ON AMERICAN POLITICAL INSTITUTIONS 2 (2008).

103. *Number Initiatives by State-Year (1904–2019)*, INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/data.cfm [https://perma.cc/93VR-CTEM].

104. *Id.* The legislative-veto referendum allows the public to vote on repealing a statute. *See* WILLIAMS, STATE CONSTITUTIONS, *supra* note 14, at 280–81.

105. *Historical State Legislative Recalls*, BALLOTPEDIA (2023), https://ballotpedia.org/State_legislative_recalls [https://perma.cc/8LF7-PHR9].

106. *Ballot Measure Campaign Finance 2020*, BALLOTPEDIA, https://ballotpedia.org/Ballot_measure_campaign_finance_2020 [https://perma.cc/RN7E-K8GY].

Thus, state legislative power in many states is a complex patchwork of representative institutions, detailed regulations in constitutional text, and powerful forms of direct democracy.[107] Professor Elizabeth Garrett has referred to this as "Hybrid Democracy" because of the various complex interactions that occur between legislatures, direct lawmaking, and a more fluid and detailed constitutional text.[108]

All of this makes the structure of state legislative power complex in ways that are a poor fit for Madisonian constitutional design. Indeed, the dominant theme in the development of state legislative power has been toward increasing popular control over lawmaking rather than enhancing internal checks and buoying representation.

2. *State Executives.* State executive power also suggests that Madisonian models of constitutional design do not fully account for state government. The story begins with the severe limiting of state governors in eighteenth-century state constitutions.[109] Most early governors were appointed by legislatures and did not have veto or appointment powers.[110] This was, of course, the corollary of the legislative dominance that characterized early state constitutional design. During this period, governors were little more than "figureheads" with no meaningful power to check any other departments.[111]

As defects of this model were exposed, reformers gave governors greater veto and appointment powers and generally sought to strengthen the governor by extending terms, removing reelection bans, and increasing budgeting authority.[112]

It is critical to recognize, however, that growth in gubernatorial power coincided directly with the shift to popular election of governors.[113] Gubernatorial power expanded primarily because

107. Tarr, *For the People*, *supra* note 83, at 87–89.

108. Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1097 (2005).

109. LESLIE LIPSON, THE AMERICAN GOVERNOR: FROM FIGUREHEAD TO LEADER 13 (1939).

110. Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 493–94 (2017).

111. *Id*. at 498.

112. TARR, STATE CONSTITUTIONS, *supra* note 86, at 123.

113. *Id*. at 122–23 (noting that the shift to popular election ran parallel with various measures to strengthen the office); M. BARBARA MCCARTHY, THE WIDENING SCOPE OF AMERICAN

governors emerged as being especially responsive to popular majorities.[114] As a delegate to New Jersey's 1844 constitutional convention explained: "The Governor is the only true representative of the people. He will be elected by a majority of the whole people of the State. It is peculiarly proper therefore that he should be entrusted with the exercise of the responsible Executive power."[115] In other words, gubernatorial power grew not because states wanted a stronger system of internal checks and balances but because a popularly elected governor provided a more direct line of accountability to popular majorities.[116]

Moreover, other developments in state executive power have created further problems for Madisonian theory. First, as an extension of the idea that power should correspond with direct pathways of popular accountability, states began to proliferate the number of popularly elected executive officials during the Jacksonian era.[117] At first, this involved only key posts, such as the governor, lieutenant-governor, secretary of state, treasurer, auditor, and attorney general.[118] But it later continued into most aspects of state government, including very specialized positions.[119] The trend eventually abated, but in 1992 there were still more than ten thousand independently elected state and local officials nationwide.[120]

CONSTITUTIONS 52 (1928) (listing the number of states that adopted popular election of governors over time).

114. *See* TARR, STATE CONSTITUTIONS, *supra* note 86, at 121–23 ("As a result of popular election, executive officials could claim that they had just as strong a connection to the people, the source of all political authority, as did the legislature."); *see also infra* Part III.C.1 (providing primary sources from state convention debates emphasizing that expanded gubernatorial power was premised on more direct popular accountability).

115. PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 351 (N.J. Writers' Project ed., 1942) [hereinafter N.J. CONVENTION OF 1844].

116. Tarr, *For the People*, *supra* note 83, at 93–94 ("[T]he state reforms were primarily concerned with preventing faithless legislators from frustrating the popular will, not with checking majority faction. The fact that executive officials . . . were directly elected was crucial.").

117. TARR, STATE CONSTITUTIONS, *supra* note 86, at 121–23.

118. MCCARTHY, *supra* note 113, at 52–55 (focusing on the shift to popular election of these offices).

119. *E.g.*, *id.* at 55 (discussing the popular election of the superintendent of public instruction); N.Y. CONST. of 1846, art. 5, §§ 2–4 (establishing popular elections for canal commissioner, state surveyor, and prison inspector).

120. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1400 (2008).

Second, state constitutions have increasingly codified portions of the administrative state.[121] They have used the constitution to create agencies, establish processes for staffing and funding those agencies, and set the scope of agency rulemaking and adjudicative authority.[122] State constitutions have also been used to adjust administrative procedure, including creating a legislative-veto process for agency regulations.[123] Running alongside these constitutional agencies is a long list of powers, created by statute and constitutional provisions, that allow governors to reorganize agencies.[124]

Third, states have experimented with several versions of the governor's veto power. All states empower governors to exercise a conventional veto on legislation subject to a legislative override.[125] But the vast majority of states (forty-four) allow governors to use a line-item veto, which the Supreme Court has said violates federal separation-of-powers principles.[126] And there is considerable variation within this group. Some states authorize it only for appropriation bills. Other states allow it for any legislation.[127] Aside from the line-item veto, seven states have adopted the so-called amendatory veto, which allows a governor to accept a bill subject to the approval of their own substantive changes, thereby giving the governor extraordinary legislative power.[128]

These complex features (the combinations of which vary across states and add extra layers of complication) make it difficult to tabulate the combined strength of any state executive relative to the other branches on any given policy issue. State executives are knit together with a variety of crosscutting and overlapping institutional characteristics. The divided executive, for example, may undermine overall executive power by placing governors and attorneys general at

121. Marshfield, *Popular Regulation?*, *supra* note 79, at 358–71 (cataloging amendments affecting the administrative state); Seifter, *State Agency Independence*, *supra* note 14, at 1555.

122. Marshfield, *Popular Regulation?*, *supra* note 79, at 358–71.

123. *Id.* at 358–60.

124. Seifter, *State Agency Independence*, *supra* note 14, at 1557–60.

125. DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 78, at 112–13.

126. 53 THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 114 tbl.4.4 (2021) (tabulating item-veto power of all state governors). *See generally* Clinton v. City of New York, 524 U.S. 417 (1998) (holding the federal line-item-veto statute unconstitutional).

127. Seifter, *Gubernatorial Administration*, *supra* note 110, at 508 (explaining the nuanced variations).

128. DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 78, at 118–19, 123.

odds.[129] Constitutional agencies may operate to insulate a particular area of regulation from the governor and/or the legislature, while the line-item veto may give the governor disproportionate power in shaping legislative priorities. The sheer complexity of these institutional arrangements suggests that state government is not built around carefully orchestrated and monitored systems of internal checks and balances.

Despite these complexities, Professor Miriam Seifter has offered a remarkably nuanced and compelling account of the state executive branch, suggesting that modern governors increasingly predominate state government.[130] Seifter has shown that a variety of legal, institutional, and social factors increasingly permit expansive gubernatorial influence across all of state government (and even on national policy).[131] For present purposes, what is most remarkable about Seifter's account is that, if her synthesis of state executive complexity is correct, it reveals a great imbalance in the structure of state power that now favors the governor—a single person. This surely presents problems for applying Madison's checks-and-balances theory to state constitutions.[132] Indeed, it suggests that state constitutions have

129. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2453 (2006) (noting that "a divided executive creates substantial opportunities and incentives for conflict"). *See generally* Vikram David Amar, *Lessons from California's Recent Experience with Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General*, 59 EMORY L.J. 469 (2009) (providing examples of this from California). *But see* Seifter, *Gubernatorial Administration*, *supra* note 110, at 46–48 (arguing that this point is overstated and that governors retain significant control even alongside long ballots).

130. Seifter, *Gubernatorial Administration*, *supra* note 110, at 487.

131. *Id.* at 499–515.

132. Seifter acknowledges this. *See id.* at 519–24 (noting that checks on state executive power are minimal and that "the picture that emerges is one of executive power rather than constraint"). Here, it is important to recognize that state constitutional reforms toward expansive gubernatorial power have occurred very differently than federal structural reforms. There is a compelling argument that the presidency has now ascended to dominate the federal constitutional structure to an extent that is equally inconsistent with a Madisonian theory. Some have argued that this is precisely the case. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1727 (1996); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1810–43 (2010). However, federal reforms have occurred informally and have developed against the persistent backdrop of the federal constitution's checks-and-balances approach. Michaels, *supra* note 9, at 517. As I describe below, the states have taken a much more direct approach regarding structural reform. *See infra* Part III. In many instances, the states have explicitly rejected Madisonian constitutional design in favor of the public-accountability rationale. *See infra* Part III.C. In this sense, state constitutional history,

swung from legislative predominance to gubernatorial predominance; neither of which coheres with Madisonian theory.

3. *State Courts.* State courts present another puzzle for the Madisonian theory of separation of powers. The role of federal courts in the separation of powers has evolved and changed over time.[133] And Madison himself likely did not imagine federal courts would assume the position that they now occupy.[134] But federal courts now play an important role in maintaining and monitoring the balance of power between the branches.[135] If federal courts are well suited to perform this role, it is presumably because of their expertise in "saying what the law is" and their insulation from the political branches. Recent work by Professors Nikolas Bowie and Daphna Renan has questioned whether the federal Constitution truly allocates (or should allocate) a strong role to courts in regulating the separation of powers.[136] But federal courts nevertheless occupy an important role in ostensibly providing neutral mediation of intragovernment disputes.[137] This role, in turn, helps to prop up and entrench the underlying structure of the political branches.

Here again, state constitutions present superficial similarities to the federal structure. State courts universally exercise the power of judicial review, and they purport to neutrally resolve disputes between

development, and text provide a stronger argument of incorporating the public-accountability rationale into structural doctrine.

133. *See generally* Bowie & Renan, *supra* note 29 (arguing that the modern role of the federal courts in enforcing separation of powers emerged as a reaction to Reconstruction).

134. *See generally* Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV. 1513 (2002) (tracing Madison's many thoughts on federal judicial power across time).

135. Levinson, *Empire-Building*, *supra* note 9, at 951 n.135 (collecting modern Supreme Court cases addressing separation of powers).

136. *See generally* Bowie & Renan, *supra* note 29 (arguing that the modern role of the federal courts in enforcing separation of powers emerged as a reaction to Reconstruction).

137. Within the Madisonian approach to the separation of powers, an important question is why federal judges might engage in the kind of "empire-building" necessary to keep tension and balance within the federal government. Professor Daryl Levinson has argued, for example, that it is unclear why federal judges would have an incentive to enlarge the federal judicial role at the expense of the other branches. Levinson, *Empire-Building*, *supra* note 9, at 958. In this sense, the nature of federal courts suggests its own problems for the Madisonian model. Interestingly, this is an instance where the public-accountability rationale might align more closely with the Madisonian model than the federal Constitution. Because most state judges are elected, it is easier to see why they might have incentives to enlarge their role—or at least increase their popularity—at the expense of the other branches.

government branches.[138] But state courts are intentionally tied to politics in ways that have no federal analog.[139]

First, selection and retention rules for state judges are generally more political and populist.[140] In thirty-eight states, high-court judges are popularly elected rather than appointed.[141] While the influence of elections on judicial decision-making is complicated, there are good reasons to believe that elections skew courts toward majoritarian rulings.[142] If courts are meant to operate as neutral arbiters maintaining constitutional balance and tension between branches as a protection against majority faction, then the election of judges may present obvious problems.

Second, the state constitutional tradition has long recognized that liberal constitutional amendment processes can have a chilling effect on courts.[143] Indeed, correcting for countermajoritarian judicial rulings was a major theme during Progressive Era reforms to state constitutional-amendment rules, and states have a long history of using constitutional amendments to overrule unpopular court rulings.[144] In other words, state judicial review does not have the same finality because it is ultimately subject to popular referendum through liberal amendment rules.

Third, many state courts are not endowed with the "passive virtues" that limit federal judicial power.[145] At least eleven state courts

---

138. WILLIAMS, STATE CONSTITUTIONS, *supra* note 14, at 283–301.

139. *Id*. at 285.

140. G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES 44–47 (2012) [hereinafter TARR, WITHOUT FEAR OR FAVOR] (noting that the perception that state government, especially legislatures, were "ignoring" the popular will contextualized new reforms to judicial selection).

141. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1164 (2007).

142. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1771–73 (2021).

143. *See generally* John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007) [hereinafter Dinan, *Court-Constraining Amendments*] (explaining the historical practice and modern views of using amendments to overturn state court decisions); *see also* Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. REV. 55, 73–97 (2018) [hereinafter Marshfield, *Amendment Effect*] (theorizing how the ease of making amendments might impact judicial decision-making).

144. Dinan, *Court-Constraining Amendments*, *supra* note 143, at 989–1000; Marshfield, *Amendment Effect*, *supra* note 143, at 89.

145. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1834–35 (2011) (explaining that the doctrines of justiciability—standing, mootness, and ripeness—constitute "passive virtues" that allow a court "to avoid or delay deciding controversial public issues").

are explicitly authorized to render advisory opinions, for example.[146] State standing requirements can also be more liberal than the "case and controversy" requirement that limits federal courts.[147] Many state supreme courts have constitutional authority to engage in independent judicial administration, including rulemaking.[148] These structural differences mean that state courts are often more powerful relative to the other branches than Article III courts are presumed to be relative to Congress and the president. And at the same time, state courts are more directly accountable to statewide majorities.

* * *

State government is not structured for easy application of a checks-and-balances approach to the separation of powers. It consists of too many complex, unique, and detailed structural arrangements to clearly track how the parts of state government might work to hold each other in check in the aggregate. And, to the extent that it is possible to locate nodes of power, those tend to reflect prolonged periods of deliberate power imbalance. Moreover, various structural features import direct popular involvement into all three traditional branches of government, which tend to override any intragovernment checks that might otherwise exist. To the extent there is a separation-of-powers theory that might explain the structure of state government, it seems unlikely to be grounded solely in Madisonian constitutional design. Yet, as explained in the next Part, courts and scholars have continued to assume that state separation of powers is best conceptualized through a Madisonian lens.

146. *E.g.*, COLO. CONST. art. VI, § 3; FLA. CONST. art. V, § 3(b)(10); ME. CONST. art. VI, § 3. Eight of these authorizations are by constitutional provisions. WILLIAMS, STATE CONSTITUTIONS, *supra* note 14, at 296. For a list of statutory provisions, see Lucas Moench, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. REV. 2243, 2246 (2017). State courts have also at times held that they have an inherent power to issue advisory opinions. *See id.* at n.17.

147. Hershkoff, *supra* note 145, at 1852–57; City of Wilmington v. Lord, 378 A.2d 635, 637 (Del. 1977) (recognizing taxpayer standing).

148. WILLIAMS, STATE CONSTITUTIONS, *supra* note 14, at 291–92; *e.g.*, Winberry v. Salisbury, 74 A.2d 406, 414 (N.J. 1950) ("We therefore conclude that the rule-making power of the [New Jersey] Supreme Court is not subject to overriding legislation . . . .").

II. MADISONIAN MYOPIA

Despite these significant differences in constitutional structure, state courts have not looked to develop an independent state approach to the separation of powers. This is not to say that state courts have not charted their own paths on structural issues. There is variation on separation-of-powers questions.[149] However, those differences reflect familiar disputes within the Madisonian tradition and essentially no effort to explore a unique state theory that better corresponds to state constitutionalism.[150] Existing scholarship has not fared much better. To be sure, there is a well-developed literature criticizing state courts for ignoring distinctive state structures, but there is a dearth of scholarship that takes seriously the idea that state constitutions represent more than contextual riffs on old Madisonian or antifederalist themes. In this Part, I provide an overview of the existing state court approaches to the separation of powers and the key academic contributions with a focus on showing that they tend to assume the separation of powers is synonymous with a system of internal checks and balances.

A. By Courts

Contemporary state courts approach the separation of powers from a variety of different doctrinal frameworks, but three pervasive themes are evident.

First, some state cases are resolved easily and unremarkably based on the routine application of conventional interpretive methods, primarily text, clause-specific history, and structural reasoning.[151] This group of cases does not require state courts to engage in subtextual theorizing (or at least the courts' framing of the issue does not open that question). These disputes are framed as relatively "easy" cases,

149. *See, e.g.*, Rossi, *supra* note 7, at 1172 ("In many states, courts impose substantive limits on delegation. . . . [Other] states accept a legislative oversight role for agency rulemaking not allowed Congress."); Devlin, *supra* note 7, at 1210–11 (arguing that state courts reached different decisions on separation-of-powers and delegation questions not because "of differences in constitutional texts or history, but rather [because] of the real debate over how distribution of powers principles common to all American constitutions should be applied to state governance").

150. *See* Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS L. REV. 79, 90–92 (1998) (making a similar observation and noting that state courts are especially reluctant to draw on meaningful structural differences in state government when crafting separation-of-powers rules).

151. *See* Rossi, *supra* note 7, at 1173, 1220 (surveying state court cases addressing nondelegation issues and finding that the most popular method of resolving these cases was a simplistic application of state constitutional text).

and they reveal very little about how courts understand the theory and purpose of the state separation of powers.[152]

Second, some state courts have equated state separation of powers with federal theory and jurisprudence.[153] Sometimes this occurs subtly by drawing on federal cases as persuasive precedent.[154] On other occasions, courts overtly equate state and federal separation of powers.[155] These cases often reflect no critical assessment of potential differences between state and federal constitutional design and instead assert that the separation of powers is a generic concept of universal applicability.[156]

---

152. There are myriad examples of courts resolving disputes concerning separation of powers by means of straightforward textual analysis. *E.g.*, New Mexico *ex rel.* Stratton v. Roswell Indep. Schs., 806 P.2d 1085, 1088 (N.M. Ct. App. 1991) (holding that an individual's dual status as a public school teacher and legislator did not violate separation of powers based on the specific wording of New Mexico's constitution); Monaghan v. Sch. Dist. No. 1, 315 P.2d 797, 805–06 (Or. 1957) (en banc) (reaching an opposite conclusion based on different language in Oregon's constitution).

153. Devlin, *supra* note 7, at 1220–21.

154. For examples of this phenomenon, see Am. K-9 Detection Servs., LLC v. Freeman, 556 S.W.3d 246, 252 (Tex. 2018); Perdue v. Baker, 586 S.E.2d 606, 615 (Ga. 2003); Pellegrino v. O'Neill, 480 A.2d 476, 481–83 (Conn. 1984); Dep't of Transp. v. Armacost, 532 A.2d 1056, 1062–65 (Md. 1987); Commonwealth v. Sessoms, 532 A.2d 775, 778–79 (Pa. 1987); *In re* Advisory from the Governor, 633 A.2d 664, 674–75 (R.I. 1993); Common Cause of W. Va. v. Tomblin, 413 S.E.2d 358, 360–61, 363–64 (W.Va. 1991); Billis v. State, 800 P.2d 401, 413–15 (Wyo. 1990); Paisner v. Att'y Gen., 458 N.E.2d 734, 738–39 (Mass. 1983); State v. Di Frisco, 571 A.2d 914, 920–21 (N.J. 1990); Under 21 v. City of New York, 482 N.E.2d 1, 4 (N.Y. 1985); Dep't of Env't Res. v. Jubelirer, 567 A.2d 741, 748–49 (Pa. Commw. Ct. 1989); *In re* House of Representatives, 575 A.2d 176, 178 (R.I. 1990); State v. De La Cruz, 393 S.E.2d 184, 186 (S.C. 1990); Carrick v. Locke, 882 P.2d 173, 177 (Wash. 1994).

155. *See, e.g.*, Thomas v. N.C. Dep't of Hum. Res., 478 S.E.2d 816, 822 (N.C. Ct. App. 1996) ("This commitment to the principal of separation of powers exemplified in our State constitution is virtually identical in practice to that shown at the federal level."); State v. Bernades, 795 P.2d 842, 845 (Haw. 1990) (concluding that state sentencing guidelines did not violate "the separation of powers doctrine under the Hawaii and United States Constitutions").

156. *See* Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 263 (Fla. 1991) (citing Mistretta v. United States, 488 U.S. 361, 380 (1989)) (concluding that "[t]he principles underlying the governmental separation of powers antedate our Florida Constitution and were collectively adopted by the union of states in our federal constitution"). Another example can be found in Maryland caselaw, where the state supreme court has noted that:

> The delegation doctrine . . . is a corollary of the separation of powers doctrine which underlies both the Maryland and Federal Constitutions. Steeped in the political theories of Montesquieu and Locke, those who framed the constitutions of our states and of the federal government believed that separating the functions of government . . . was fundamental to good government and the preservation of civil liberties.

Armacost, 532 A.2d at 1062.

A prominent example of this is *Ex parte Jenkins*,[157] where the Alabama Supreme Court considered whether legislation reopening final paternity judgments violated separation of powers.[158] Drawing upon Madison and Montesquieu, the court found the legislation unconstitutional because "[t]he People of the United States, and the People of Alabama, transformed Montesquieu's maxim from political philosophy into fundamental law by ratifying Constitutions that expressly vest the three great powers of government in three separate branches."[159] The court also relied heavily on various Supreme Court opinions to support its ruling.[160] At no point did the court suggest that the case might be resolved by reference to unique state structural considerations.

Third, a few courts engage with the idea that state separation-of-powers jurisprudence might, for good reason, diverge from federal law.[161] Within this group, some state courts have inferred from state constitutional provisions referencing the separation of powers that their states have adopted a more formalist approach than the federal Constitution, which does not contain an explicit separation-of-powers provision.[162] These courts have applied the separation of powers more rigidly and have drawn on formalist ideas to decide cases.[163] What is most striking about these opinions, however, is that they tend to tie

157. *Ex parte* Jenkins, 723 So. 2d 649 (Ala. 1998).

158. *Id.* at 650–51.

159. *Id.* at 654.

160. *See id.* at 654–55. These cases included *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *Buckley v. Valeo*, 424 U.S. 1 (1976), *United States v. Klein*, 80 U.S. 128 (1872), *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855), and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). *Id.* As Professor Robert Schapiro has observed, what is most remarkable about *Jenkins* is that the court produced five opinions, and none of them disagreed that federal precedent provided the applicable separation-of-powers principle. Schapiro, *supra* note 150, at 89.

161. *See, e.g.*, Parcell v. Kansas, 468 F. Supp. 1274, 1277 (D. Kan. 1979) (noting that federal and state structural precedents should not be quickly substituted for each other). *Parcell* is an oft-cited example of this phenomenon, but the irony is not lost that it was a federal judge. *Cf.* N.D. Legis. Assembly v. Burgum, 916 N.W.2d 83, 101 (N.D. 2018) (distinguishing between state and federal separation of powers); Soares v. State, 121 N.Y.S.3d 790, 816 (N.Y. Sup. Ct. 2020) (same).

162. For examples of this phenomenon, see Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 465–69 (Tex. 1997); State v. Williams, 583 P.2d 251, 254–55 (Ariz. 1978); Stofer v. Motor Vehicle Cas. Co., 369 N.E.2d 875, 878–80 (Ill. 1977); Legis. Rsch. Comm'n v. Brown, 664 S.W.2d 907, 915 (Ky. 1984).

163. *See* Devlin, *supra* note 7, at 1246–47 (noting and describing this trend); Rossi, *supra* note 7, at 1193–97 (discussing states with stronger nondelegation principles than the federal Constitution).

their alternative approach very closely to state constitutional text without any mention of unique state structural or theoretical considerations.[164] To the extent courts offer a deeper theoretical justification, it tracks the usual rationales offered in favor of formalist approaches to *federal* separation of powers.

A helpful example of this approach is *Askew v. Cross Key Waterways*,[165] where the Florida Supreme Court considered the scope of the state's nondelegation doctrine.[166] In applying the doctrine rigidly to prohibit broad delegation to administrative agencies, the Florida Supreme Court relied primarily on the text of its state constitution, which provides: "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[167] From this language, the court held that delegation of policymaking authority was impermissible.[168] The court engaged with federal and comparative state precedents, but it analogized those precedents by comparing and contrasting the constitutional texts with essentially no discussion of the underlying theoretical questions raised by delegation.[169]

Some courts have charted their own paths on functional grounds. But here too, state courts tend to justify their rulings by reference to the same general rationales offered by *federal* functionalists without regard to any unique state structural or theoretical considerations. A good example is *Cooper v. Berger*.[170] There, the North Carolina Supreme Court considered whether a statute requiring senate

164. *See* Schapiro, *supra* note 150, at 90 ("When courts do depart from federal doctrine, they generally do not stray far. They commonly seek to ground their divergence on quite specific textual differences between the state and federal charters.").

165. Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1978).

166. *Id.* at 918–21.

167. *Id.* at 918 (quoting FLA. CONST. art. II, § 3).

168. *Id.* at 919 (holding the statute unconstitutional because it "reposit[ioned] in the [executive branch] the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection").

169. *See* Rossi, *supra* note 7, at 1220 (making this point). To the extent the court in *Askew* engaged with the rationale underlying the nondelegation issue, it said:

> [U]ntil the provisions of Article II, Section 3 of the Florida Constitution are altered by the people we deem the doctrine of nondelegation of legislative power to be viable in this State. Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.

Askew, 372 So. 2d at 925.

170. Cooper v. Berger, 822 S.E.2d 286 (N.C. 2018).

confirmation of gubernatorial cabinet members violated North Carolina's separation of powers.[171] Applying a "functional" approach to the separation of powers, the court upheld the statute.[172] The court concluded that although the statute "undoubtedly granted the Senate some piece of the appointment power," that intrusion did not functionally impair the balance of power between the governor and the legislature.[173] Citing Federalist 76 and the Supreme Court's ruling in *Myers v. United States*,[174] the court reasoned that "senatorial confirmation curtails the Governor's appointment power only minimally" because the governor retained the power to make the initial appointment and to supervise and remove confirmed cabinet members.[175] At no point did the court suggest that North Carolina's approach to the separation of powers invited unique functional considerations.

Finally, some state courts have spawned a "hybrid" approach that focuses on the degree to which one branch might eclipse or coerce another branch's "core function." Opinions by the Arizona, California, and Kansas supreme courts are good examples of this.[176] In *Schneider v. Bennett*,[177] which is often cited as the leading case for this approach,[178] the Kansas Supreme Court considered whether a statutory finance council comprising the governor, lieutenant governor, and four legislators violated the separation of powers because it had lawmaking and executive powers.[179] The court held that it was necessary to examine four factors to determine whether one branch unconstitutionally usurped the powers of another.[180] First, courts

171. *Id.* at 290.

172. *Id.* at 293–95.

173. *Id.* at 293–94.

174. Myers v. United States, 272 U.S. 52 (1926).

175. *Cooper*, 822 S.E.2d at 294 (first citing THE FEDERALIST NO. 76, *supra* note 34, at 384 (James Madison) (1788); and then citing *Myers*, 272 U.S. at 121).

176. For examples from these states of this approach, see *Cal. Radioactive Materials Mgmt. F. v. Dep't of Health Servs.*, 19 Cal. Rptr. 2d 357, 377–78 (Cal. Ct. App. 1993); *Seisinger v. Siebel*, 203 P.3d 483, 486–88 (Ariz. 2009); *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 792 (Kan. 1976).

177. State *ex rel.* Schneider v. Bennett, 547 P.2d 786 (Kan. 1976).

178. Devlin, *supra* note 7, at 1258 ("A more serious approach to [state separation-of-powers] analysis eventually began with the groundbreaking decision of the Kansas Supreme Court in *State ex rel. Schneider v. Bennett*."); Caleb Stegall, *Something There Is That Doesn't Love a Wall*, 46 HARV. J.L. & PUB. POL'Y 361, 366 (2023).

179. *See Bennett*, 547 P.2d at 794–97 (discussing the makeup and powers of the finance council and the separation-of-powers challenge at issue).

180. *Id.* at 792.

should consider whether the essential nature of the power being exercised is purely legislative, executive, judicial, or a "blend" of powers.[181] Second, courts should consider the degree of influence by one branch over the other.[182] Here, the court suggested a continuum between coercion and cooperation.[183] Third, courts should consider "the nature of the objective sought to be attained" by the assuming branch.[184] Fourth, courts should consider "the practical result of the blending of powers."[185]

Applying these factors, the court found that the statute violated the separation of powers when it gave the council power over the day-to-day supervision of the Department of Administration.[186] The court reasoned that this supervision was an essential executive function and that the four legislators on the council could co-opt the executive's authority over the department.[187] On the other hand, the court found that the power to expend emergency funds did not violate the separation of powers because that power required unanimous approval by all six members, which effectively preserved the governor's power in the form of a veto.[188]

Bennett is notable because its doctrinal framework does not have a strong analog in federal precedent.[189] The court constructed a series of novel factors to help it address separation-of-powers concerns.[190] However, *Bennett* does not represent a truly independent state approach to the separation of powers. On the contrary, the court's approach aims to ensure that the branches remain in competitive tension.[191] *Bennett* adds color and detail to this inquiry, but the court's

181. *See id.* ("Is the power exclusively executive or legislative or is it a blend of the two?").

182. *See id.* (noting how courts should consider the degree of control of one branch over the other).

183. *See id.* (noting the difference between coercive influence and cooperation in the separation-of-powers context).

184. *See id.* (noting this factor in the context of the legislative branch).

185. *Id*.

186. *Id.* at 797–98.

187. *Id.*

188. *Id.* at 798.

189. *See* Devlin, *supra* note 7, at 1259–61 (exploring *Bennett*'s potential as an independent state doctrine of separation of powers); Stegall, *supra* note 178, at 366–68 (noting that the *Bennett* framework sounds in "practicability, cooperation, and acquiescence" rather than functional or formalist reasoning).

190. *See* Stegall, *supra* note 178, at 366–67.

191. The *Bennett* Court said:

ultimate focus is whether a proposal to blend powers would dissolve the balance of power between branches, which is the core of the Madisonian theory of separation of powers. At no point did the court engage with the idea that unique state structures reflect an alternative approach to the separation of powers in Kansas.[192] Thus, to the extent *Bennett* represents the centerpiece of independent state separation-of-powers jurisprudence, it is little more than a playful riff on Madisonian logic.

B. By Scholars

Since at least the 1990s, scholars have argued that federal separation-of-powers precedent may be a poor fit when resolving state structural disputes.[193] These scholars point to significant structural differences between state and federal government that undermine the utility of federal precedent.[194] For example, they emphasize that: (1) Congress has only enumerated lawmaking powers while state legislatures have plenary power;[195] (2) the federal Constitution establishes a unitary executive with only the president subject to election while the vast majority of states elect multiple executive officials;[196] and (3) Article III judges are appointed to life terms while most state judges are subject to regular popular elections.[197] As Professor James Gardner has argued, "These differences surely have ramifications for the precise ways in which the balance of power among the branches of government ought to be struck."[198]

> We must maintain in our political system sufficient flexibility to experiment and to seek new methods of improving governmental efficiency. At the same time we must not lose sight of the ever-existing danger of unchecked power and the concentration of power in the hands of a single person or group which the separation of powers doctrine was designed to prevent.

Bennett, 547 P.2d at 791.

192. *See infra* Part IV (proposing that judicial analysis of separation-of-powers questions should consider the unique structures of state governments).

193. For more important works in this regard, see Devlin, *supra* note 7, at 1210–65; Gardner, *supra* note 8, at 114–17; Rossi, *supra* note 7, at 1172–1240; Schapiro, *supra* note 150, at 92; Robert F. Williams, *Rhode Island's Distribution of Powers Question of the Century: Reverse Delegation and Implied Limits on Legislative Powers*, 4 ROGER WILLIAMS L. REV. 159, 170 (1998); WILLIAMS, STATE CONSTITUTIONS, *supra* note 14, at 236–45 (surveying this literature).

194. *See, e.g.*, Gardner, *supra* note 8, at 114–17.

195. *E.g.*, *id.* at 115–16.

196. *E.g.*, *id.* at 115.

197. *E.g.*, *id.*

198. *Id*.

Scholars have also emphasized that state courts are not bound to follow federal law regarding the separation of powers.[199] Unlike federal constitutional rights, which state courts must enforce, federal separation-of-powers principles have not been "incorporated" against the states.[200] Even the Guarantee Clause, which requires the United States to "guarantee to every State in this Union a Republican Form of Government,"[201] does not require courts to apply federal norms to state structural disputes.[202]

Thus, scholars have built a compelling case that courts need not (and should not) blindly follow federal separation-of-powers precedent when resolving state structural disputes.[203] However, existing scholarship has generally failed to offer an alternative, state-oriented separation-of-powers theory that might help guide courts toward an independent state structural jurisprudence. There are a few limited exceptions, but none offer a truly independent state theory of the separation of powers.

Professor John Devlin has argued, for example, that state constitutions provide unique guidance for resolving disputes related to efforts by legislators to appoint themselves with administrative powers.[204] In this very specific context, Devlin identifies various unique state constitutional texts, histories, and practices that could support an independent state analysis.[205] Devlin also makes the insightful point that state courts might decide separation-of-powers disputes less rigidly because fears about state government tyranny are mitigated by the individual rights guarantee under the federal Constitution.[206] However, besides admonishing state courts to draw on unique state

199. *See* Schapiro, *supra* note 150, at 92.

200. *See id.*

201. *See* U.S. CONST. art. IV, § 4.

202. *See* Schapiro, *supra* note 150, at 93.

203. *See* WILLIAMS, STATE CONSTITUTIONS, *supra* note 14, at 240–41 (providing a succinct summary of this argument).

204. *See* Devlin, *supra* note 7, at 1210 (noting that the analysis was limited to this context).

205. *See id.* at 1224–38 (noting, for example, that unlike Congress, state legislatures possess plenary lawmaking power, which might impact how courts approach separation-of-powers questions).

206. *See id.* at 1232. Devlin also makes a compelling case that state courts should draw on structural precedent from sister states because systematic similarities make comparative analysis worthwhile and informative. *See id.* at 1264–68.

sources and offering a rationale in favor of flexible separation-of-powers norms, Devlin does not propose a unique state theory.[207]

Professor Jim Rossi has offered a very insightful and robust exploration of state structural rulings in the nondelegation and legislative-veto contexts.[208] Rossi makes several important points. First, he notes that state courts rarely ground their structural decisions in unique state institutional considerations.[209] Instead, state courts pervasively decide structural disputes by references to a "common American heritage" or specific and clear constitutional text.[210] Second, Rossi argues that despite this common form of reasoning, state courts often reach results at odds with federal precedent.[211] For example, he argues that many states significantly limit delegation of lawmaking powers and allow legislatures to oversee agency rulemaking in ways that conflict with federal norms.[212] Third, Rossi attributes this divergence to the subtextual influence of antifederalist ideas on state institutional design.[213] Specifically, he argues that these outcomes reflect antifederalist concerns about excessive executive power, which grew from early experiences with colonial governors and the monarch.[214] Legislative supremacy was a key antifederalist response to those concerns, and, according to Rossi, this institutional posture has influenced contemporary state rulings, which apply the separation of powers in favor of legislative power over agency rulemaking.[215] Greater legislative oversight is further justified by structural limitations to state administrative oversight that make capture of state agencies more likely than capture of federal agencies.[216]

---

207. The closest Devlin gets to this is to endorse the Kansas Supreme Court's analysis in *Bennett* as "the most promising approach to the resolution of state distribution of powers issues." *Id.* at 1265.

208. *See* Rossi, *supra* note 7, at 1172–73, 1222–40.

209. *See id.* at 1173.

210. *See id.*

211. *See id.* at 1172.

212. *See id.*

213. *See id.* at 1172–73.

214. *See id.* at 1185.

215. *See id.* at 1172–73.

216. *See id.* at 1222–32. Rossi notes, for example, that state legislatures are in session for much shorter periods than Congress, which can create space for agencies to wander without oversight. *Id*. at 1223. Many states also have less rigorous judicial review of agency decision-making than under federal law, which can result in a lack of agency accountability. *Id.* at 1227. Consequently, Rossi argues:

Rossi's points are important, compelling, and relevant to my claim here. By connecting state structural decisions to antifederalist ideals, Rossi invites an independent, theoretical assessment of state separation of powers. Ultimately, however, Rossi's conclusion is largely an application of arguments about the best intragovernment balance of power to avoid abusive state action—an iteration of the Madisonian checks-and-balances approach. For example, the antifederalist ideals that Rossi emphasizes are legislative supremacy and a strict separation of powers as a counterweight to executive abuse.[217] These are influential themes in state constitutionalism, but they are made relevant to the separation of powers by invoking the logic of checks and balances. Thus, Rossi sees state nondelegation as a manifestation of antifederalist ideals because they reflect efforts to provide a legislative counterweight to growing executive power through agencies.[218]

In the context of nondelegation and agency oversight, Rossi's assessment of state institutional dynamics is surely correct. What is missing, however, is a more complete assessment of the role that direct popular involvement in government plays in the state experience with the separation of powers. The antifederalist commitment to legislative supremacy was an early manifestation of this enduring state constitutional commitment, but the influence of popular involvement is much broader, and a state theory of the separation of powers must account for it.[219]

> [T]he institutional design features of federal agencies may also make the possibility of capture and factional interference in the agency lawmaking process less likely. In the states, reduced legislative oversight, due to limited sessions, and reduced executive oversight, due to plural offices in the executive branch, may make capture of an agency's decision making process more likely than at the federal level.

Id. at 1236.

217. *See id.* at 1185.

218. To be clear, Rossi does not make this as a normative point. *See id.* at 1238–40. He is very precise that his argument is explanatory. *See id.* at 1239. He offers a theory for why state courts might reach results at variance from the federal doctrine, but he does not endorse that approach. *See id.* at 1240. In fact, he indicates skepticism and concern. *See id.*

219. Indeed, despite drawing out several important and nuanced structural differences between state and federal government, Rossi does not engage with the many forms of direct democracy that are embedded within state constitutional structure and act upon the separation of powers in various ways. *See* Rossi, *supra* note 7, at 1222–32. *But see* Marshfield, *Popular Regulation?*, *supra* note 79, at 371 (arguing that processes of direct democracy have significant impacts on regulation and agency oversight).

Finally, Professor Jonathan Zasloff has offered an insightful account of the separation of powers under the California constitution with the suggestion that it might be applied more generally to other states.[220] Zasloff offers an unassailably sophisticated account of the workings of separation-of-powers doctrine in California by tracing text,[221] history,[222] precedent, and practice.[223] He concludes that prevailing functional and formalist theories developed under the federal Constitution fail to explain the California experience.[224] Importantly, Zasloff takes seriously the notion that direct democracy in California has implications for the separation of powers.[225] However, Zasloff explicitly adopts a Madisonian understanding of the separation of powers as being designed to mitigate majoritarian impulses.[226] He concludes that, by explicitly endorsing the separation of powers *and* the initiative, the California constitution intended to embolden and empower state courts to tightly monitor the initiative to protect against majoritarian abuses.[227] More generally, Zasloff concludes that the separation of powers should be narrowly construed by courts in favor of allowing political processes to guide the allocation of powers.[228] Zasloff's account is compelling. However, by its own terms, it is not a theory of the separation of powers but instead a theory for why state courts should dismiss or abandon the principle to constitutional desuetude.[229] Moreover, Zasloff's proposed doctrine for when courts should enforce the separation of powers focuses on ensuring adequate intragovernment competition between branches—a conventional checks-and-balances theory.

---

220. *See* Zasloff, *supra* note 7, at 1084–85.

221. *See id.* at 1095–1101.

222. *See id.* at 1102–08.

223. *See id.* at 1110–26.

224. *See id.* at 1129–30.

225. *See id.* at 1123.

226. *See id.* at 1126 ("In any event, even if majority filtration is not the exclusive justification for the separation of powers, it is the most important one.").

227. *See id.* ("It stands to reason, then, that under California's strong initiative system, the judiciary should still assume a strong role in protecting individual rights even though the initiative deeply compromises the utility of the separation of powers.").

228. *Id.*

229. *See id.* at 1128–29 (arguing that because "we are left . . . with a principle that is textually anomalous, historically ungrounded, and normatively suspect," the judiciary should respond by emphasizing "superiority of the political process in maintaining the balance of power in California governance"). Zasloff offers a test for when courts should enforce the separation of powers but again draws on familiar checks-and-balances logic. *See id.* at 1130.

III. UNDERSTANDING THE STATE APPROACH TO SEPARATION OF POWERS

This Part argues that careful attention to state constitutional history, text, and practice suggests an alternative approach to the separation of powers that views it as a tool in service of popular accountability. As described above, the federal approach separates power to reinforce representative government, entrench constitutional norms, and mitigate majority faction. To do this, it relies on Madison's belief that officials will compete between branches of government, which will then hold government in check from within.

State constitutions capture an alternative logic for the separation of powers. State constitutions have a long history of viewing government officials as a dangerous elite who will eventually coalesce in a common interest against the people. The best antidote to this is to enhance popular oversight of government, in part by dividing (and subdividing) it into specific departments with detailed constitutional mandates. These divisions would then better enable the public to monitor and direct government. Thus, in the state tradition, a foundational reason for separating government power is to enhance popular accountability.

To be sure, state constitutions have incorporated aspects of Madison's checks-and-balances theory. Important examples include representative law making, bicameralism, the executive veto, legislative confirmation of executive appointments, and judicial review. States have at various times explicitly justified these arrangements on the grounds that they create important checks and balances within state government. It is also important to recognize that some state constitutions are much closer to a Madisonian design than others. California and New Jersey, for example, have very different institutional arrangements. New Jersey has a strong, largely consolidated executive branch, no initiative process, appointed judges not subject to popular recall, and a legislature without constitutional spending limits.[230] California, on the other hand, is heavily influenced by statutory and constitutional initiatives, the recall of even state supreme court justices, and budgetary limits on the legislature.[231] These examples show state constitutions exist on a continuum.

230. *Id.* app. at 1149–50 (tabulating significant structural differences between states).

231. *See id.* (detailing California's extensive structural makeup).

My claim does not ignore this reality. Rather, it emphasizes that checks and balances are not the sole orientation of state separation of powers (and often not the dominant orientation). Checks and balances are a real and important component of state institutional design. But the overlooked polestar in state constitutionalism is the idea that separating government power helps the public hold government accountable. My claim is that this public-accountability rationale should be incorporated into contemporary state constitutional theory and jurisprudence. As I argue below, it is simply inaccurate to talk about the separation of powers under state constitutions by reference solely to checks and balances and without any regard for how the states have leveraged and redesigned the separation of powers to facilitate popular oversight. This Part argues that state constitutional history, texts, and practice all support greater recognition of the public-accountability rationale under state constitutions.

A. History

Much has been written about state constitution-making during the revolutionary period.[232] Many scholars conclude that these early texts reflect noble aspirations but an inability to implement the separation of powers.[233] This perspective is based mostly on the fact that early state constitutions included provisions paying homage to the separation of powers while at the same time establishing legislative dominance.[234]

---

232. Canonical works include: GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1998); DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL (1980); WILLI P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS (Rita Kimber & Robert Kimber trans., 1980); CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2008); MARC W. KRUMAN, BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA (1997).

233. *See, e.g.*, LUTZ, *supra* note 232, at 97; E.S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 514 (1924) (concluding that separation-of-powers provisions in early state constitutions were "verbal merely").

234. *See, e.g.*, LUTZ, *supra* note 232, at 97; WILLIAMS, STATE CONSTITUTIONS, *supra* note 14, at 236; VILE, CONSTITUTIONALISM, *supra* note 30, at 147 (recounting this perspective but not ascribing to it fully). Professor Edward S. Corwin makes a slightly more nuanced and condemning critique. He examines the early laws of New Hampshire and finds many acts of specific encroachment by the legislature. *See* Corwin, *supra* note 233, at 514. But even Corwin acknowledges these encroachments as problematic based on later determinations about the separation of powers. *See id.* at 514–15. In other words, he does not conclude that these actions were outside constitutional legislative authority (for the most part) but that they were not truly "legislative" acts as defined by later understandings. *See id.* at 536.

From this imbalance in power, most scholars conclude that state constitutions were inept and that "[i]t was left to the Federalists to draw out fully the implications of separation of powers in the United States Constitution."[235]

This perspective is accurate to a degree. Early state constitutions were imperfect. They were largely experimental and were often drafted under exigent circumstances. And there were obvious gaps between aspiration and implementation. Moreover, the actual distribution of powers adopted by early state constitutions did not work. Corrupt legislatures ran amok on a variety of important issues during the nineteenth century. But it is a mistake to assume that early state constitutions represent only failed attempts at something that the Federalists later achieved in the federal Constitution. For better or worse, state constitutions often represent deliberate deviations from the federal Constitution's approach.[236]

Indeed, if we read early state constitutions on their own terms and in context, there are several reasons to believe that they capture a nascent alternative approach to the separation of powers that continues to characterize certain aspects of how the states practice constitutionalism.

1. *Popular Sovereignty and Mixed Government.* To properly understand the separation of powers in state constitutions, it is critical to appreciate the shift in political and constitutional theory that occurred during the revolutionary period. At the end of the eighteenth century, British and colonial governments were justified under a theory of "mixed" government.[237] It was a complex and nuanced system that

235. LUTZ, *supra* note 232, at 97. As an interpretive matter, this line of reasoning is weak. When early state constitutions ascribed to a separation of powers but also explicitly included an extreme imbalance in power between the branches, one reasonable interpretation is that the reference to "separation of powers" imagines something other than a system of checks and balances fueled by parity between branches. *See infra* Part III.B.1.

236. *See generally* DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 78, at 97–136 (cataloging myriad examples of this).

237. This account is taken primarily from KRUMAN, *supra* note 232, at 132; VILE, CONSTITUTIONALISM, *supra* note 30, at 37, 135–38; WOOD, *supra* note 232, at 222–55; LUTZ, *supra* note 232, at 97; and ADAMS, *supra* note 232, at 257–59. In this regard, Professor Willi Adams presents a slightly different account than Vile on a key point described below. Adams understood early state constitutions to quickly reject the idea that powers could be "separated" without also incorporating a theory of checks and balances. *See* ADAMS, *supra* note 232, at 257–59, 261 (finding that "[s]imple plans for government organization," that is, legislative predominance in the mode of Thomas Paine's thoughts on the Pennsylvania constitution of 1777, "were rejected as reflecting

varied in the details, but the "central theme [was] a blending of monarchy, aristocracy, and democracy."[238] The core idea was that "the major interests in society must be allowed to take part jointly in the functions of government."[239] Thus, in colonial government, significant power was maintained by rulers appointed by the Crown (governors and members of the Privy Councils, for example), who were incorporated into most government functions.[240]

Mixed government also recognized that each of the "social estates" should be checked by the other within government.[241] As Professor Marc Kruman has explained (with an amusing nursery-rhythm canter), "The people checked the nobility and the nobility checked the people; the king checked both, as both checked the king."[242] If the system worked as planned, kings were prevented from becoming tyrants, aristocracies did not become self-centered

---

an idyllic view of society that no longer applied, not even in America"). Vile, on the other hand, concludes that even as John Adams and the Massachusetts constitution of 1780 incorporated some elements of a checks-and-balance system, the dominant orientation in early state constitutions regarding the separation of powers was best illustrated by the extreme 1776 Pennsylvania constitution. *See* VILE, CONSTITUTIONALISM, *supra* note 30, at 154–55. As will become clear below, I find Vile's account more compelling. This is primarily because it remains more closely tied to the textual development of early state constitutions and because it recognizes that state constitutions included both understandings of the separation of powers but placed more or less emphasis on one or the other based on external circumstances. *See id.* at 154–55. Vile notes:

> [I]n the America of 1787 the doctrine of the separation of powers was modified, tempered, buttressed even, by the theory of checks and balances drawn from the older conception of English constitutional theory, but it remained itself firmly in the centre of men's thoughts as the essential basis of a free system of government.

Id. at 133.

Adams, on the other hand, seems focused on demonstrating that state constitutions were not fully captured by the extreme ideas that generated the Pennsylvania constitution of 1776. *See* ADAMS, *supra* note 232, at 257. Professor Gordon Wood's account seems to fall somewhere in between Vile and Adams. *See* WOOD, *supra* note 232, at 222–55. Wood makes the compelling point that the early American acceptance of bicameralism indicates some endorsement of a checks-and-balances approach to the separation of powers. *See id.* at 253–54. Professor Donald Lutz seems to brush past this distinction in the context of the separation of powers. LUTZ, *supra* note 232, at 97.

238. *See* VILE, CONSTITUTIONALISM, *supra* note 30, at 37. There were known problems with describing colonial government as mixed in the same way as British government because the underlying structure of society was very different, especially with the absence of legally defined estates. *See* ADAMS, *supra* note 232, at 255–56; KRUMAN, *supra* note 232, at 132–34.

239. VILE, CONSTITUTIONALISM, *supra* note 30, at 37.

240. KRUMAN, *supra* note 232, at 125; VILE, CONSTITUTIONALISM, *supra* note 30, at 139–40.

241. Drawing from classical political theory, it further claimed that each estate contributed something of positive value to compensate for the other: the king power and decisiveness, the aristocracy wisdom, and the people virtue and honesty. *See* KRUMAN, *supra* note 232, at 132.

242. *Id.*

oligarchies, and the people did not degenerate into "anarchy, mob rule, and licentiousness."[243] The idea was that by sharing power, the constitution kept "the estates of the realm in careful equipoise."[244] Importantly, mixed government did not share power by strictly allocating different government functions to different groups.[245] Instead, it tended to include a combination of groups in most functions.[246]

As the principle of popular sovereignty took hold in the United States, some aspects of mixed government seemed especially noxious.[247] First, popular sovereignty lodged all political power in the people themselves.[248] It rejected any claim to political power based on divine right or hereditary entitlement.[249] All government officials were now agents of the people alone, and neither the king nor the aristocracy had any legitimate claim to power without the people's consent.[250]

Critically, this meant that the people's power was not subject to any inherent checks.[251] Mixed government assumed that the people had

243. *See id.*

244. *See id.*

245. VILE, CONSTITUTIONALISM, *supra* note 30, at 151–52.

246. *See id.*

247. *See id.* at 150.

248. *See id.* ("The revolutionary concept of the delegation of power from the people to their agents in the various branches of government is deeply opposed to the ideas of the balanced constitution, in which important elements were independent of the popular power, and able to check the representatives of that power.").

249. *See, e.g.*, VA. DECL. OF RTS. of 1776, § 4 ("That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of Magistrate, Legislator, or Judge, to be hereditary."); MD. DECL. OF RTS. of 1776, art. XL ("That no title of nobility or hereditary honours ought to be granted in this State."); N.C. DECL. OF RTS. of 1776, § XXII ("That no hereditary emoluments, privileges or honours ought to be granted or conferred in this state.").

250. Early state declarations of rights are littered with explicit statements of these premises. *See, e.g.*, VA. DECL. OF RTS. of 1776, § 2 ("That all power is vested in, and consequently derived from, the people . . . ."); DEL. DECL. OF RTS. of 1776, § 1 ("That all government of right originates from the people . . . ."); MD. DECL. OF RTS. of 1776, art. I (same); PA. CONST. of 1776, ch. I, § IV ("That all power [is] originally inherent in, and consequently derived from, the people . . . ."); VT. CONST. of 1777 ch. I, § V (same); N.C. DECL. OF RTS. of 1776, § I ("That all political power is vested in and derived from the people only."); *see also* Marshfield, *Misunderstood Rights*, *supra* note 13, at 882–86 (surveying myriad provisions affirming that political power was vested in the people).

251. Thomas Paine's idea of "simple government" (that is, legislative dominance and direct popular control) is often associated with this idea, but the concept was more theoretical than Paine's rather simplistic deductions for the design of government. *See* ADAMS, *supra* note 232, at

a voice but that the people's political power was intrinsically limited by other competing claims from the Crown and the aristocracy.[252] In other words, mixed government assumed that political power was inherently separated and in tension. Popular sovereignty rejected this. Political power was consolidated in the people, and the people could not be checked without their consent by any official or segment of society.[253]

Second, and relatedly, if all political power originated with the people, then the people absolutely controlled the structure of government. Popular sovereignty rejected the idea that the pre-existing conditions of society determine how government should be organized.[254] Instead, the people had ultimate authority to design their government in whatever manner they believed was best.[255] Popular sovereignty freed government from any predetermined or archetypal

257–59 (describing the English concepts that led to "the modern system of a functional division of powers among several institutions"), WOOD, *supra* note 232, at 224–30 (noting that Americans needed a "'plain and simple' government"); VILE, CONSTITUTIONALISM, *supra* note 30, at 138–39 ("Paine's *Common Sense* . . . heralded the rejection of the old theory of constitutionalism and opened a period of intense constitutional development . . . ."). The people could surely construct a mixed government. The critical point was that under a theory of popular sovereignty, mixed government could be legitimated only by the people's consent. Again, the texts of early state declarations of rights make this explicit. *See, e.g.*, DEL. DECL. OF RTS. of 1776, § 1 ("That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole."); *id.* § 4 ("That the people of this state have the sole exclusive and inherent right of governing . . . .").

252. KRUMAN, *supra* note 232, at 125.

253. *See* VILE, CONSTITUTIONALISM, *supra* note 30, at 150 (noting that in a balanced constitution, "important elements were independent of popular power, and able to check the representatives of that power"). This point is made explicit in many early state constitutional texts through a constellation of provisions (often appearing in the declaration of rights). For example, many state bills of rights adopted before 1800 include some explicit declaration that *all* government officials are mere "servants," "trustees," or agents of the people. *See, e.g.*, MASS. CONST. of 1780, pt. I, § V ("All power residing originally in the People, and being derived from them, the . . . officers of Government, vested with authority . . . are at all times accountable to them."); VA. DECL. OF RTS. of 1776, § 2; DEL. DECL. OF RTS. of 1776, § 5; PA. CONST. of 1776, ch. I, § IV; MD. DECL. OF RTS. of 1776, §§ I, IV; N.C. DECL. OF RTS. of 1776, § I; VT. CONST. of 1777, ch. I, § V; N.H. CONST. of 1784, pt. I, art. VIII; VT. CONST. of 1786, ch. I, § VI; DEL. CONST. of 1792, art. I, § 16; KY. CONST. of 1792, art. XII, § 2; KY. CONST. of 1799, art. X, § 2; VT. CONST. of 1793, ch. I, art. VI; TENN. CONST. of 1796, art. XI, § I.

254. *See* VILE, CONSTITUTIONALISM, *supra* note 30, at 150; WOOD, *supra* note 232, at 244–55 (explaining the very nuanced development of this point in the poignant context of the upper legislative chamber's role in constitutional design).

255. *See, e.g.*, MD. DECL. OF RTS. of 1776, art. II ("That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof."). Of course, popular sovereignty came with its own preconditions, such as a theory of political equality, representation, and suffrage. But these preconditions did not determine the structure of government in the way that mixed-government theory did.

organization based on external constraints.[256] The corollary of this was that the constitution (as the people's instrument) had to positively construct government.[257] It was within this context that early state constitutions drew most heavily from Montesquieu's division of government into three function-based branches.[258] Organizing government around functional categories was simultaneously a poignant repudiation of the noxious aspects of mixed government and the active implementation of popular sovereignty.[259]

---

256. VILE, CONSTITUTIONALISM, *supra* note 30, at 155–58.

257. The spirit of the preambles in early state constitutions capture this. *See, e.g.*, CONN. CONST. of 1818, pmbl. ("The people of Connecticut, . . . do, in order more effectually define, secure, and perpetuate the liberties, rights, and privileges which they have derived from their ancestors, hereby, after a careful consideration and revision, ordain and establish the following Constitution and form of civil government."); DEL. CONST. of 1792, pmbl. ("We, the people, hereby ordain and establish this constitution of government for the State of Delaware.").

258. *See* VILE, CONSTITUTIONALISM, *supra* note 30, at 105 (noting that Montesquieu's functional division of government was revolutionary in this context); *id.* at 133–43 (explaining how Americans drew on both aspects of Montesquieu's theory—separation of powers and checks and balances—for different reasons).

259. *See id.* at 155–58. As I note in Part III.B.2 below, this explains why many early state constitutions included explicit separation-of-powers provisions within their bill of rights. Early bills of rights were, at bottom, a declaration of popular sovereignty and the rights of the people to control the substantive outputs of government. *See* Marshfield, *Misunderstood Rights*, *supra* note 13, at 895–96. They were anchored by strong and clear declarations of popular sovereignty. Understood against the backdrop of mixed government, ascriptions to a functional division of government were bold declarations that the structure of government would now be based on a wholly different organizing principle with no relation to the prior political order. In this sense, separation-of-powers provisions were very properly placed within the bill of rights. Pennsylvania's 1776 declaration of rights captured this well: "That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them." PA. CONST. of 1776, ch. I, § IV. Similarly, Delaware's 1776 declaration of rights stated:

> That persons intrusted [sic] with the Legislative and Executive Powers are the Trustees and Servants of the public, and as such accountable for their conduct; wherefore whenever the ends of government are perverted, and public liberty manifestly endangered by the Legislative singly, or a treacherous combination of both, the people may, and of right ought to establish a new, or reform the old government.

DEL. DECL. OF RTS. of 1776, § 5. And Virginia's 1776 declaration of rights urged:

> That the Legislative, and Executive powers of the state should be separate and distinct from the Judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens [sic] of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent[,] certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

VA. DECL. OF RTS. of 1776, § 5; *accord* MD. DECL. OF RTS. of 1776, art. VI ("That the legislative, executive, and judicial powers of government, ought to be forever separate and distinct from each other.").

It is critical at this point to recognize that constituting government around three functional branches did not necessarily imply a system of checks and balances between those branches. Indeed, Professor M.J.C. Vile has forcefully argued that early state constitutions adopted the separation of powers to the exclusion (or at least minimization) of a checks-and-balances system.[260] On this theory, the separation of powers should be understood by reference primarily to the relationship between the people (as principal) and government officials (as agents).[261] When state constitutions divided power between three branches, the primary goal was to supply government officials with a framework for delineating their agency.[262] The goal was to retain popular control over all components of government by articulating a limiting principle for all conceivable aspects of government work.[263] This is precisely why Montesquieu's tripartite functional inventory of government was so useful. It helped early state constitutionalists draw

260. *See* VILE, CONSTITUTIONALISM, *supra* note 30, at 132–35, 149–55 (explaining the core of his analysis on this point).

261. *See id*. at 150, 152–53. Again, this point is made explicit in the vast majority of early state constitutions. *See, e.g.*, VT. CONST. of 1777, ch. I, § V ("That all power being originally inherent in, and consequently, derived from, the people; therefore, all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them."). Even the Massachusetts constitution of 1780, which is often understood as the antithesis to the populist Pennsylvania constitution of 1776, *see* TARR, STATE CONSTITUTIONS, *supra* note 86, at 82, provided: "All power residing originally in the People, and being derived from them, the several magistrates and officers of Government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them." MASS. CONST. of 1780, pt. I, art. V. As discussed in the next Section, this provision remains in the Massachusetts constitution today.

262. The 1776 Maryland Declaration of Rights is especially telling in this regard. In three successive sections, it provided: (1) "[t]hat all persons invested with the legislative or executive powers of government are the trustees of the public, and as such accountable for their conduct;" (2) "[t]hat . . . elections ought to be free and frequent," and (3) "[t]hat the legislative, executive, and judicial powers of government, ought to be for ever [sic] separate and distinct from each other." *See* MD. DECL. OF RTS. of 1776, art. IV–VI; *see also* VILE, CONSTITUTIONALISM, *supra* note 30, at 153 (discussing historical sources besides state constitutional text supporting this point).

263. Vile stated:

> It was a theory that accepted no concessions to the monarchic-aristocratic idea of checks and balances. It relied for the safeguards of constitutional government upon the allocation of abstractly defined functions of government to distinct branches of government, and upon the vigilance of the people to maintain this division in practice.

VILE, CONSTITUTIONALISM, *supra* note 30, at 153. Vile's "pure separation of powers" definition, which is very close to what he describes here, is slightly different than the final model I suggest. However, the historical understanding that Vile describes is critical for my argument that this approach was embedded in to state constitutional design, even if it has morphed.

lines between the people and government by supplying a catalogue of government's functions.

On this view, a checks-and-balances system worked against the separation of powers because it necessarily blended government functions across officials and institutions.[264] For the executive to check the legislature, for example, the executive needed some role in lawmaking. For the legislature to check the executive, the legislature needed some pathway into executive business. And for the judiciary to check the other branches, it needed some claim to authority outside of those branches. All of this threatened to undermine popular control of government because it could be unclear who within government was responsible for any given decision or policy.[265] And it bore an uneasy resemblance to mixed government.

Thus, when early state constitutions spoke about the separation of powers, one idea that they were capturing was something analogous to auditing government. Under this view, government power should be kept separate by function so that when the public reviewed government work, it would know precisely whom to hold accountable for particular government work. If the problem was a bad law, for example, the separation of powers would reinforce holding the legislature responsible because the legislature was the institution with lawmaking power. If the problem was failed execution of a law, then the separation of powers would reinforce holding the governor responsible because it was the office with power to enforce laws.[266]

To be sure, government operations and popular oversight are more complicated than this (both then and now). Moreover, this was not the only theme in early state constitutions. John Adams famously advocated for a more rigorous checks-and-balances systems in the 1780 Massachusetts constitution.[267] His view gained traction in the states and was incorporated to varying degrees.[268] My point is not that the

264. *See id.*

265. For example, if the executive can veto a law, how does the public know who bears responsibility for the ultimate content of a law that navigates the legislature's deliberations and the governor's veto? Is the law a reflection of the legislature or is it a product of the legislature bending (to some degree) to the governor's anticipated preferences to avoid a veto? In theory, it is easier for the people to track accountability for bad laws if the only institution responsible for passing laws is the legislature.

266. It is within this conceptual context that the issues of patronage, corruption, and dual office-holding make much sense under the separations of powers rubric. *See* KRUMAN, *supra* note 232, at 116–23.

267. Williams, *Founding Decade*, *supra* note 82, at 541–43.

268. *See infra* notes 310–14 and accompanying text.

approach I describe here was exclusive or that it is more effective than the checks-and-balances system that dominates federal constitutional design. Rather, my point is that, for better or worse, early state constitutions set in motion a very different understanding of the separation of powers than the Madisonian approach. That approach has been modified and even tempered by Madisonian features, but it remains present in the text, structure, theory, and ongoing practice of state constitutionalism (as I argue in the following sections).

2. *Minority Faction and Intragovernment Collusion.* To understand the state approach to the separation of powers, it is also critical to recognize that state constitutions are structured around a set of fears regarding popular sovereignty that differ from the assumptions underlying the federal Constitution. As discussed above, federal constitutional design is generally committed to the Madisonian belief that self-interested majorities are a dominant threat to democracy.[269] On this view, "majority faction" is a concern because democratic processes enable majorities to capture government for their own ends at the expense of political minorities, liberty, and the public good.[270] Thus, Madison set out to design government in ways that would protect against "majority faction." He enlisted a variety of tools in this regard, including a deeply entrenched constitutional text (via Article V), federalism, representative democracy (to the complete exclusion of all forms of direct democracy), and the horizonal separation of powers. Madison understood each of these as working against majority faction, which he viewed as the "greatest danger" to republican government.[271]

State constitutions tend to be oriented around a different concern (or at least a different prioritization of risk). State constitutionalism seems obsessed with the fear that government will be captured, not by a self-serving democratic majority, but by an elite minority.[272] The

269. *See* TARR, STATE CONSTITUTIONS, *supra* note 86, at 78.

270. In Federalist 10, Madison described this problem as "the superior force of an interested and overbearing majority." THE FEDERALIST NO. 10, *supra* note 34, at 47.

271. *See* Part III.A.2.

272. *See* TARR, STATE CONSTITUTIONS, *supra* note 86, at 78–82. This fear is prolific in state convention debates. *See, e.g.*, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 683 (1850) ("It is a notorious fact . . . that hitherto the agents of corporations have been able . . . to carry through the Legislature almost any measure which their principals deemed of sufficient importance to expend money enough to carry."); 2 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION (1917–18), at 946–47 (1918) ("We have found that in our

dominant concern in state constitutional theory is that government officials will use their political power to pursue their own interests at the expense of the public and in derogation of popular preferences.[273] So where Madisonian constitutional theory looks to use government officials and institutions to enforce constraints on democratic majorities,[274] state constitutions are structured principally to empower democratic majorities and regulate government officials.[275]

This concern for tyranny by an elite minority has deep roots in state constitutional design and reverberated in early references to state separation of powers. During the revolutionary period, there was widespread skepticism of anyone with political power.[276] This perspective came from lived experience under colonial and British government as well as Whig political theory. Whigs took seriously the truism that power corrupts.[277] They viewed officials (even elected representatives) as a potentially dangerous elite that would eventually coalesce in a common interest against the people.[278] For Whigs, the greatest danger to liberty came from rulers who were "separated from the rest of the community" because this gave them the opportunity to associate and align with other powerful people.[279]

---

legislative bodies these organized human selfish forces were very powerful and, indeed, at times were able to thwart the will and judgment of the majority.").

273. *See* Marshfield, *Misunderstood Rights*, *supra* note 13, at 859 ("[I]f there is a single thread that connects state constitutions across jurisdictions and time, it is a populist fear that government is prone towards capture and recalcitrance.").

274. *See* THE FEDERALIST NO. 10, *supra* note 34.

275. *See, e.g.*, Bulman-Pozen & Seifter, *supra* note 13.

276. *See* KRUMAN, *supra* note 232, at 109 ("Constitution makers . . . believed that men in power invariably lusted after more power and would attempt in myriad ways to obtain it."); TARR, STATE CONSTITUTIONS, *supra* note 86, at 73 ("This reliance on popular enforcement of constitutional guidelines . . . reflected an assumption that constitutional violations resulted primarily from officials' deviations from the popular will rather than from unconstitutional aims among the populace.").

277. *See* WOOD, *supra* note 232, at 21 ("Men struggled constantly, the Whigs believed, to secure power and if possible to aggrandize it at the expense of others, for power relationships were reciprocating: what was one man's increase of power was another's loss.").

278. *See id.* at 22 ("'Men in high stations . . . ,' the Whigs knew, 'increase their ambition, and study rather to be more powerful than wiser or better.' 'Voracious like the grave, they can never have enough . . . power and wealth . . . .'" (first omission in original)); *id.* at 33 ("The corruption of the constitution's internal principles was the more obvious and the more superficial danger [to the Whigs]."); KRUMAN, *supra* note 232, at 109 ("Constitution makers brought to their task an obsession with governmental power. They believed that men in power invariably lusted after more power and would attempt in myriad ways to obtain it.").

279. *See* WOOD, *supra* note 232, at 22 ("[N]o men were further separated from the rest of the community, and hence more dangerous, than the rulers of a society.").

Indeed, Whigs understood the English monarch to have "upset[] the delicately maintained" separation of powers under the British constitution "through borough-mongering and the distribution of patronage."[280] Although the Glorious Revolution of 1688 had introduced a mixed government with the House of Commons as a democratic check on the monarch, King George III was able to evade the Commons by manipulating members through offers of personal reward and privilege.[281] In this way, the Crown was "bribing its way into tyranny" while preserving the pretense of mixed government with its internal checks and balances.[282] For Whigs, this was strong evidence that political elites are prone to coalesce at the public's expense and that mixed government was a failure.

This aspect of Whig theory rang true for early state constitutionalists. Harsh experience under colonial governments convinced them that the greatest danger to republican government was self-interested collusion and cooperation between political elites.[283] By 1776, colonial government included a significant role for legislative assemblies, which ostensibly represented local community interests and provided an important check on colonial governors and Privy Councils.[284] However, governors were deft at circumventing and capturing legislative assemblies.[285] They used various tactics, but it was common for governors to use their appointment powers to manipulate representatives by appointing them (or close family members) to well-

280. *Id.* at 33.

281. *See id*. at 31–34 (describing government corruption in England after the Glorious Revolution); KRUMAN, *supra* note 232, at 116 (listing statistics showing the degree to which "commoners" were enticed with Crown contracts and "Crown-appointed" offices).

282. *See* WOOD, *supra* note 232, at 33 (describing the internal corruption that thwarted the Crown's ability to maintain truly separate powers).

283. *See* KRUMAN, *supra* note 232, at 109–16.

284. *See* WOOD, *supra* note 232, at 154–55.

285. *See* EVARTS B. GREENE, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 157–58 (1898) (providing specific examples of state governors circumventing legislative assemblies); Louis E. Lambert, *The Executive Article*, *in* STATE CONSTITUTIONAL REVISION 185, 185–86 (W. Graves, ed. 1960) (describing how colonial governors attempted to influence colonial assemblies).

paid government positions.[286] Governors would also grant lucrative licenses or government contracts in exchange for favorable votes.[287]

Thus, in 1767, a Massachusetts author observed that "[c]ommissions are shamefully prostituted to obtain an Assembly that shall be subservient to [the governor's] designs."[288] This was especially offensive because assemblymen were patriots expressly selected to represent local communities and check colonial power.[289] But the check was overrun because, as John Adams observed, "for the smallest trifle––'for a yard of ribband, or for the sake of wearing any bit of finery at his tail'—a man could be influenced."[290] And this was exaggerated in the American colonies precisely because ambition was strong.[291] The result was a sham checks-and-balances system and the triumph of political elites over the majority of society.

From these experiences, early state constitutionalists concluded that ambitious government officials were likely to collude across government institutions and offices. Political power was a gravitational force that overtook all other distinctions in law and society.[292] Moreover, early state constitutionalists viewed representative government as partially to blame for these problems.[293] The people could not, of course, govern themselves en masse. But electing representatives separated the people from government and created a

286. *See* GREENE, *supra* note 285, at 158 (including sheriffs and law enforcement officers); WOOD, *supra* note 232, at 157 (describing how governors used their appointment powers to assert their influence over government officials).

287. GREENE, *supra* note 285, at 158 (noting that colonial assemblies attempted to curb corruption by passing acts disqualifying certain groups, such as ordinary keepers, from serving in the assembly if they had been elected or granted their licenses by the governor); WOOD, *supra* note 232, at 157 (describing how governors used lucrative government contracts to effectively buy political support).

288. *Intelligence Extraordinary*, *supra* note 18, at 642 ("Commissions are shamefully prostituted to obtain an Assembly that shall be subservient to [the governor's] designs."); *see also* ELLEN E. BRENNAN, PLURAL OFFICE-HOLDING IN MASSACHUSETTS, 1760-1780, at 86–87 (1945).

289. *See* WOOD, *supra* note 232, at 146 ("Men who drank of 'this baneful poison' were enthralled by the ruling hierarchy and lost their concern for their country.").

290. *Id.* at 147.

291. *See id.* ("John Adams was struck by the prevalence of ambition even among the smallest, most insignificant Americans.").

292. *See id*. at 21 (discussing the "insatiable" desire for political power in colonial America).

293. *See* Marshfield, *Misunderstood Rights*, *supra* note 13, at 877–82 ("[S]tate constitutionalists believed the greatest danger came from the opportunities and incentives for corruption created by representation.").

political elite with opportunity and incentives to collude in derogation of the public interest.[294]

This perspective differs significantly from the assumptions underlying Madison's approach to the separation of powers under the federal Constitution. Madison ultimately concluded that if government is carefully divided into three separate but interdependent branches, then the private ambition of government officials will be transferred to intrabranch rivalries.[295] This competition would place the branches in tension and prevent self-interested majorities from running roughshod over the public good.[296] Madison placed great weight on the idea that ambitious officials would maximize their own power by enhancing the power of their respective government branches.[297]

Early state constitutionalists operated from a different starting point: they viewed minority faction as the dominant threat to popular sovereignty and saw private ambition as fueling collusion across government offices and institutions. This view dovetailed tightly with the emphasis on popular sovereignty described above. Early state constitutionalists were not only wary of a checks-and-balances system because of its similarities to mixed government, but they were also skeptical of the idea that the separation of powers could be implemented for the public good by pitting government officials (an elite and powerful minority) against each other.[298] Instead, they placed faith in democratic majorities and mechanisms of direct popular oversight.[299] Although they assumed that officials were likely to collude for their private interests, they also believed that democratic majorities would generally coalesce around the public good. The core idea was that "the multitude collectively always are true in intention to the interest of the public, because it is their own. They are the public."[300]

---

294. *See id*. at 880 ("[R]epresentation necessarily separated the people from their rulers, produced a cohort of political elites, and thereby increased the likelihood that 'government might escape the control of its creators.'").

295. THE FEDERALIST NO. 51, *supra* note 34, at 264.

296. *Id.*

297. *Id.*

298. *See* VILE, CONSTITUTIONALISM, *supra* note 30, at 154 (explaining that early Vermont and Pennsylvania constitutions were reactions to the "aristocratic" nature of other state constitutions that included a checks-and-balances version of separation of powers).

299. *See* Tarr, *For the People*, *supra* note 83, at 87–90.

300. WOOD, *supra* note 232, at 164 (citation omitted).

Thus, from the beginning, state constitutions sought to institutionalize opportunities for the public to directly monitor and participate in governance.[301] Indeed, essentially all early state bills of rights began by recognizing that the people have an inherent right to reform government in whatever "manner as shall be judged most conducive to the public weal."[302] Early state legislatures were also designed to facilitate direct popular oversight as much as possible through a variety of mechanisms, including annual elections, term limits, and the obligation to receive instructions from constituents.[303] The state constitutional convention was also deeply populist by design and was quickly incorporated into state constitutional law as the gold standard for constitutional reform.[304]

During subsequent decades, reliance on mechanisms of direct democracy continued (albeit in different forms). A dominant trend in the nineteenth century was toward the popular election of judges as well as a variety of other executive offices.[305] The twentieth century involved the widespread adoption of the initiative, referendum, and recall, which provided the most direct pathways for public involvement in governance.[306] Thus, state constitutions exhibit a strong and steady commitment to direct democracy as a solution to the problem of minority faction and recalcitrant government.[307] Where Madison sought to build government around a series of constraints on democratic majorities, state constitutionalists have persistently innovated new ways of drawing popular majorities into governance to address agency costs associated with representative government.

---

301. *See* Tarr, *For the People*, *supra* note 83, at 90–93.

302. VA. DECL. OF RTS. of 1776, § 3; s*ee* Marshfield, *Misunderstood Rights*, *supra* note 13, at 884 ("[E]arly state bills of rights . . . constitutionalize various guarantees that empower the people to directly monitor, control, and even re-create government as necessary to protect against recalcitrant officials.").

303. *See* Tarr, *For the People*, *supra* note 83, at 91–92.

304. *See* Jonathan L. Marshfield, *Forgotten Limits on the Power To Amend State Constitutions*, 114 NW. U. L. REV. 65, 118 (2019) (describing the populist influence on the design of state constitutional law).

305. *See* TARR, STATE CONSTITUTIONS, *supra* note 86, at 121–22 (noting that many nineteenth-century state constitutions made executive and judicial positions elective).

306. *See id.* at 151 ("[Progressives] sought to free political decision-making from the dominance of special interests through direct democracy, championing the initiative, referendum, and recall.").

307. *See* Tarr, *For the People*, *supra* note 83, at 97–99.

It was within this context that the public-accountability rationale for the separation of powers took shape. Where Madison hoped that the separation of powers would constrain democratic majorities, state constitutionalists viewed the separation of powers as a way to enhance popular control over government.[308] By separating government into functional categories, early state constitutionalists hoped that the public would be better equipped to monitor and control officials who would otherwise tend to collude against the public good. As historian Samuel Williams concluded in 1794 regarding the Vermont constitution, "[T]he security of the people is derived not from the nice ideal application of checks, ballances [sic], and mechanical powers, among the different parts of the government; but from the responsibility, and dependence of each part of the government, upon the people."[309]

My point in emphasizing this history is not that the states eliminated checks and balances from their constitutional design. Indeed, the opposite is true.[310] After Pennsylvania's 1776 constitution, which adopted a unicameral legislature and removed internal checks on legislative authority,[311] a "second wave" of state constitution-making began that reflected a more measured approach to institutional design.[312] New York's constitution of 1777, for example, included a bicameral legislature and a Council of Censors with the authority to veto legislation. New York adopted these internal checks largely in response to Pennsylvania's 1776 constitution, which many viewed as too extreme because of its populist orientation and the "absence of

308. *See* VILE, CONSTITUTIONALISM, *supra* note 30, at 154–55 ("[D]emands for a more democratic system of government were associated with strong assertions of the doctrine of the separation of powers . . . .").

309. WILLIAMS, HISTORY OF VERMONT, *supra* note 20, at 343.

310. Williams, *Founding Decade*, *supra* note 82, at 584 (stating that the checks and balances adopted in early constitutions—including New York (1777), Massachusetts (1780), and the United States (1789)—were in direct response to the lack of such provisions in the 1776 Pennsylvania constitution).

311. *See id.* at 547 ("Although the 1776 Pennsylvania Constitution . . . did not include an upper house, it represented the culmination of the first wave and provided a counterpoint for the second wave [of state constitutional reform]."); *id.* at 584 (describing the "absence of checks and balances in the 1776 Pennsylvania Constitution").

312. *See id.* at 547, 558–59 (noting that controversy over the Pennsylvania constitution's design "dominated most elections in Pennsylvania until the 1790 constitution was substituted as part of the overall movement leading to the federal Constitution").

checks and balances."[313] Similarly, the Massachusetts constitution of 1780, which included a bicameral legislature and executive-veto power, was largely a reaction to Pennsylvania's 1776 constitution.[314] These features (and other internal checks) have become the norm in state constitutional design.

However, the incorporation of these internal checks did not, as most scholarship suggests, eliminate the public-accountability rationale for the separation of powers under state constitutions. As I explain below, state constitutional text and practice remain deeply oriented around the public-accountability rationale. It is not a historic relic. The states did not abandon it wholesale when they incorporated checks and balances. To the contrary it is an active, anchoring principle in state separation of powers.

B. Texts

Since 1776, it has been the norm for state constitutions to include language explicitly incorporating the separation of powers.[315] Indeed, by my count, 113 of all 144 (78 percent) state constitutions adopted since 1776 have included an explicit separation-of-powers provision.[316] The dominant perspective on these provisions is that they contain very little useful content and instead reflect "an extended exercise in cutting and pasting" between state constitutions.[317] However, despite these claims, there has not been a comprehensive and systematic study of

313. *See id.* at 559, 584 (highlighting how criticism of Pennsylvania's constitution inspired the creation of checks and balances in other state constitutions).

314. *Id.* at 558–59, 584 (listing notable critiques of the 1776 Pennsylvania constitution and highlighting its role in the establishment of checks in balances in other state constitutions).

315. *See infra* Appendix (collecting all known instances of state separation-of-powers provisions in all state constitutions from 1776–2022).

316. *See infra* Appendix. This count is understated because it excludes several early provisions that clearly address separation-of-powers concerns but are not in the conventional structure. For example, Delaware's 1776 declaration of rights stated:

> That persons intrusted [sic] with the Legislative and Executive Powers are the Trustees and Servants of the public, and as such accountable for their conduct; wherefore whenever the ends of government are perverted, and public liberty manifestly endangered by the Legislative singly, *or a treacherous combination of both*, the people may, and of right ought to establish a new, or reform the old government.

DEL. DECL. OF RIGHTS 1776, § 5 (emphasis added).

317. *See* Zasloff, *supra* note 7, at 1102 (describing the proliferation of separation-of-powers provisions among the state constitutions); TARR, STATE CONSTITUTIONS, *supra* note 86, at 14–15 (collecting cases calling separation-of-powers provisions truisms).

these provisions across states and time.[318] To remedy this, I collected and reviewed all 113 provisions, including any amendments to these provisions through August 1, 2022. When studied together and in context, these provisions suggest an alternative approach to the separation of powers. Specifically, the separation of powers in state constitutions is an instrument designed to reinforce and facilitate direct popular control over government. I advance three arguments in support of this claim.

1. *Presuming Harmony with Other Intratext Structural Provisions.* References to the separation of powers in state constitutions are often criticized for being little more than "lip service."[319] At the core of this critique is the notion that although state constitutions contain admirable language regarding the separation of powers, they have never realized those aspirations in the actual design of government.[320] This critique is strong if we equate the separation of powers with an effective system of internal checks and balances.[321] State constitutions have rarely (if ever) structured government around a series of effective internal checks and balances. To the contrary, state constitutions have tended to produce large imbalances in power between branches.

However, this critique is based on a weak interpretive premise that should be reconsidered. The logic of this critique is that because state constitutions do not implement a checks-and-balances system, provisions ascribing to the separation of powers have no content. But this is illogical and acontextual. A better approach is to assume that state constitutions have something else in mind when they refer to the

318. For a survey of all extant state separation-of-powers provisions, see Devlin, *supra* note 7, at 1236–37; *see also* Rossi, *supra* note 7, at 1190–91 (surveying extant provisions and cataloging them as either strict or general).

319. LUTZ, *supra* note 232, at 97 ("State constitutions after 1789 would pay lip service to the Federalist principle [of separation of powers] . . ."). *See generally* Rogan Kersh, Suzanne B. Mettler, Grant D. Reeher & Jeffrey M. Stonecash, *"More a Distinction of Words than Things": The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS L. REV. 5 (1998) (arguing that separation-of-powers provisions contain little content).

320. Madison also made this point in 1788 in THE FEDERALIST NO. 47, *supra* note 34, at 247–51; *see also* Zasloff, *supra* note 7, at 1107–08 (describing how states adopted separation-of-powers clauses but failed to ensure that the theory was actualized).

321. This is the core and (explicit) assumption in these critiques. *See, e.g.*, LUTZ, *supra* note 232, at 97 (referring to the state constitutional approach to separation of powers as merely "lip service" because it did not follow the "Federalist principle").

separation of powers.[322] Why else would they boldly ascribe to a concept that they then abandon a few paragraphs later?[323]

Consider, for example, the 1776 Virginia constitution.[324] Before addressing the structure of government, it included two separate provisions ascribing to the separation of powers.[325] Yet, in the sections structuring government, it created a system of legislative dominance. It gave the legislature the power of selecting the governor for a one-year term.[326] The governor had no veto authority, very limited appointment powers, and was required to consult with the Council of State (appointed by the legislature) on most business.[327] The legislature also appointed the state's highest judges (among other officers).[328] By all accounts, and consistent with practice of the time, the 1776 Virginia constitution was imbalanced and created a legislature without any

322. Here, I mean to invoke something akin to the "harmonious-reading" canon on construction, which favors the construction of a provision that would avoid a direct conflict with other provisions in the same text. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012) (stating that the harmonious-reading canon means that "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory"). This canon is especially appropriate in this context because state separation-of-powers provisions were first adopted alongside a fully developed system of government that did not incorporate a checks-and-balances theory of design.

323. Of course, this requires one to ascribe a degree of rationality and coherence to state constitutions that some scholars are unwilling to find. In this instance, however, it seems particularly problematic to assume that these provisions were adopted without any regard for their meaning because they originated as part of the initial state constitutional project and especially because they first appeared in state bills of rights, which, as I explain below, were effectively a constitution for the constitution. *See infra* notes 339–41 and accompanying text.

324. Madison himself presents something of a mystery in this regard because he was a member of the convention that adopted the 1776 Virginia constitution. George Mason was the principal author of the declaration of rights, which included reference to the separation of powers. ADAMS, *supra* note 232, at 72–73. Madison later criticized state constitutions precisely because of their ascriptions to the separation of powers while including inadequate checks and balances as part of his case for the federal Constitution. THE FEDERALIST NO. 47, *supra* note 34, at 247–50.

325. VA. DECL. OF RTS. of 1776, § 5 ("That the Legislative, and Executive powers of the state should be separate and distinct from the Judiciary . . . ."); VA. CONST. of 1776, ch. IV § III ("The Legislative, Executive, and Judiciary departments, [sic] shall be separate and distinct . . . .").

326. VA. CONST. of 1776, ch. II, § IX.

327. *Id.* § VIII (providing that "[a]ll laws shall originate in the House of Delegates, to be approved or rejected by the Senate . . . ."); *id.* § IX ("[The governor] shall, with the advice of a Council of State, exercise the executive powers of government . . . ."); *id.* § XI (establishing the method by which the legislature would select the Council of State); *id.* § XV ("The Governor, with the advice of the [Council of State], shall appoint Justices of the Peace for the counties . . . .").

328. *Id.* § XIV ("The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney General . . . .").

meaningful institutional counterweights.[329] As an interpretive matter, this suggests that the provisions ascribing to the separation of powers mean something other than a system of institutional checks and balances between branches.[330]

This point persists in modern state constitutions, which have generally shifted the locus of power from legislatures to governors while retaining explicit ascriptions to the separation of powers. New Jersey's 1947 constitution is a good example. It includes a strong separation-of-powers provision asserting that "[t]he powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial" and "[n]o person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others."[331] Yet, the constitution created one of the strongest gubernatorial offices in the country,[332] replete with the power to return bills to the legislature with amendments (the so-called amendatory veto),[333] the power to control most agency appointments,[334] and the power to appoint and reappoint all appellate judges.[335] Despite some formal checks on gubernatorial powers, like senate confirmation for appointments, there is good

329. *See* TARR, STATE CONSTITUTIONS, *supra* note 86, at 117–18 ("Eighteenth-century state constitutions imposed few restrictions on state legislatures beyond those included in their declarations of rights, and even these were typically framed as admonitory principles rather than as specific legal restraints.").

330. Indeed, one of the bizarre aspects of interpreting these provisions as coextensive with a Madisonian checks-and-balances system is that some of the most imbalanced state constitutions ever constructed explicitly ascribed to a separation of powers. The Maryland constitution of 1776, for example, declared that "the legislative, executive, and judicial powers of government, ought to be for ever [sic] separate and distinct from each other." MD. DECL. OF RTS. of 1776, art. VI. Yet, the governor was selected by the legislature and had few (if any) powers independent of the legislature. MD. CONST. of 1776, art. 25. Surely this history suggests that the state conception of the separation of powers is something more than internal checks and balances?

331. N.J. CONST. art. III, ¶ 1.

332. *See* Thad L. Beyle, *The Governor's Formal Powers: A View from the Governor's Chair*, 28 PUB. ADMIN. REV. 540, 542 tbl.1 (1968) (finding that New Jersey's governor was tied for the fourth most powerful in the nation based on budget, appointive, tenure, and veto powers and the lack of virtually any constraints).

333. N.J. CONST. art. V, § 1, ¶ 14(b).

334. *Id.* ¶ 12.

335. *Id.* art. VI, § 6, ¶ 1.

reason to believe that the New Jersey governorship operates in a largely unchecked space.[336]

In short, rather than conclude that 78 percent of all state constitutions are failed attempts at Madisonian constitution design, it seems more reasonable to assume that when they ascribed to the separation of powers, they were referring to something else.[337] Indeed, viewing these provisions on their own terms and in context suggests that they capture an alternative theory that views the separation of powers as an instrument of popular control over government.

2. *Etymology of State Separation-of-Powers Provisions.* The earliest references to the separation of powers in state constitutions appeared in eighteenth-century state declarations of rights.[338] These early state bills of rights connect the separation of powers to the constitution's overall architecture and theory. Indeed, early state declarations of rights were much more than a list of government limitations.[339] They operated as an affirmative articulation of "the fundamental principles of government."[340] They were designed to convey the state constitution's deep structure and to guide the drafting of the rest of the constitution.[341] Within this context, it is clear that the states first conceptualized the separation of powers as part of a broader

336. *See* Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L.J. 987, 1023 (1999) (concluding that New Jersey courts are reluctant to decide questions of executive power, thus leaving the executive unchecked in many instances).

337. *See* Zasloff, *supra* note 7, at 1103–05 (making this point in response to the idea that state constitutional separation-of-powers provisions have a history of formalism).

338. *See, e.g.*, MD. DECL. OF RTS. of 1776, art. VI; N.C. DECL. OF RTS. of 1776, § IV; MASS. CONST. of 1780, pt. I, art. XXX; N.H. CONST. of 1784, pt. I, art. XXXVII. During the eighteenth century, the states adopted twenty-four different constitutions. *See infra* Appendix. Thirteen of those included explicit separation-of-powers provisions, and five of those thirteen appeared in the bill of rights. *See id.* Importantly, most of the earliest expressions of the separation of powers (those adopted in 1776) occurred in state bills of rights. *See id.*

339. *See* TARR, STATE CONSTITUTIONS, *supra* note 86, at 78 (explaining that "state declarations necessarily included a mixture of structural concerns, political maxims, and rights guarantees"); KRUMAN, *supra* note 232, at 37–40.

340. KRUMAN, *supra* note 232, at 38.

341. *See id.* (explaining that the authors of declarations fashioned systems of government compatible with the idea of government with a limitation). Indeed, it was common practice during the revolutionary period for states to first debate and adopt a declaration of rights as a guide for the constitutional drafting process. *Id.* ("[Delegates] invariably adopted the bill of rights before the plan of government because they viewed the bill as the foundation for the rest of the constitution.").

project to empower popular control over government and reduce agency costs.

All early state bills of rights were dominated by strong declarations of popular sovereignty and a constellation of related provisions designed to facilitate popular control over government.[342] The Massachusetts declaration of rights, for example, provides: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."[343] Early state bills of rights also embedded the notion that officials are prone to coalesce against the public good the longer they are in office.[344] Again, the Massachusetts declaration provides a good example: "In order to prevent those, who are vested with authority,

342. For early provisions declaring representatives to be "trustees," "servants," or "agents" of the people, see VA. DECL. OF RTS. of 1776, § 2; DEL. DECL. OF RTS. of 1776, § 5; PA. CONST. of 1776, ch. I, § IV; MASS. CONST. of 1780, pt. I, art. V; N.C. CONST. of 1776, § 1 ("[T]he legislative authority shall be vested in two distinct branches, both dependant [sic] on the people, to wit, a senate and house of commons."); N.C. DECL. OF RTS. of 1776, § I ("That all political power is vested in and derived from the people only."); VT. CONST. of 1777, ch. I, § V; N.H. CONST. of 1784, pt. I, art. VIII; VT. CONST. of 1786, ch. I, § VI; PA. CONST. of 1790, art. IX, § 2 ("All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness . . . ."); DEL. CONST. of 1792, art I, § 16; KY. CONST. of 1792, art. XII, § 2; KY. CONST. of 1799, art. X, § 2; VT. CONST. of 1793, ch. I, art. VI; TENN. CONST. of 1796, art. XI, § I. Many of these provisions have persisted in state constitutions. For an exhaustive and nuanced analysis of current state constitutional provisions capturing "democracy principles," see generally Bulman-Pozen & Seifter, *supra* note 13.

343. MASS. CONST. of 1780, pt. I, art. V.

344. For example, the 1777 Vermont declaration states "[t]hat those who are employed in the legislative and executive business of the State, may be restrained from oppression, the people have a right . . . to reduce their public officers to a private station." VT. CONST. of 1777, ch. I, § VII. Likewise, the Virginia 1776 declaration of rights states that representatives "may be restrained from oppression, by feeling and participating in the burthens [sic] of the people." VA. DECL. OF RTS. of 1776, § 5; *see also* MD. DECL. OF RTS. of 1776, art. XXXI (providing similarly "[t]hat a long continuance in the first executive departments . . . is dangerous to liberty" and therefore "a rotation . . . in those departments is one of the best securities of permanent freedom"). Early state constitutions also include another set of provisions related to this idea that demonstrated a sophisticated understanding of how political power could become informally entrenched. Various bills of rights declare that "[a] frequent recurrence to the fundamental principles of the constitution" is "absolutely necessary to preserve the advantages of liberty, and to maintain a free government." MASS. CONST. of 1780, pt. I, art. XVIII; *see also* VT. CONST. of 1777 ch. I, § XVI ("That frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry and frugality, are absolutely necessary to preserve the blessings of liberty, and keep government free."). Modern term-limit provisions are a contemporary manifestation of this commitment. *See* Bulman-Pozen & Seifter, *supra* note 13, at 874–75 (listing and explaining these provisions).

from becoming oppressors, the people have a right, at such periods, and in such manner, as they shall establish by their frame of government, to cause their public officers to return to private life . . . ."[345]

Early state bills of rights also included provisions boldly declaring that the people have the exclusive authority to organize government in whatever manner they please and to remain active in governance notwithstanding the selection of representatives.[346] For example, the 1776 Maryland declaration of rights provides: "[T]he people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof."[347] Similarly, the North Carolina constitution of 1868 provides, "the people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government, whenever it may be necessary to their safety and happiness."[348] Through a variety of provisions, early bills of rights extended this idea to include direct popular involvement in governance. This included early provisions formalizing the right to "petition the Legislature, for the redress of grievances,"[349] the right of the people to "instruct" representatives,[350] and provisions regulating

345. MASS. CONST. of 1780, pt. I, art. VIII.

346. *E.g.*, VT. CONST. of 1777, ch. I, § IV ("That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."); N.C. DECL. OF RTS. of 1776, § II ("That the people of this state ought to have the sole and exclusive right of regulating the internal government and police thereof."); MISS. CONST. of 1832, art. I, § 2 ("That all political power is inherent in the people, and all free goverments [sic] are founded on their authority, and instituted for their benefit; and therefore they have at all times an unalienable and indefeasible right to alter or abolish their form of goverment [sic], in such manner as they may think expedient.").

347. MD. DECL. OF RTS. of 1776, art. II.

348. N.C. CONST. of 1868, art. I, § 3.

349. MD. DECL. OF RTS. of 1776, art. XI; *see also, e.g.*, N.C. DECL. OF RTS. of 1776, § XVIII (stating "[t]hat the people have a right to . . . apply to the legislature for redress of grievances"); MASS. CONST. of 1780, pt. I, art. XIX ("The people have a right . . . to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."); N.H. CONST. of 1784, pt. I, art. XXXII ("The people have a right . . . to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.").

350. *See, e.g.*, VT. CONST. of 1777, ch. I, § XVIII; MASS. CONST. of 1780, pt. I, art. XIX; N.H. CONST. of 1784, pt. I, art. XXXII; N.C. DECL. OF RTS. of 1776, § XVIII ("That the people have a right to . . . instruct their representatives . . . .").

the legislative process to enable popular oversight.[351] Early bills of rights also included a near universal provision declaring that the people have an inherent right (indeed, obligation) to go outside of existing institutions and make their own corrections to government.[352]

It was within this context that early state constitutions first expressed an understanding of the separation of powers. Not surprisingly, these early provisions directly connected the separation of

351. Many of these focused on the freedom of elections. *See, e.g.*, MD. DECL. OF RTS. of 1776, art. V (stating "[t]hat the right in the people to participate in the Legislature is the best security of liberty, and the foundation of all free government; for this purpose, elections ought to be free and frequent"); DEL. DECL. OF RTS. of 1776, § 6 (stating "[t]hat the right in the people to participate in the Legislature, is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent"); MD. CONST. of 1776, art. 5 (stating "[t]hat the right in the people to participate in the legislature is the best security of liberty, and the foundation of all free government; for this purpose, elections ought to be free and frequent"); N.C. DECL. OF RTS. of 1776, § VI (stating "[t]hat elections of members to serve as representatives in General Assembly, ought to be free"); VT. CONST. of 1777, ch. I, §§ VII–VIII ("[T]he people have a right, at such periods as they may think proper, to reduce their public officers to a private station, and supply the vacancies by certain and regular elections[, which] .... ought to be free."); N.H. CONST. of 1784, pt. I, art. XI; PA. CONST. of 1776, ch. I, § VII; VT. CONST. of 1793, ch. I, art. VIII; DEL. CONST. of 1792, art. I, § 3; KY. CONST. of 1792, art. XII, § 5 (stating "[t]hat all elections shall be free and equal"); KY. CONST. of 1792, art. X, § 5 (stating "[t]hat all elections shall be free and equal"); PA. CONST. of 1790, art. IX, § 5; TENN. CONST. of 1796, art. XI, § V. Others focused on the freedom of the press to check the legislature. *See, e.g.*, *id.* § XIX (stating "[t]hat the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or of any branch or officer of government, and no law shall ever be made to restrain the right thereof"). The combined idea with these projections was to ensure that the people could act on legislatures but also obtain information necessary to hold them accountable.

352. *See, e.g.*, TENN. CONST. of 1796, art. XI, § II (stating "[t]hat goverment [sic] being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression, is absurd, slavish and destructive to the good and happiness of mankind"); MD. DECL. OF RTS. of 1776, art. IV; N.H. CONST. of 1784, pt. I, art. I, § X; KY. CONST. of 1792, art. XII, § 2; KY. CONST. of 1799, art. X, § 2. These provisions—the first of which was drafted for the Virginia declaration of rights and then incorporated by Jefferson into the Declaration of Independence—institutionalized the Lockean right to revolution. JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 60 (1992). For discussions of the revolutionary nature of these provisions, see Journal of the Convention Assembled to Frame a Constitution for the State of Rhode Island at Newport, Sept. 12, 1842, at 28–31 (1859) (reporting disagreement over the meaning of a constitutionalized right to revolution, including one delegate who argued that such a right would "le[ave] any portion of the people free to commence a revolution whenever they conceive themselves aggrieved" (statement of Mr. Simmons)); 1 PROCEEDINGS OF THE VIRGINIA STATE CONVENTION OF 1861, at 710 (George H. Reese ed., 1965) (describing these provisions as distinctly "American principle" that "overthrew . . . ideas of divine right of legitimacy"). These commitments have not dissolved. In fact, they find more concrete manifestation in contemporary provisions formalizing the initiative, referendum, recall, and majoritarian-oriented amendment rules.

powers to popular sovereignty and popular control of government. Three themes in these provisions demonstrate this.

First, early references to the separation of powers explicitly tied it to elections and democratic accountability. More specifically, these provisions sought to keep government neatly organized and compartmentalized so that elections could effectively address recalcitrance and corruption. For example, the very first state constitutional reference to the separation of powers appeared in the 1776 Virginia declaration of rights, and it framed institutional separation in terms of electoral accountability.[353] It said:

> [T]he legislative and executive powers of the state should be separate and distinct from the Judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent certain, and regular elections . . . .[354]

The Maryland declaration of rights, which was adopted on November 8, 1776, is perhaps the best illustration of this point.[355] After declaring that "all government of right originates from the people"[356] and that the people "ought to have the sole and exclusive right of regulating the internal government,"[357] Maryland embedded the separation of powers within four successive sections as follows:

> 4. That all persons invested with the legislative or executive powers of government are the trustees of the public, and, as such, accountable for their conduct . . . [;]
>
> 5.That the right in the people to participate in the Legislature is the best security of liberty, and the foundation of all free government; for this purpose, elections out to be free and frequent . . . [;]
>
> 6. That the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other[;]

353. *See* ADAMS, *supra* note 232, at 73 (for date of adoption, June 12, 1776); *infra* Appendix.
354. VA. DECL. OF RTS. of 1776, § 5.
355. *See* ADAMS, *supra* note 232, at 80 (for date of adoption).
356. MD. DECL. OF RTS. of 1776, art. I.
357. *Id.* art. 2.

> 7.That no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed.[358]

The structure of these provisions suggests that their focus was on ensuring that the people have strong control over the legislature and that the legislature *alone* retains control over government. The aim was to ensure an effective pathway of popular accountability between the people and the legislature. Government powers were "separated" to ensure that other government branches did not obscure or interfere with the all-important line of accountability between the people and the legislature.[359] Contrary to Madisonian thought, the executive was not separated from the legislature so that it could act as a counterweight (indeed, as described below, this is a strained interpretation of the separation of powers because the executive was almost entirely dependent on the legislature).[360] Rather, the executive was separated from the legislature so that it would not interfere with the people's tight grip on the government via the legislature.

Second, these provisions also connected the separation of powers to longstanding concerns about intragovernment collusion and corruption. The Delaware declaration of rights, adopted on September 21, 1776, is illustrative:

> That persons intrusted [sic] with the Legislative and Executive Powers are the Trustees and Servants of the public, and as such accountable for their conduct; wherefore whenever the ends of government are perverted, and public liberty manifestly endangered *by the Legislative singly, or a treacherous combination of both*, the

358. *Id.* §§ 4–6.

359. For a full discussion of the critical role that the legislature performed in public accountability during early state constitutional development, see PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH CAROLINA, CALLED TO AMEND THE CONSTITUTION OF THE STATE WHICH ASSEMBLED AT RALEIGH JUNE 4, 1835, at 172 (1836) (arguing for less frequent legislative sessions but recognizing the impact on public accountability and oversight because the legislature was the sole pathway for popular accountability).

360. Under the 1776 Maryland constitution, for example, the governor was not popularly elected, but was selected by the legislature. MD. CONST. of 1776, art. 25. Moreover, the governor's powers (including appointment powers) were significantly limited by a council that was appointed by the legislature. *See id.* art. 26.

> people may, and of right ought to establish a new, or reform the old government.[361]

Other provisions were more explicit in targeting official patronage across branches.[362] The 1776 Virginia constitution, for example, provided: "[N]or shall any person exercise the powers of more than one of [the three branches] at the same time . . . ."[363] These prohibitions reflected the fear that officials (including legislators) would capture government for their own interests by appointing themselves or their cohorts to lucrative positions within government and then retain seats in the legislature.[364] This, of course, would exacerbate the commodification of appointments within government and enable officials to trade appointments for policies favorable to their private interests. The primary idea of the state separation of powers was that officials should be kept to a singular branch to help mitigate intragovernment collusion and corruption, a problem that was of primary concern for early state constitutionalists.[365]

---

361. DEL. DECL. OF RTS. of 1776, § 5 (emphasis added). The 1780 Massachusetts declaration of rights is also telling in this regard. It provides:

> In the government of this Commonwealth the Legislative Department shall never exercise the Executive and Judicial powers, or either of them; the Executive shall never exercise the Legislative and Judicial powers, or either of them; the Judicial shall never exercise the Legislative and Executive powers, or either of them: To the end, it may be a government of laws and not of men.

MASS. CONST. of 1780, pt. I, art. XXX.

362. *See generally* KRUMAN, *supra* note 232, at 116–23 (providing a detailed history of this aspect of separation-of-powers provisions).

363. VA. CONST. of 1776, § III. Other early state constitutions included related provisions regulating office-holding and interbranch patronage. *See* GA. CONST. of 1798, art. IV, § 4 ("All persons appointed by the legislature, to fill vacancies, shall continue in office only so long as to complete the time for which their predecessors were appointed."); KY. CONST. of 1799, art. X, § 26 (stating "[t]hat the Legislature shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment to which shall be for a longer term than during good behavior").

364. Kruman notes that New Jersey sought to "prevent[] legislators from choosing themselves for executive offices . . . to preserve the legislature 'from all suspicion of corruption.'" KRUMAN, *supra* note 232, at 118. He also writes:

> Constitution writers assumed that if executive officials served in the legislature, they would bring to it interests incompatible with the public good and their responsibilities as representatives, and ultimately acquire arbitrary power. If representatives and executive officials were the same persons, they would pursue their own interests at the expense of the public's.

Id. at 117.

365. *See id.* at 118 (quoting an early Massachusetts commentator as saying that these provisions were designed to ensure that the Massachusetts legislature was "as pure as the element we breath").

Importantly, this concern was different than a Madisonian notion of checks and balances. To be sure, dual office-holding would likely undermine a Madisonian checks-and-balances system because it could weaken interbranch competition. But a core concern expressed in early state bills of rights was that officials are more likely to corrupt the legislature (the branch created to most faithfully represent the people) if they could trade government power across branches.[366] This, of course, was a well-founded fear based on how colonial legislative assemblies were corrupted.[367]

Third, when read in context, early state separation-of-powers provisions were structured as bold refutations of the ideas of mixed government. As noted earlier, mixed government recognized different groups as sharing claims to the powers and functions of government. Consequently, government authority was spread across institutions to accommodate competing claims. Once the bill of rights established popular sovereignty as the only basis for legitimate political power, it was necessary and natural to articulate a guiding principle for how government would be organized. More importantly, because all government officials were now the people's agents, without any inherent political power from any other source, it was critical that government remain separated along the lines delineated by the people in the constitution. Otherwise, the people would lose their ability to control their agents through law.

It is through this lens that early state separations-of-powers provisions make the most sense. They were a critical part of the people's efforts to reconstruct and control government based on "genuine principles" of popular sovereignty.[368] Consider, for example, the 1784 New Hampshire bill of rights, which described the separation of powers as an act of statecraft by the people: "In the government of this state[,] the three essential powers thereof, to wit, the legislative, executive and judicial[,] ought to be kept as separate from and independent of each other as the nature of a free government will admit . . . ."[369] The Massachusetts provision is also illustrative:

---

366. Kruman makes the point that these provisions reflected a fear of legislative and executive corruption. *Id.*

367. *See supra* note 18 and accompanying text.

368. *See* WOOD, *supra* note 232, at 128–29.

369. N.H. CONST. of 1784, pt. I, art. XXXVII. Kentucky's 1792 provision is also illustrative: "The powers of government shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: those which are legislative to one, those which

> In the government of this Commonwealth the Legislative Department shall never exercise the Executive and Judicial powers, or either of them; the Executive shall never exercise the Legislative and Judicial powers, or either of them; the Judicial shall never exercise the Legislative and Executive powers, or either of them: *To the end, it may be a government of laws and not of men*.[370]

Contrary to Madisonian theory, these provisions made no connection between the separation of powers and a system of internal checks and balances. Rather, they emphasized that for government to retain its legitimacy based on popular sovereignty, government power should be exercised by different agents with different functional mandates given by the people. If government authority became mixed, it would indicate a loss of control by the people over their agents and (in historical context) a likely regression back to ideas of mixed government.[371] Stated differently, early expressions of the separation of powers reflected nascent ideas about the relationship between popular sovereignty, the rule of law, and constitutional supremacy.[372]

3. *The Coherent (Albeit Subtle) Evolution of Text.* The states have no doubt engaged in verbatim copying of each other's separation-of-powers provisions. The 1857 Oregon constitutional convention, for example, overtly copied the text of Indiana's 1851 separation-of-powers provision.[373] Early state constitutions also engaged in obvious copying.[374] However, it is a mistake to conclude that these provisions

---

are executive to another, and those which are judiciary to another." KY. CONST. of 1792, art. I, § 1.

370. MASS. CONST. of 1780, pt. I, art. XXX (emphasis added).

371. This contextual reading also explains why many of these early provisions are impossibly categorical in their terms. The 1776 Maryland and North Carolina declarations of rights, for example, both say "[t]hat the legislative, executive[,] and [supreme] judicial powers of government, ought to be for[]ever separate and distinct from each other." MD. DECL. OF RTS. of 1776, art. VI; N.C. DECL. OF RTS. of 1776, § IV. My argument here is that a sound understanding of these provisions is that they represent a repudiation of mixed government and the adoption of constitutional government where every government official is presumed to have a limited and incomplete mandate from the people. This, I argue, was a core purpose of these provisions.

372. *See* VILE, CONSTITUTIONALISM, *supra* note 30, at 152–53.

373. THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 470 (Charles Henry Carey ed., 1926) (noting that Oregon's separation-of-powers provision was "identical" to Indiana provision and was adopted by convention without any remark).

374. TARR, STATE CONSTITUTIONS, *supra* note 86, at 50–53; Zasloff, *supra* note 7, at 1102–03 (describing how California and other states copied separation-of-powers provisions).

have passed from state to state over more than two hundred years without any critical thought or meaningful evolution. When these provisions are viewed together and across time, important and revealing themes are evident. Indeed, there were three distinct stages of development in these provisions, and this evolution demonstrates that the states have pursued an alternative separation-of-powers theory.

Stage One (1776 to 1800) – The first phase of development reflected in state constitutional texts explicitly addressing the separation of powers began with Virginia's inaugural separation-of-powers provisions (adopted in June 1776) and ran until roughly the end of the eighteenth century. During this period, the states first incorporated ascriptions to the separation of powers as part of their declarations of rights.[375] As noted above, these provisions were part of a broader project to construct government based on popular sovereignty. They explicitly tied the separation of powers to electoral accountability and concerns about intragovernment corruption and collusion without any reference to Madisonian notions of checks and balances. This phase of development is also characterized by short categorical statements of the separation of powers and an emphasis on prohibiting dual office-holding. As explained in detail below, it is easy to misunderstand the significance of these early provisions if they are not read in context.[376]

Stage Two (1800 to 1950) – During the second phase of development, states generally moved these provisions from their bills of rights into independent articles within their constitutions.[377] Significant for present purposes, the language of these provisions was also changed to more clearly identify the separation of powers as an affirmative act of the people creating their government. Thus, the 1832

375. All separation-of-powers provisions adopted in 1776 were included in state bills of rights. *See infra* Appendix.

376. *See infra* Part III.C.3; VILE, CONSTITUTIONALISM, *supra* note 30, at 150–63 (providing historical background on early debates surrounding the separation of powers).

377. By this, I mean that the practice in the states was to locate separation-of-powers provisions in freestanding separation-of-powers articles without any reference to the separation of powers in the bill of rights. Before 1800, it was relatively common for the bill of rights to include reference to the separation of powers. *See* Appendix (showing that roughly 40 percent of state constitutions with separation-of-powers provisions before 1800 included a reference in their bill of rights). However, after 1800, the dominant practice was to remove references to the separation of powers from the bill of rights. Indeed, the Appendix shows that after 1800, no new state included a separation-of-powers provision in their bill of rights.

Mississippi constitution located the provision in a separate article titled "Distribution of Powers."[378] The provision, which is representative of the majority of provisions adopted during this period, begins: "The powers of the government of the State of Mississippi *shall* be divided into three distinct departments, and each of them confided to a separate body of magistracy; to wit: those which are legislative to one, those which are judicial to another, and those which are executive to another."[379]

However, the most significant development during this phase was the near universal inclusion of an "escape clause," which provided that government should remain separate "except as expressly provided in this Constitution."[380] The inclusion of this language is telling because it reinforced the central role of popular sovereignty in the state approach to the separation of powers and also accounted for a dramatic shift in state constitutional practice that began in the early nineteenth century.

Regarding popular sovereignty, these escape clauses recognized that the people could blend powers however they pleased.[381] The separation-of-powers provisions created a default organizing principle to hold government accountable, but the people could (through their constitution) organize government power however they liked. The deeper point was that government officials remain bound by constitutional limits to their powers, and the escape clauses emphasized and reinforced this. In other words, government could not unilaterally combine or rearrange the powers of particular branches,

---

378. MISS. CONST. of 1832, art. II.

379. *Id.* § 1 (emphasis added); *see also* ALA. CONST. of 1861, art. II, § 1 ("The powers of the Government of the State of Alabama shall be divided into three distinct departments; and each of them confided to a separate body of magistracy, to-wit: those which are legislative, to one; those which are executive, to another; and those which are judicial to another."); ARIZ. CONST. of 1911, art. III ("The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."); ARK. CONST. of 1874, art. IV, § 1 ("The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another.").

380. *See, e.g.*, N.J. CONST. art. III, § 1.

381. *See* Tarr, *Separation of Powers*, *supra* note 78, at 340 (noting that escape clauses "confirm[] that the populace retains the right to allocate any power to whatever branch it chooses, as long as it locates that choice in the text of the constitution").

but the people could do so in the constitution, and the government was obliged to comply with whatever arrangements the people constructed.

As a historical development, these clauses were not accidental. They were added during a period when the states began introducing copious amounts of textual detail into their constitutions. At the beginning of the nineteenth century, state constitutions averaged approximately 7,500 words.[382] By the end of the century, the average was almost 20,000 words, and by 2014 it was 36,333 words.[383] This dramatic growth in text began following a series of catastrophic government failures early in the nineteenth century. State constitutionalists responded to these failures by using detailed text to more tightly control and direct government officials. Much of this new textual detail reorganized government powers into unusual and idiosyncratic institutions so that the people could better monitor government.[384] Many of these innovations did not fit cleanly within the tripartite organization of state government, and these escape clauses aligned the separation-of-powers provisions with the realities of state constitutional practice during the nineteenth century. Far from being gratuitous verbiage, these provisions reflected the popular-accountability rationale for the separation of powers.

Stage Three (1950 to present) – The final stage in the development of state separation-of-powers provisions is characterized by a series of highly contextual and idiosyncratic amendments to these provisions in response to actual or anticipated separation-of-powers court rulings. These amendments constitutionalized very specific institutional arrangements because of fear that those arrangements might be struck down by courts as violating the separation of powers. This stage is best understood as implementing the escape clauses added during the nineteenth century.

Oregon's experience with its fiscal Emergency Board is illustrative.[385] In 1913, the Oregon legislature created an Emergency Board with the power to make necessary budget adjustments between

382. Versteeg & Zackin, *supra* note 97, at 665 fig.3. To put this in context, the U.S. Constitution with all current amendments is 7,644 words. *Id.* at 663.

383. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1655 (2014).

384. For example, as described below, it was during this period that the states began to create constitutional agencies with particular mandates. *See infra* notes 385–93 and accompanying text.

385. *See* OR. CONST. art. III, § 2 (granting the legislature the power to establish an agency to make budgetary decisions).

legislative sessions.[386] The board consisted of legislative and executive members, but the executive members had veto authority on any budget adjustments.[387] In 1951, the legislature proposed re-creating the Emergency Board to consist entirely of legislators, who would have the power to administer previously approved appropriations.[388] However, the state attorney general issued a strong opinion finding that the arrangement would violate Oregon's separation-of-powers provision because it would give legislators executive powers.[389] To address this, Oregon voters approved a 371-word amendment to the separation-of-powers provision that constitutionalized a framework for the legislature to create the Emergency Board.[390]

There are several other similar examples. Nevada and Connecticut have amended their separation-of-powers provisions to explicitly allow for legislative veto of agency regulations.[391] New Mexico amended its provision to allow for the creation of a special

386. Bromleigh S. Lamb, *The Emergency Board: Oregon's System of Interim Fiscal Adjustment*, 55 OR. L. REV. 197, 197 (1976).

387. *Id*. at 197–98.

388. *Id*. at 198.

389. As the attorney general wrote:

> Once the legislature has enacted a law its functions cease, and the duty to carry the law into execution resides with the executive or administrative departments of the government. To place its own member on a committee, as provided in House Bill 334, creating the emergency board, would be to impose administrative or executive functions upon officers and members of the legislative assembly. This would clearly meet the full force and impact of Article III, §1 of the constitution . . . [providing for the separation of powers].

25 Or. Op. Att'y Gen. 139, 142 (1951).

390. Lamb, *supra* note 386, at 199–200; OR. CONST. art. III, § 2.

391. The Nevada constitution now provides that:

> If the legislature authorizes the adoption of regulations by an executive agency which bind persons outside the agency, the legislature may provide by law for: (a) The review of these regulations by a legislative agency before their effective date to determine initially whether each is within the statutory authority for its adoption; (b) The suspension by a legislative agency of any such regulation which appears to exceed that authority, until it is reviewed by a legislative body composed of members of the Senate and Assembly which is authorized to act on behalf of both houses of the legislature; and (c) The nullification of any such regulation by a majority vote of that legislative body, whether or not the regulation was suspended.

NEV. CONST. art. III, § 1. Similarly, the Connecticut constitution now provides that "[t]he legislative department may delegate regulatory authority to the executive department; except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed." CONN. CONST. art. II.

Worker's Compensation Court,[392] and Nebraska added a clause authorizing judicial or executive supervision of parolees.[393]

These provisions reinforce that the state approach to the separation of powers is not grounded in an archetypal division of power or a functional equilibrium between branches. Rather, the core of the state approach is government accountability. The separation of powers is a tool that the people have enlisted to help them better monitor and control government.

C. Practice

In the sections above, I have argued that the public-accountability rationale for the separation of powers is grounded in state constitutional history and text. In this Section, I argue that the public-accountability rationale has remained a critical (albeit overlooked) aspect of the states' experience with the separation of powers. As the states have experimented with and changed government institutions, a constant point of reference has been the idea that clearly separating government power into different offices and institutions can facilitate better popular oversight of government. This idea has been largely lost by courts and scholars, but it is at the core of state constitutional design and the state experience with the separation of powers.

To support this claim, I argue that, over time, the states have developed at least three interrelated strategies to separate powers and facilitate popular accountability: by isolating decision-makers for voters, isolating policies, and creating redundancies in favor of popular accountability. I describe and illustrate each strategy in turn. This list is not meant to be exhaustive. My primary purpose is to concretely demonstrate that the public-accountability rationale for the separation

---

392. The New Mexico constitution now states:

> Nothing in this section, or elsewhere in this constitution, shall prevent the legislature from establishing, by statute, a body with statewide jurisdiction other than the courts of this state for the determination of rights and liabilities between persons when those rights and liabilities arise from transactions or occurrences involving personal injury sustained in the course of employment by an employee. The statute shall provide for the type and organization of the body, the mode of appointment or election of its members and such other matters as the legislature may deem necessary or proper.

N.M. CONST. art. III, § 1.

393. *See* NEB. CONST. art. II, § 2 ("[S]upervision of individuals sentenced to probation, released on parole, or enrolled in programs or services established within a court may be undertaken by either the judicial or executive department, or jointly, as provided by the Legislature.").

of powers plays a significant role in how states structure government across issues and time.

1. *Isolating Decision-Makers.* In various contexts, the states have used the separation of powers to enhance popular oversight of government by isolating officials or institutions responsible for particular work. In doing so, the primary goal has not been to recalibrate the checks and balances within government. Indeed, some reforms appear to undermine conventional checks and exaggerate imbalance in government.[394] Instead, these efforts have responded to the concern that when government work is spread indiscriminately across various officials or institutions, it can be difficult for the public to isolate who is responsible for specific outcomes. By dividing government into specialized, popularly elected positions, the public can more easily and efficiently isolate who within government is responsible for bad outcomes.[395] This isolation, in turn, allows the public to respond to government recalcitrance by directly targeting responsible officials.[396]

One of the most straightforward examples of this is the shift toward the popular election of state judges. This shift was part of a constellation of mid-nineteenth-century reforms designed to enhance the overall accountability of state government.[397] During this period, a key problem had been wayward and corrupt legislators who had disregarded the public will in favor of using their positions for personal gain—especially by supporting economic development projects that

394. The popular election of judges, for example, might be understood to weaken an important check on the political branches. The divided executive might be understood to weaken important executive-branch oversight and thereby empower legislatures. And constitutionalizing agencies can be seen as combining all three functions of government in one institution. Indeed, this was not lost on the delegates who created some of the first state constitutional agencies. *See* 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 556 (1880) [hereinafter CAL. CONSTITUTIONAL CONVENTION OF 1878–1879] (noting that "all the powers of government [would be] combined" in the railroad commission, which would be "independent of the other three departments of government").

395. *See, e.g.*, S. CROSWELL & R. SUTTON, PROCEEDINGS IN THE NEW YORK STATE CONVENTION, FOR THE REVISION OF THE CONSTITUTION 406 (1846) (explaining that prior powers of the state comptroller "exceeded those of all other executive officers put together" and that the office's powers should be split up between separate offices to enhance accountability).

396. On the formal logic of enhancing popular accountability by breaking government up into specialized offices, see Berry & Gersen, *supra* note 120, at 1403–05.

397. *See* TARR, WITHOUT FEAR OR FAVOR, *supra* note 140, at 46–47.

directly benefited them.[398] At the time, legislatures and governors controlled the appointment of judges, which meant that many judges were the product of this same cycle of corruption and self-dealing.[399] Thus, when citizens went to court seeking protection from a variety of abusive programs and policies, the courts were unsympathetic and often found ways to uphold the schemes.[400] And when the people obtained legislative reforms, courts would often strike down the reforms as unconstitutional.[401]

This self-dealing represented the kind of intragovernment collusion that early state constitutionalists feared. More importantly, after a bad judicial ruling, it was difficult for the public to trace accountability and take any remedial steps. As a delegate to New Jersey's 1844 constitutional convention explained regarding the legislature's appointment power, "No *individual* member of the legislature ever considered himself responsible for the acts of joint meeting [for appointments]. The individual was merged in the mass. It was impossible therefore to reach him."[402] This was in part because legislators secretly traded votes regarding appointments, which not only affected the outcomes of appointments but also votes on legislation.[403] The result was a complicated web of patronage, political favors, and corruption caused by spreading the appointment power across various officials and branches of government.[404]

---

398. *See id.* at 46.

399. *See id.* at 47.

400. A good example of this was the process whereby legislatures would authorize private companies, such as railroads, to take private property to develop infrastructure projects. *See* Marshfield, *Misunderstood Rights*, *supra* note 13, at 897–98. The railroads would often take property without providing any compensation at all. *Id.* When property owners would sue for protection under state law, courts often sided with the railroad and legislative scheme. *Id.* at 897 (discussing how "legislation and judicial complicity" eroded eminent domain protection for property owners); TARR, WITHOUT FEAR OR FAVOR, *supra* note 140, at 42–43 (providing various examples).

401. *See* DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 78, at 48–50.

402. N.J. CONVENTION OF 1844, *supra* note 115, at 351.

403. *See id.* at 352 ("Thus is the influence of appointments made to control the legislation of the State, regardless of honest principle or the interests of the people. The lamentable effects that have been produced by this sort of influence upon appointments, legislation, and the public morals cannot be estimated.").

404. *See* Charles A. Beard, *The Ballot's Burden*, 24 POL. SCI. Q. 589, 595 (1909) (claiming that the appointment power had resulted in "[t]he transformation of the legislature into a chamber of intrigue for office-hunters").

For many states, the solution to this was to separate the appointment power from the executive and legislative branches and give it to the people.[405] This setup cleared lines of communication, so to speak, between the people and the courts. It allowed for the people to make the upfront decision of whom to place on the bench and (in most cases) allowed the public to vote on whether to reelect questionable judges.[406]

The divided executive is another example of this strategy. As noted above, most states divide executive power among several separately elected officials.[407] Many states also provide for the election of specialized posts, such as the comptroller, commissioners of agriculture, and education superintendents, among many others. A core rationale for this division was to enhance the public's ability to control government by more surgically responding to particular government failures.[408] Thus, some delegates to the 1971 Montana constitutional convention argued that by making various executive officers "responsible only to the people,"[409] "the public [would have] the best chance to view critically its public officers."[410] They further explained that, by electing officials separately, "the activities of government are visible and . . . there are ways for checking on what our public officials are doing."[411] Conversely, when officials were hidden within a large bureaucracy, there was concern for an "open invitation to unviewed corruption."[412]

This strategy can also operate to consolidate positions under fewer elected officers. For either approach, the core idea is that the states have actively reallocated government powers based on which allocations will best empower voters. The exact allocations are often

405. *Id.*

406. Other examples of this tactic exist. *See, e.g.*, Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1531 (2012).

407. *See supra* notes 117–20. Only three states (Maine, New Hampshire, and Tennessee) concentrate executive power in a single elected governor. SUTTON, *supra* note 7, at 149. Montana's executive article is illustrative: "The executive branch includes a governor, lieutenant governor, secretary of state, attorney general, state treasurer, superintendent of public instruction, and state auditor." MONT. CONST. art. VI, § 1.

408. *See* TARR, STATE CONSTITUTIONS, *supra* note 86, at 121–22.

409. 1 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, at 463 (1979) (statement of the Executive Committee).

410. *Id.* at 845 (statement of Delegate Wilson).

411. *Id.*

412. *Id.* Delegate Erdmann also argued that removing separately elected offices "tak[es] democracy just one step away from the people." *Id.* at 848.

very contextual and influenced by assumptions about voter decision-making. My point is not that the public-accountability rationale always results in the proliferation of elected offices. Rather, my point is that it seeks to allocate power in ways that will enhance popular accountability and oversight (as opposed to allocating power in ways that will create intragovernment checks).

The 1947 New Jersey constitution is a good example. Delegates to that convention ultimately determined that it was best to consolidate many executive offices under a strong governor with significant appointment power. There were various factors driving this reorganization, but the convention debates are striking in that they emphasize popular accountability as a principal justification for *consolidating* offices. Delegate Jane E. Barus described the theory underling the consolidated executive:

> [I]n the growing complexity of government today, it becomes more than ever essential to make the lines of authority and responsibility very clear and very simple so that all people can understand it. It does not make for democracy to split up the government so that groups of people here and there share in the exercise of authority. That makes for a complex situation and such an interweaving and crisscrossing of lines of authority that the people are unable to understand it, and therefore they are unable to exercise their true powers of control over their government. In this Article [the proposed executive article] I think we have corrected that failure in New Jersey. We have put the Governor in a position of great authority, it is true. But we have tried to limit that authority to the confines of the branch of government which he represents, to give him strong power and clear-cut authority over the administrative section of the State Government.
>
> We have also tried to make responsibility go hand in hand with that authority. I think our idea in working this Article out was that the power we need to fear is irresponsible power. The power which is clear and simple and which obviously rests with responsibility on the shoulders of the Chief Executive will do us no harm. The power that we need to fear is the power that is underneath, behind the scenes, that is not accountable, that never comes out for election or stands up before the people clearly.[413]

Barus's eloquent explanation captures the core of the public-accountability rationale for the separation of powers because she

413. 1 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 207 (1947).

emphasizes that power should be organized in whatever manner will best enable voters to hold officials accountable.[414]

2. *Isolating Policies.* Another strategy used by the states has been to separate government power to isolate decisions regarding particular issues. This strategy can overlap with isolating decision-makers, but it is broader in scope. The core idea is that, for particular issues, a government structure, process, or institution may be organized in ways that produce outcomes at variance with salient popular preferences. To address this variance, states have used the separation of powers to pull specific substantive areas out of one branch of government and place them in a better location. Sometimes this relocation places the issue under more direct popular oversight. Other times, however, it merely isolates the issue for transparency purposes or subjects it to a different decision-making process. In any event, the restructuring can be motivated by a desire to increase accountability and not only to recalibrate intragovernment checks. Indeed, these reforms have resulted in constitutionalizing unusual boards and commissions that defy conventional separation-of-powers principles.[415]

The most compelling example of this is the creation of state constitutional agencies. The creation of the first railroad commission in California in 1878 is an especially helpful example, but this strategy has gained popularity in recent years and remains highly relevant.[416]

---

414. Barus's explanation tracks the language of the 1947 New Jersey separation-of-powers provision. This language was first added to the prior constitution of 1844, where there was also clear discussion of this approach to the separation of powers. N.J. CONVENTION OF 1844, *supra* note 115, at 351. The provision itself, while new, was adopted without discussion. *See id.* at 390. Zasloff has argued that the New Jersey convention of 1844 illustrates the incoherence of state separations-of-powers theory. Zasloff, *supra* note 7, at 1107. He notes that delegates to the convention disagreed on a variety of critical separations-of-powers issues and ultimately formulated a compromise while at the same time including a strong separations-of-powers provision. *Id.* He also quips that the provision's lack of theoretical underpinning is highlighted by its phrase "except in instances hereafter expressly directed or permitted." *See id.* My argument is that this actually captures the core of the public-accountability rationale for the separation of powers, which is grounded in popular sovereignty and theories of popular accountability expressed through detailed constitutional text.

415. *See, e.g.*, CAL. CONSTITUTIONAL CONVENTION OF 1878–1879, *supra* note 394, at 556 (describing the railroad commission as performing the roles of all three branches).

416. *See* Marshfield, *Popular Regulation?*, *supra* note 79, at 360–64 (describing various examples of this strategy); *see also* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 48 (2018) [hereinafter DINAN, STATE CONSTITUTIONAL POLITICS] (describing several states' adoption of railroad commissions by constitutional amendment).

The California Railroad Commission was constitutionalized because of regulatory failures by the California legislature.[417] Part of these failures related to outright capture of legislators by wealthy railroads.[418] But another less nefarious problem was logrolling, facilitated by the structure of legislative representation and the nature of the railroads.[419] Because legislators represented local constituencies, not all of them had an equal interest in the success of particular railroad projects, but most had an interest in a railroad connecting their communities.[420] Thus, legislators were incentivized to trade votes on railway regulation, which resulted in statewide policies wildly misaligned with popular preferences.[421]

To remedy this problem (and others), the 1878 convention constitutionalized the railroad commission.[422] The commission was comprised of three popularly elected commissioners, who were elected from three unique geographic districts of proportional populations.[423] The commission had the exclusive power to regulate railway rates.[424] It was also authorized and required to pass rules for "a uniform system of accounts" for all railway companies[425] and to investigate, prosecute, and "punish" corporations for rate violations.[426]

In describing the purpose of the commission, delegates made several points. First, the commission would be more accountable to the public because its members were directly elected for that purpose alone.[427] Second, creating unique electoral districts for a commission with only one regulatory power would prevent administrative

417. *See* DINAN, STATE CONSTITUTIONAL POLITICS, *supra* note 416, at 48–51.

418. *Id.*

419. *See* CAL. CONSTITUTIONAL CONVENTION OF 1878–1879, *supra* note 394, at 557 (debating this problem at the convention).

420. *Id.*

421. *Id.*

422. *See* DINAN, STATE CONSTITUTIONAL POLITICS, *supra* note 416, at 51.

423. CAL. CONST. of 1879, art. XII, § 22.

424. *Id.*; *see also* CAL. CONSTITUTIONAL CONVENTION OF 1878–1879, *supra* note 394, at 556 (speech of Mr. Wyatt) (expressing understanding that the commission operated as a divestment of legislative authority to set rates).

425. CAL. CONST. of 1879, art. XII, § 22.

426. *Id.*

427. *See* CAL. CONSTITUTIONAL CONVENTION OF 1878–1879, *supra* note 394, at 530–31 (speech of Mr. Wickes) (noting the legislature was not accountable because its powers were "too much distributed"); *id.* at 551 (speech of Mr. Wyatt) ("I . . . want the Commission above the Legislature, practically speaking. I want the Commission so that they can act responsive to the behests of the people, and not the Legislature.").

capture.[428] Third, by siphoning railroad regulation into the commission, the public could easily and directly judge policy outputs.[429]

The California railway commission is an important example of the public-accountability rationale because it violates conventional separations-of-powers principles. In effect, the commission took a highly significant public issue outside of ordinary institutions, with all the regular checks and balances, and placed it within an institution that had almost no internal checks and was immune from interference by the rest of government. Indeed, one delegate described the commission as a "fourth department" of government that would "exercise combined and mingled functions, at once legislative, judicial, and executive."[430] Yet, from the perspective of the public-accountability rationale for the separation of powers, the commission fits. Through the convention, the people used the separation of powers to help enhance their oversight of government.[431]

This approach has continued to characterize how states deal with the organization of power. In a recent series of amendments, several initiative states have amended their constitutions to create marijuana commissions to regulate legalized marijuana.[432] These commissions were created because partisan influence on state legislatures resulted in misalignment between popular preferences and marijuana policy.[433] The commissions have commingled functions but keep a very specific and limited substantive focus. The goal has been to override legislative recalcitrance but also focus ongoing popular oversight of marijuana policy.

---

428. *See id.* at 593, 604 (remarks of Mr. Hager) (arguing that election of commissioners by district will prevent the railroad companies from capturing the commission). The logrolling rationale is implicit in the underlying problems facing legislative attempts to regulate this issue. *See supra* note 427. By creating a regulatory body with only one substantive area for regulation, even district-based representation could limit logrolling because district representatives would have less to trade between themselves for their districts on that one issue.

429. *See* CAL. CONSTITUTIONAL CONVENTION OF 1878–1879, *supra* note 394, at 531 (speech of Mr. Wickes) ("[R]esponsibility is so localized in this triumvirate, that the light of public scrutiny can be concentrated upon it in an intense focus.").

430. *Id.* at 556 (speech of Mr. Wyatt).

431. *Id.* at 556–57 (speech of Mr. West) (noting that this approach was highly contextual based on the unique position that corporations had assumed in the development of California and the laws that allowed for flourishing and abuse and noting that a solution for the proper regulation of railroads required careful attention to California's particular "experience" with corporations).

432. Marshfield, *Popular Regulation?*, *supra* note 79, at 363–64.

433. *Id.*

Another example outside the agency context is the executive-budget model.[434] During the twentieth century, several states constitutionalized a process for state budgeting that responded to concerns that the legislature was a poorly suited institution to craft state budgets.[435] Many states reformed the process by placing initial responsibility for budgeting with the governor subject to legislative approval.[436] The primary justification for this was that legislatures tended to engage in logrolling to satisfy their local constituencies at the expense of the overall public.[437] Because the governor was elected by the state at large, the governor presumably would propose a budget more tightly aligned with statewide preferences.[438] And by shifting a specific policy decision to the governor, the public could better observe and respond to budgeting policies.

3. *Creating Redundancies in Favor of Popular Accountability.* Another strategy has been to organize (and reorganize) state power so that a variety of elected government officials are empowered to review policies independently. This strategy can appear similar to a checks-and-balances approach because it relies on elected representatives sharing responsibility for government actions and policies. There is certainly overlap. However, the core of the popular-accountability rationale is that popular preferences are more likely to be realized if actions are double-checked by independent, popularly elected officials.

The executive-budget models described above illustrates this strategy.[439] By subjecting gubernatorial budgets to legislative review, some state constitutions offer the people's representatives two

434. DINAN, STATE CONSTITUTIONAL POLITICS, *supra* note 416, at 62–63.

435. *Id.*

436. *Id.*

437. *Id.*

438. For example, one convention delegate was quoted as saying:

> [E]xperience has shown that usually the chief executive, being more directly responsible to the people as a whole, is an instrument of economy, while the legislative branch, under enormous pressure from different parts of the Commonwealth for the expenditure of money, is apt to be the branch of government which results in the spending of a great deal of money.

Id. at 62 (quoting 3 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION, 1917–1918, at 1150 (1919) (statement of Mr. Balch)).

439. *See supra* notes 434–38 and accompanying text.

opportunities to debate budgeting decisions publicly. This structure presumably gives the public more control over these processes.[440]

Longstanding debates about the governor's veto powers are also illustrative. Those debates have centered on the governor's democratic accountability as a basis for their review of legislation.[441] Debates regarding the line-item veto and the amendatory veto have forced these issues to the extreme.[442] The amendatory veto is a significant power that allows a governor to accept a bill subject to her own substantive changes.[443] This process places the governor in "a legislative capacity."[444] In support of this extraordinary blending of powers, state delegates have argued that it benefits the public by subjecting legislation to review and modification by the official in state government who is most likely to be held accountable by the public at large.[445] Advocates also emphasized that formalizing the amendatory veto ensures that gubernatorial objections to legislation are aired in public, rather than through back channels, which enhances the public's ability to hold government accountable.

IV. JURISPRUDENTIAL IMPLICATIONS

My primary goal in this Article is to suggest that the polestar for the separation of powers under state constitutions should not be parity or balance between the branches as part of a Madisonian checks-and-balances system. Rather, state constitutional history, text, and practice suggest that a primary point of reference for the separation of powers is the clear itemization of power by the people to assist them in monitoring and responding to government. The separation of powers is a practical tool deployed by state constitutions to help realize a core objective in state constitutional design: the faithful agency of

440. Chafetz, *supra* note 38, at 771 (making the point that introducing multiple decision points that include input from representatives accountable to different constituencies can enlarge accountability and voice).

441. DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 78, at 99–123 (summarizing the debates).

442. Seven states adopted the amendatory veto, but South Dakota's power is very limited. *Id.* at 123.

443. *Id.* at 122.

444. *See* Williams v. Kerner, 195 N.E.2d 680, 682 (Ill. 1963) (finding that the governor "is a part of the legislative department" when considering whether to veto bills); KRUMAN, *supra* note 232, at 123 ("The veto empowered the governor to participate directly in the legislative process.").

445. DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 78, at 118–19.

government officials. This reorientation has important implications for how state courts decide separation-of-powers cases.

In this Part, I offer preliminary thoughts on those implications. It is not my purpose to exhaust the inquiry. Much more work must be done. Nevertheless, I sketch the beginnings of an authentic state jurisprudence that centers on popular accountability.

A. Toward a New "Accountability Doctrine" in State Separation of Powers

As I argue above, state constitutions affirmatively enlist the separation of powers as an instrument of popular control. The separation of powers works together with elections and other processes of popular accountability to assist the public in controlling government. If this is correct, state courts should blindly follow neither the formalist nor functionalist theories developed under the federal Constitution but should adopt something that I call an "accountability doctrine."

Formalism is a bad fit for state separation of powers for several reasons. At its core, formalism attempts to define the separation of powers by reference to prototypical executive, judicial, or legislative functions.[446] The vagueness and stability of the federal Constitution seem to allow for this approach. Under state constitutions, however, the organization of government power is highly contextual and reactive—producing great variation across jurisdictions and time.[447] In my view, this is a feature and not a bug of the state model. State government organization is driven by a commitment to popular involvement in government. State executives, for example, garnish whatever powers the people think most appropriate under the circumstances at the time.[448] This reality not only makes a formalist

446. Huq, *supra* note 12, at 1527 (describing formalism as offering a "Newtonian model of branches as discrete zones of authority").

447. *See supra* Part I.B.

448. A delegate to California's 1878 convention captured this point well when debating whether to constitutionalize the country's first railway commission:

> [I]t was the abuse of the railroad corporations and other corporations supplemental to the railroad corporations, that induced the people of this State to call this Convention, and this Convention has been assembled for the purpose, and for the paramount purpose, of dealing with that question above and beyond all other questions. . . .
>
> It is objected that this section providing for the Commission will give too much power into the hands of the Commissioners. . . . When it is necessary to meet an evil of one kind the government must meet it. When another and a different kind of evil arises, the government must meet that. When you have no railroads, you do not want any Railroad Commissioners. When you have railroads, . . . [and] all other expedients fail

inquiry under state constitutions difficult as a theoretical matter, but it is also highly impractical given the complex web of institutional structures that exist under state constitutions.

But functionalism, as developed under the federal Constitution, is an equally bad fit. First and foremost, the federal approach views checks and balances as the core function to respect when deciding separation-of-powers disputes.[449] As I have argued throughout, that does not apply equally to state constitutions (at least not as a top priority to be used in deciding tough cases). Moreover, as many others have already noted, using federal functional precedent is inapposite because of significant structural differences between state and federal governments.[450]

What then is a better way to approach state separation-of-powers cases? I propose a two-step process that better fits state constitutional structure.

First, the model I have sketched here implicitly places a premium on detailed constitutional text. The main idea is that the people purposefully interject their preferences into state government structure to realign government with their preferences. This reality remains true when those modifications create imbalances in power or disrupt archetypal government functions. As such, state courts should avoid reliance on tropes about checks and balances or formalistic articulations of executive, judicial, or legislative power that might (even by implication) disturb otherwise clear constitutional text. This recommendation may seem rather unhelpful, but my approach provides a theoretical basis for courts to give life to even the most arcane and counterintuitive structural provisions of state constitutions. Courts should apply text even in the face of outcomes that might appear to imbalance power between branches.[451]

---

to govern the railroads, then it is the duty of the government to form a Railroad Commission.

CAL. CONSTITUTIONAL CONVENTION OF 1878–1879, *supra* note 394, at 551 (speech of Mr. Wyatt).

449. Huq, *supra* note 12, at 1530–35.

450. *See, e.g.*, Zasloff, *supra* note 7, at 1129–30 (explaining how the federal functional approach regarding presidential control over agencies does not match California's constitutional structure, which has a divided executive and where the governor does not have an explicit appointment clause).

451. Conversely, the careful application of text also ensures that any institutional checks and balances are honored but without elevating them over the accountability principle that represents the deep structure of state separation-of-powers theory.

Second, when courts face separation-of-powers disputes that cannot be resolved by text, a critical consideration should be whether the proposed power would obfuscate the public's ability to track accountability for decisions.[452] The idea is that, rather than analyzing how a proposed allocation of authority would affect the distribution of power between branches of state government, courts should pay careful attention to how allocating the power might distance government decision-making from voters. In general, courts should favor the allocation of power that would keep the lines of accountability most clear.

One concern with this approach might be that it will require courts to speculate about voter behavior and knowledge and that it ignores the complexities of public choice. This is a genuine concern with many complex layers.[453] However, it is unclear why this sort of analysis would be any more speculative or indeterminate than the analysis that courts already perform under either the formalist or functionalist approaches. Those approaches require courts to define vague concepts (such as the meaning of legislative, executive, and judicial functions) or analyze how allocating a power to a particular branch will affect the behavior and performance of officials in another branch.

More importantly, in other doctrinal areas, state courts already engage in complicated analysis of voter behavior and awareness. For example, in most initiative states, courts review initiatives to ensure that they are not misleading to voters and embrace only a "single subject."[454] That analysis often involves judicial determination about how voters will respond to ballot language, what information is necessary for a full understanding of the issue, and strategic analysis of how voters would behave based on the bundling or isolation of

452. Here, my proposal operates like a "second-order" constitutional principle as Professors James Nelson and Micah Schwartzman describe that concept. That is, it provides a decision-making framework in those hard cases where the law "runs out." *See* James D. Nelson & Micah Schwartzman, *Second-Order Decisions in Rights Conflicts*, 109 VA. L. REV. 1095, 1096 (2023).

453. *See infra* Part IV.D.1. Besides well-documented long-ballot concerns, there will also be concerns about whether voters are able to properly track institutional mandates so that they can hold the correct officials accountable. For example, even if a voter continues to the very end of the ballot, it is not altogether clear that the median voter would intuitively understand which government outputs should be tractable to the state comptroller.

454. Scott L. Kafker & David A. Russcol, *The Eye of a Constitutional Storm: Pre-Election Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1293 (2014).

issues.[455] In the interpretive context, state courts often purport to interpret ballot initiatives by discerning the intent of voters who endorsed the initiative.[456] Courts are not perfect in conducting these analyses, but it is well within their judicial purview.[457]

Of course, the accountability doctrine is not a panacea for state separation-of-powers problems. It will sometimes fail to produce a clear result.[458] Moreover, in a particular case, it might be in tension with other constitutional commitments. However, the accountability doctrine is a modality of argument that is missing from the current state separation-of-powers jurisprudence. Integrating it into state constitutional doctrine not only helps develop a more authentic state jurisprudence, but it also ensures that courts use the separation-of-powers doctrine to empower (rather than constrain) democratic majorities.

B. Illustrating the Accountability Doctrine in Specific Cases

At this point, it is helpful to illustrate the accountability doctrine. I first discuss an "easy" case where the accountability doctrine would produce a more predictable and sound result. I then explore how, even in tough cases, the accountability doctrine is good because it resituates the analysis along lines that better match state constitutional structure and theory.

---

455. *See id.* at 1289–1310 (providing a survey of relevant doctrines and examples of judicial review).

456. Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 117 (1995).

457. There is another line of state cases that support the doctrine I propose here. State courts have a long tradition of more rigorously scrutinizing delegations of public power to private entities because of concerns regarding democratic accountability. *See* Daniel Schwarcz, *Is U.S. Insurance Regulation Unconstitutional?*, 26 CONN. INS. L.J. 191, 221 (2018) (noting that cases resists delegation to private parties for various reasons, including that private actors "may not be subject to direct political controls" (citation omitted)); Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1241–59 (2022) (exploring sovereignty theory of nondelegation in state constitutional law).

458. A case that may illustrate this if revisited through my framework is *Fabick v. Evers*, 956 N.W.2d 856 (Wis. 2021). The case involved the governor's power to issue a state of emergency during the COVID-19 pandemic after the legislature had removed the governor's prior state of emergency. *Id.* at 862–64. In that case, it may be unproductive or indeterminate for the court to decide the case based on which branch is more democratically accountable. On the other hand, my approach would provide the framework for arguing that, in a close case like this, the best result would be to allocate the power with the most accountable branch, and the governor may stake claim to that as a singular, statewide official.

Consider the 2017 Minnesota case of *Otto v. Wright County*.[459] In that case, the Minnesota Legislature adopted a statute that reassigned certain powers of the state auditor (a constitutional officer elected by the state at large) to county officials.[460] The statute allowed county auditors and treasurers to unilaterally determine whether required audits would be performed by the state auditor or by private accounting firms. After the state auditor attempted to audit several counties, those counties sued to enforce their right to select a private auditor. The state auditor responded that the statute violated the separation of powers.

The majority opinion concluded that the statute did not violate the separation of powers. According to the majority, the statute was permissible because the state auditor retained powers adequate to check the counties. The majority emphasized that although the statute prohibited the state auditor from performing county audits, the state auditor could review the audits and set auditing standards.[461] The dissent, on the other hand, argued that the statute would reduce the state auditor's office to an "empty shell" unable to provide a meaningful check on the counties.[462]

The opinions in *Otto* illustrate the limitations of the current approach to separation of powers. Both the majority and dissent present plausible arguments regarding the statute's effect on intragovernment power dynamics, and it is unclear how the judges chose between the two alternatives (beyond mere fiat).

More importantly, *Otto* illustrates how applying federal frameworks to state separation-of-powers disputes can obscure the core issue and produce bad results. Neither opinion makes any mention of how the statute would impact public accountability regarding county audits.[463] As it turns out, the statute was part of a broader series of reforms that had shifted county audits from elected county officials to appointed county officials contracting with private firms.[464] Indeed, Ramsey County, one of the named parties to the lawsuit, had modified

459. Otto v. Wright County, 899 N.W.2d 186 (Minn. Ct. App. 2017).

460. *Id.* at 189–90; MINN. CONST. art. V, §§ 1, 4.

461. *Otto*, 899 N.W.2d at 195.

462. *Id.* at 192.

463. *Id.* at 186–200.

464. MN HOUSE RSCH., COUNTY OFFICES: COMBINING OR MAKING APPOINTED 1 (Nov. 2019), https://www.house.mn.gov/hrd/pubs/cntyoff.pdf [https://perma.cc/MKR4-RZCM].

its government structure to replace the elected auditor, treasurer, and recorder with appointed officials.[465]

Through the lens of the accountability doctrine, the real issue in *Otto* was whether the statute violated the separation of powers by moving audit authority away from the state auditor (a statewide elected official with a specific and clear mandate) to private firms selected by unelected county officials. If the court had applied the accountability doctrine, it would have focused on how the statute would limit and obscure the public's ability to track and respond to problems in county audits.[466] By upholding the statute, the court endorsed a clear obfuscation of public accountability regarding county audits based on Madisonian functionalism rather than state constitutional history, practice, and theory.[467]

465. *Id.* at 9; MINN. STAT. § 383A.20 (2022).

466. This is even more unfortunate because there was evidence of meaningful malfeasance by county officials regarding a variety of similar programs, which had been caught and exposed by audits conducted by the state auditor's office. *See* Ass'n for Gov't Accountability Amicus Curiae Brief at 10–20, Otto v. Wright County, 899 N.W.2d 186 (No. A16-1634), 2017 WL 8217184 at *10–20.

467. Interestingly, the Association for Government Accountability ("AGA") filed an amicus brief in the case that drew out some of these public-accountability concerns. *See id*. However, the AGA lacked a clear "legal hook" on which to hang these concerns because they did not fit cleanly within the conventional separation-of-powers logic. *See id.* at 10–11 (making practical argument based on public accountability without invoking any clear doctrinal basis to effectuate that argument). Indeed, the court made no mention of them in either opinion despite them being briefed by AGA. *See Otto*, 899 N.W.2d at 189–99 (majority opinion) (not engaging with public accountability); *id.* at 199–200 (Cleary, C.J., dissenting) (same).

While this approach will bring predictability and coherence to many cases,[468] consider the more difficult case of *State v. Bodyke*,[469] decided in 2010 by the Supreme Court of Ohio. In that case, the Ohio legislature adopted a law designed to comply with the Federal Adam Walsh Act, which set national standards for sex-offender registration and classification.[470] Under the federal law, classifications were based solely on the crime committed without considering any case-specific factors.[471] To comply with the federal law, the Ohio legislation directed the attorney general to review all relevant convictions and reclassify them based on the new standards.[472] An offender reclassified by the attorney general sued, arguing that the Ohio statute unconstitutionally transferred judicial powers to the executive branch.[473]

468. Examples abound, but another helpful illustration is the 2021 New York case of *People v. Viviani*, 169 N.E.3d 224 (N.Y. 2021). In that case, the legislature adopted a statute allowing the governor to appoint a special prosecutor for particular crimes. *Id.* at 227; *see* N.Y. Exec. § 552(2)(a) (McKinney 2022); *see also* Jonathan Remy Nash, *Secondary Prosecutors and the Separation-of-Powers Hurdle*, 77 N.Y.U. ANN. SURV. AM. L. 33, 37–39 (2022) (explaining background to *Viviani* case). The special prosecutor was not elected, and the statute effectively stripped authority from locally elected district attorneys, a position created by the state constitution. *See* N.Y. Exec. § 552(2)(a); N.Y. CONST. art. XIII, § 13. Several defendants challenged the statute as violating New York's separation of powers. *Viviani*, 169 N.E.3d at 229. The New York Court of Appeals applied a functional approach to the question, focusing on whether the statute attempted to impermissibly shift an "essential function" between officers. *Id.* at 230. In so doing, the court conducted an "odd" analysis by largely speculating and hypothesizing about the essential functions of the district attorney. *Id.*; *see* Nash, *supra*, at 45 (characterizing the analysis as "odd"). The court ultimately determined that the special prosecutor was infringing on an essential purpose of the local district attorney, but the reasoning and result were far from predictable or obvious.

Consider how the court might have approached *Viviani* under the accountability doctrine. The statute at issue shifted prosecutorial authority to an unelected official appointed by the governor. Although the governor is elected, the public is surely less empowered to track accountability for the actions of the governor's appointed special prosecutors than through the election of local district attorneys (which are constitutionally created and subject to direct popular elections). Thus, notwithstanding the lack of clarity in the constitution regarding the core functions of the district attorney or the uncertain implications of reallocating prosecutorial power within government in this way, the court could have invoked the doctrine of accountability to easily and soundly resolve the separation-of-powers issue.

469. State v. Bodyke, 933 N.E.2d 753 (Ohio 2010).

470. *Id.* at 759–61.

471. *Id.* at 759.

472. *Id.* at 759–60.

473. *See* Merit Brief of Appellants at 17, State v. Bodyke, 933 N.E.2d 753 (Ohio 2010) (No. 08-2502) ("S.B. 10 violates the separation-of-powers principle inherent in Ohio's constitutional framework by unconstitutionally infringing on the powers of the judicial branch of government.").

In holding that the statute violated Ohio's separation of powers, the court drew heavily from federal precedent, Madison, and Montesquieu.[474] The court espoused conventional functional rationales: "Foremost in the analysis, we recognize that the Founders' design of the tripartite model was intended to serve as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'"[475] But it also endorsed formalist reasoning, asserting that individualized judgments were an essential judicial function.[476] Ultimately, the court applied both methodologies.[477] It reasoned that the statute was unconstitutional because it assigned an essential judicial function to the executive and because the particular power at issue would allow the legislature to run roughshod over judicial rulings.[478] The court acknowledged that the constitutional text was largely unhelpful because it simply assigned judicial functions to the courts without any elaboration relevant to the particular dispute.[479]

As a matter of functional and formalist analysis, the court's opinion is coherent. However, when viewed through the lens of my proposal, a few points jump out. First, the court described the executive as a monolith,[480] but this is not the case in Ohio. The governor and attorney general are separately elected.[481] Second, the court's analysis did not consider how the public might track responsibility for sex-offender classifications,[482] which is an issue of general public concern because offender classifications trigger public notification and registry requirements designed to protect the public.[483] Of course, the absence of this analysis is not surprising based on the court's explicit acknowledgment that the separation of powers is principally about intragovernment checks and balances. But my approach would

474. *Bodyke*, 933 N.E.2d at 763–64.

475. *Id.* at 765 (quoting Mistretta v. United States, 488 U.S. 361, 382 (1989)).

476. *Id.* at 765–66.

477. *Id.*

478. *Id.* at 766–67.

479. *Id.* at 767.

480. *Id.* at 763 (stating that "*the* executive power" is vested in "*the* governor" (emphasis added) (quoting Norwood v. Horney, 853 N.E.2d. 1115, 1148 (Ohio 2006))).

481. OHIO CONST. art. III, § 1 ("The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be elected . . . by the electors of the state.").

482. *See generally Bodyke*, 933 N.E.2d at 753.

483. OHIO REV. CODE §§ 2950.02–03 (2008).

emphasize a different inquiry. Rather than imagine that the people of Ohio intended to assign sex-offender reclassification to courts because entering final judgments is a quintessential judicial function, why not locate the power in the office where the people of Ohio would have the best opportunity to monitor and direct that government task?

This approach would not, of course, easily resolve the issue. The attorney general is separately elected, but so are Ohio judges.[484] On the one hand, locating the power with the attorney general would consolidate reclassification with a high-profile state official, which might enhance salience and empower voters to respond if the reclassification were mishandled. On the other hand, the state trial judges who made the initial classifications were subject to local elections and were responsible for a much smaller set of cases, thus making popular response to classification problems more focused.[485] In any event, my approach would bring these considerations to the fore as part of the state approach to the separation of powers, and this case illustrates how that approach could function constructively, even in difficult cases.

Consider one final contrived illustration that more starkly highlights the differences between my approach and the conventional methods. Suppose that a governor is popularly elected but without a constitutional basis for issuing executive orders.[486] The legislature adopts a generic statute that allows the governor to direct agency policy priorities by executive order subject to certain publication requirements. The constitution gives the governor generic appointment powers for most agency heads (subject to legislative confirmation) but also creates a specialized commission for regulating medical marijuana that is run by an elected commissioner who has wide rulemaking power. The governor instructs the commissioner to adopt rules prohibiting the smoking of marijuana and permitting only its ingestion. The legislature has authority to regulate the methods of marijuana consumption, but it has not acted. The legislature also has the express power to veto any agency rule, but none have yet been promulgated. The marijuana commissioners sue, arguing that although the order is lawful under the executive order statute, it is an

484. OHIO CONST. art. IV, § 6(A).

485. Ohio trial court judges are elected at the county level. OHIO CONST. art. IV, § 6(A)(3).

486. Professor Miriam Seifter flags this issue. Seifter, *Gubernatorial Administration*, *supra* note 110, at 490. For a general survey of the nature of gubernatorial orders, see Margaret R. Ferguson & Cynthia J. Bowling, *Executive Orders and Administrative Control*, 68 PUB. ADMIN. REV. 520, 521 (2008).

unconstitutional violation of the separation of powers because it intrudes on the agency's rulemaking power.

The results in this imaginary case might go various ways depending on the approach taken (and even then, multiple options may exist). A simplistic formalist approach might be skeptical of the order as a form of lawmaking. Invalidating the order would leave the lawmaking/rulemaking to an agency subject to legislative veto or preemption. This seems like the best approach for the formalist. A functional approach inspired by federal precedent might focus on the degree to which the legislature has authorized or precluded gubernatorial action; perhaps concluding that the order is permissible because the legislature has not spoken and the balance between the branches is not offended by allowing the governor to act against the backdrop of possible corrective legislation.

My approach would focus on a different inquiry: How would voters trace responsibility for this policy if the order were upheld? To be sure, this is no easy question to answer, but it at least frames the analysis appropriately under the state theory of separation of powers. On the one hand, allowing the governor to exercise this power would focus the policy in one high-profile officer rather than a relatively obscure commission that is likely to appear low down on the ballot. On the other hand, the governor's portfolio is very cluttered, and adding another issue to it might diminish salience for interested voters. Moreover, because the constitution created a specialized commission for marijuana regulation with separately elected commissioners and rulemaking power, there is a strong argument that popular accountability is best served by prohibiting the executive order and requiring the policy to be resolved by either the commissioner or the legislature (both of whom have explicit power to do so).

My example is, of course, contrived, but it illustrates the beginnings of how courts might approach a properly oriented separation-of-powers analysis, even in tough cases. Much more work must be done to develop this doctrine. My limited aim here is to show that the public-accountability rationale for the separation of powers can be translated into workable and beneficial doctrine.

C. Rethinking Nondelegation and Administrative Deference

Finally, consider how the doctrine of accountability might restructure state court analysis under foundational doctrines like nondelegation and *Chevron* deference.

State courts have generally taken a very reactive approach to both doctrines:[487] accepting federal precedent wholesale, rejecting it wholesale for reasons developed in the federal doctrine, or constructing modified cognate doctrines.[488] This dynamic appears to be accelerating as these doctrines have been politicized and cast along partisan lines.[489] As Professor Aaron Saiger has observed, "The themes raised by [federal] judges and academics opposed to the federal *Chevron* doctrine now appear repeatedly and without much modification in writings of judges and others opposed to state-level deference doctrines."[490]

One reason state courts may struggle to generate their own independent doctrine in these areas is the absence of any alternative guiding principle beyond Madison's checks-and-balances idea. Indeed, a recent survey of state court approaches found that, in assessing whether to defer to an agency, state courts generally use the same rationales and vocabulary developed by federal judges for resolving federal separation-of-powers issues.[491] The accountability doctrine provides a framework for reimagining state administrative law along lines that are more authentic and consistent with state constitutional structure and theory.

Consider *Chevron* deference as applied by state courts to state agencies. One dominant theme in the federal movement against *Chevron* is the idea that federal agencies are power-hungry, politically unaccountable, and therefore prone to make, interpret, and enforce

487. *See* Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879, 1921 (2022) ("What would it mean for states not necessarily to defer more, or less, than federal courts, or not at all, but to defer *differently*—to break out of the defer-or-de-novo discussion that has been framed by federal concerns rooted in the United States Constitution?"); Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1214 (2022) ("And state courts have applied the nondelegation doctrine in a far wider variety of contexts than have federal courts . . . .").

488. There is a general sense that state courts have performed better in administrative law than individual rights from the standpoint of developing their own constitutional doctrine. *See* Saiger, *supra* note 487, at 1887 n.35. There is certainly more diversity in reasoning and result in the administrative-law context than in individual rights. *See* SUTTON, *supra* note 8, at 184. However, as Professor Aaron Saiger has recently explained, state courts nevertheless tend to be reactive to federal precedent regarding *Chevron* and other structural issues rather than generative. *See* Saiger, *supra* note 487, at 1887–88.

489. Saiger, *supra* note 487, at 1889.

490. *Id*. (citation omitted).

491. Ortner, *supra* note 8, at 7172 (Appendix) (characterizing state deference doctrine as falling into categories constructed around federal deference doctrines).

law to aggrandize power.[492] From this standpoint, de novo judicial review "is necessary to keep [agency] power in check" (functionalist rational).[493] Another concern is that deference to agencies on legal interpretation encroaches on the court's inherent role to interpret the law (formalist rationale).[494] State courts that have rejected *Chevron* generally parroted these same rationales.[495]

But in many state cases, these are false analogs. As noted above, many state agencies have been constitutionalized to facilitate more direct popular accountability regarding specific areas of regulation.[496] The idea was to consolidate regulation of a specific industry under one institution so that officials could not pass the buck and avoid accountability.[497] Indeed, when California created its famed Railroad Commission, it purposefully consolidated legislative, executive, and judicial functions for railway regulation in one separately elected commission so that the public could carefully monitor and respond to railway policy and oversight.[498] Under those conditions, deference to agency interpretations is appropriate because it preserves the carefully crafted line of accountability between the people and the agency and avoids interventionist judicial rulings that might blur accountability.[499] In other words, the whole point of creating the agency was to consolidate power in one place and limit interference from other parts of government. Far from being inconsistent with the separation of powers, this represents the essence of the public-accountability rationale for the separation of powers.

---

492. Saiger, *supra* note 487, at 1890–91.

493. *Id.* at 1891.

494. *Id.*

495. Ortner, *supra* note 8, at 18; *see, e.g.*, *In re* Ravos Against SBC Mich., 754 N.W.2d 259, 272 (Mich. 2008) (holding that deference violates the separation of powers because it compels "delegation of the judiciary's constitutional authority to construe statutes to another branch of government"); Ellis-Hall Consultants v. Pub. Serv. Comm'n, 379 P.3d 1270, 1275 (Utah 2016) (noting concerns about power aggrandizement by agencies that can both make and interpret law).

496. Part I.B.2.

497. Part III.C.1–2.

498. *Supra* notes 416–31 and accompanying text.

499. Some offices and agencies are dependent on legislation to construct their duties and authority. This can undermine the approach I describe here. For an example, see the attempt to remove the Office of Wisconsin Treasurer because its duties have been transferred to many other agencies. *On the Ballot: The Fate of Wisconsin's State Treasurer*, WIS. POL'Y F. (Mar. 2018), https://wispolicyforum.org/research/on-the-ballot-the-fate-of-wisconsins-state-treasurer [https://perma.cc/3AZS-S5FU].

Consider also the nondelegation doctrine as developed under the federal Constitution. Those who favor delegation emphasize that agencies are accountable to the president, that the president is better situated to respond to the national electorate than Congress, and that agencies enhance government decision-making through expertise and responsiveness.[500] In contrast, those who favor a strong nondelegation rule emphasize that agencies are largely insulated from popular accountability and that Congress should primarily be responsible (and accountable) for policy-making.[501]

This debate is surely valid under the federal framework, but consider how its salience changes when viewed against the complex backdrop of state constitutional structure. Many state agencies are staffed by elected officials and subject to independent state constitutional mandates.[502] Many of those agencies were created specifically to evade the legislative process, which had become captured or was unresponsive to popular will because of logrolling or other defects.[503] In those cases, the accountability doctrine would suggest that, to *preserve* political accountability, courts should jealously guard agencies from interference by state legislatures. While this perspective is incongruous with the federal separation-of-powers approach, it represents a sound and correct application of the state separation of powers.

Many other scenarios and considerations exist. My purpose here is not to fully recast these complex doctrines nor account for all the variations in state administrative structure. My more modest point is that properly understanding the separation of powers under state constitutions opens new and important lines of inquiry for these fundamental doctrines in state constitutional law.

D. Limitations and Qualifications

My primary goal in this Article is to demonstrate that the states have developed and practiced an alternative rationale for the separation of powers. That approach views the separation of powers as a tool to enhance direct popular oversight of government rather than a

500. Rossi, *supra* note 7, at 1174–81.

501. *Id.*

502. *See* Miriam Seifter, *Understanding State Agency Independence: Appendices* app. A (Univ. of Wis. Legal Stud., Rsch. Paper No. 1469, 2019), https://repository.law.wisc.edu/s/uwlaw/media/22472 [https://perma.cc/RP6R-GCR5].

503. *Supra* Part III.C.2.

series of intragovernment checks and balances. In this Section, I explore important limitations, qualifications, and critiques of this approach and its doctrinal implementation.

1. *Assumptions About Voting.* At a high level, the public-accountability rationale assumes that particular allocations of government power can help voters better monitor and control government. Implicit in this idea are at least two connected assumptions about voting and accountability.

First, the public-accountability rationale assumes that the allocation of power can improve voter information about government performance. One way this might happen is by disaggregating information. As government powers are separated into specialized offices, the public record is enhanced because identifiable officials are required to give a public account of specific government business. In this way, government decision-making might come to the fore in ways that it would otherwise not.

Another way that the public-accountability rationale might improve information is by reducing noise and enhancing salience. By consolidating government business into accessible and intuitive categories under the authority of fewer high-profile elected officials, voters may be better equipped to hold government accountable than if government work is organized around technical distinctions and assigned to officers with obscure and antiquated titles.[504]

In either case, voters are presumed to know a fair amount about state government structure and the allocation of government work. If voters do not gather this information (or are unable to collect and process it), the state approach to the separation of powers may not work. Here, there is ample evidence to suggest that the median voter

504. After all, what is the difference between a state treasurer, comptroller, and auditor? In California, for example, the constitution provides for separate, statewide election of both a state treasurer and a state "controller," without providing clear guidance on the role or mandates of either. CAL. CONST. art. V, § 11. Likewise, Kentucky provides for the separate election of a state treasurer and auditor, without clearly explaining or defining those roles. KY. CONST. § 91. Of course, statutes further define these offices. *See id.* ("The duties of all these officers shall be such as may be prescribed by law . . . ."). But their obscure nature suggests that voters may be ill-informed to differentiate between them.

is unaware of down-ballot candidates,[505] let alone the nature of those candidates' responsibilities or performance.[506] Some states have expanded their ballots to extreme lengths, which surely exceeds the ability of voters to make intelligent and informed choices.[507] As an empirical matter, this poses a real problem for the public-accountability rationale.

Second, the public-accountability rationale assumes that, even if voters obtain and process necessary information, they will vote based on that information and not other factors at odds with government performance. Here, of course, national political parties may work to undermine the public-accountability rationale. If voters tend to vote along party lines rather than by reference to any particular state government failure, then the public-accountability rationale may be undermined.

Thus, there may be good reason to believe that the public-accountability rationale is often ineffective. State officials may enjoy a fair degree of disconnection from voters, which can result in a lack of accountability. However, this point can be overstated. Even if down-ballot officials are mostly out of public view, the public-accountability rationale creates a system where serious failures or misalignment are likely to be met with direct popular response, and this surely has some restraining effect on officials. In other words, the model works even if voters are disengaged and uninformed during times of good governance because they have the ability to isolate the responsible officials when large problems arise. This, in turn, may have an ex ante effect on officials who realize that, although they are not salient to voters at present, they could become highly salient and subject to voter reprisals if they made egregious choices. Moreover, empirical research suggests that dividing state executive power between multiple elected officials has enhanced government accountability.[508] And theorists have likewise concluded that, under the right conditions, a divided executive is better for political accountability.[509] In any event, it is

505. *See generally* Steven Rogers, *What Americans Know About Statehouse Democracy*, STATE POL. & POL'Y Q. (forthcoming 2023), https://stevenmrogers.com/wp-content/uploads/2023/09/What-Voters-Know-About-Statehouse-Democracy-Web-Version.pdf [https://perma.cc/2FR8-Y2R8] (reporting a descriptive analysis of a survey about Americans' knowledge of state politics).

506. *See* Schleicher, *supra* note 27, at 764 n.2.

507. Beard, *supra* note 404, at 600–02.

508. Berry & Gersen, *supra* note 120, at 1394 n.38.

509. *Id.*

important to acknowledge that the public-accountability rationale is tied closely to a series of very generous assumptions about voter behavior. Political science literature on voter behavior and public choice may shed important light on conditions necessary for the public-accountability rationale to be effective, but that analysis is beyond the scope of this project.

2. *Abusive Majorities and Vices of Direct Popular Governance.* Perhaps the most important critique of the public-accountability rationale for the separation of powers is that it weakens an important constraint on abusive majorities and undermines the virtues of representative governance. By allocating government power in ways that tie government more directly to popular preferences, government will presumably adopt popular preferences without the same mediation and moderation that the Madisonian theory aims to foster. This, of course, leads to concerns about the tyranny of the majority and poor public decision-making.

These concerns are not purely theoretical. The states' early experiences with legislative dominance illustrate how the public-accountability rationale can enable government to run roughshod over rights and pursue ill-conceived policies. A specific example is the early nineteenth-century infrastructure development projects that were enabled by nimble state legislatures but which took a toll on private property rights and failed catastrophically.

There is surely a tension between the public-accountability rationale and concerns about enabling harmful populism. However, the public-accountability rationale is not premised on a belief that abusive majorities should be celebrated, tolerated, or enabled. The state approach is based on the idea that popular majorities are more likely to coalesce around the public good than government officials with weak ties to the public. The public-accountability rationale seeks to structure government to realize the public good by allocating power in ways that enhance popular control over government. For better or worse, this is the core of the state approach to the separation of powers. It reflects a fundamentally different concern about the sources of tyranny that should drive institutional design, but it remains committed to public-regarding governance.

3. *Capture, Inefficiencies, and New Forms of Gridlock.* Another critique of the public-accountability rationale is that the fine fragmentation of government power may cause other detrimental

effects that could undermine popular preferences. For example, constitutionally allocating regulatory authority of a specific industry to an insulated and small office or agency might increase the chance of industry capture.[510] While it may be true that this allocation of power will help the public focus its attention on government performance and prevent undesirable logrolling, it may also be easier for industry to influence a three-member commission than a two-chamber legislature with hundreds of representatives. And, in fact, history suggests that this critique is a real concern. Early railroad commissions were constitutionalized to enhance popular oversight, but they often succumbed to industry influence.

Another concern may be that dividing government into different offices and agencies will create gridlock or inefficiencies that undermine government responsiveness and accountability. Disputes between elected state attorneys general and governors, for example, have sometimes slowed state government work in ways that would not occur if executive power was more centralized.[511] Moreover, government work is often complicated and involves issues that spill across various parts of government. Finely separated government can cause a variety of inefficiencies in this regard as separate offices are required to coordinate across government. Indeed, early twentieth-century efforts to re-organize state executive branches show how bureaucratic fragmentation can cause great inefficiencies.[512]

---

510. THE FEDERALIST NO. 10, *supra* note 34, builds in Madison's basic notion that smaller constituencies are easier to capture because:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

Id. at 52.

511. *See, e.g.*, Vikram David Amar, *Lessons from California's Recent Experience with Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General*, 59 EMORY L.J. 469, 470 (2009) (demonstrating that "the division of executive power . . . generates its own potential for mischief").

512. *See* Michael Besso, *Constitutional Amendment Procedures and the Informal Political Construction of Constitutions*, 67 J. POL. 69, 77 (2005). Another way to view this concern is to acknowledge that the separation of powers (however understood) sits within a much larger network of public law structures and doctrines designed to operate together in furtherance of good governance. *See* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN xi (2018) (describing the "competing values that undergird [federalism] and [analyzing it] through the theoretical models for interpreting federalism"). Adjusting one of these structures likely has knock-on effects for the operation of others and the system's overall outputs.

It is important to recognize and acknowledge these concerns. However, my claim in this Article is not that the state approach has always been successful or effective. It has failed on various occasions. My more modest claim is that, for better and worse, the states have practiced an alternative theory of the separation of powers that cannot be fully explained by reference to Madisonian theory and federal paradigms.

CONCLUSION

State government is of increasing significance in U.S. public law and life. As the Supreme Court and a deadlocked Congress leave many issues to the states, it is a mistake to assume that state government is a monolith that will easily decide new issues without internal contestation and conflict. The future of these important issues will frequently turn on which part of state government has the authority to decide. It is critical, therefore, that we have a clear understanding of how state government is organized and how conflicts between the branches, officers, and agencies of state government should be resolved. In many respects, the organization of state government is the new frontier in U.S. public law.

In this Article, I offer a useable and substantiated account of how state constitutions tend to approach the separation of powers. My core claim is that although state constitutions contain various internal checks and balances, the history, textual evolution, and practice of separation of powers in state constitutions shows that it is deeply oriented around allocating government power in ways that empower voters to hold government accountable. I have also shown how this theory can be turned into useful doctrine that better aligns separation-of-powers jurisprudence with the deep structure of state constitutional design—especially the majoritarian and democratic commitments at the center of state constitutionalism.

APPENDIX

Table 1. Separation-of-Powers Provisions in All State Constitutions (1776–2022)

State	Year of Adoption	SOP Prov?	Cite	In BoR?	Sep. Article?	Escape Clause?
Alabama	1819	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes
Alabama	1861	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes
Alabama	1865	Yes (2)	Art. III, §§ 1 & 2	No	Yes	Yes
Alabama	1868	Yes (2)	Art. III, §§ 1 & 2	No	Yes	Yes
Alabama	1875	Yes (2)	Art. III, §§ 1 & 2	No	Yes	Yes
Alabama	1901	Yes (2)	Art. III, §§ 42 & 43	No	Yes	Yes
Alabama	2022[513]	Yes (2)	Art. III, §§ 42 & 43	No	Yes	Yes
Alaska	1956	No	N/A	N/A	N/A	N/A
Alaska	2022	No	N/A	N/A	N/A	N/A
Arizona	1911	Yes	Art. III	No	Yes	Yes
Arizona	2022	Yes	Art. III	No	Yes	Yes
Arkansas	1836	Yes (2)	Art. III, §§ 1 & 2	No	Yes	Yes
Arkansas	1861	Yes (2)	Art. III, §§ 1 & 2	No	Yes	Yes
Arkansas	1864	Yes (2)	Art. III, §§ 1 & 2	No	Yes	Yes
Arkansas	1868	Yes (2)	Art. IV, §§ 1 & 2	No	Yes	Yes

513. The 2022 provisions reflect the author's coding of the constitutions as of 2022 to account for any amendments or additions.

Arkansas	1874	Yes (2)	Art. IV, §§ 1 & 2	No	Yes	Yes
Arkansas	2022	Yes (2)	Art. IV, §§ 1 & 2	No	Yes	Yes
California	1849	Yes	Art. III	No	Yes	Yes
California	1879	Yes	Art. III, § 1	No	Yes	Yes
California	2022	Yes (2)	Art. III, §§ 3, 3.5[514]	No	No	Yes
Colorado	1876	Yes	Art. III	No	Yes	Yes
Colorado	2022	Yes	Art. III	No	Yes	Yes
Connecti-cut	1818	Yes	Art. II	No	Yes	No
Connecti-cut	1965	Yes	Art. II	No	Yes	No
Connecti-cut	2022	Yes	Art. II	No	Yes	No
Delaware	1776	No	N/A	N/A	N/A	N/A
Delaware	1792	No	N/A	N/A	N/A	N/A
Delaware	1831	No	N/A	N/A	N/A	N/A
Delaware	1897	No	N/A	N/A	N/A	N/A
Delaware	2022	No	N/A	N/A	NA/	N/A
Florida	1839	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes
Florida	1861	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes
Florida	1865	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes
Florida	1868	Yes	Art. III	No	Yes	Yes
Florida	1886	Yes	Art. II	No	Yes	Yes
Florida	1968	Yes	Art. II, § 3	No	No	Yes

514. CAL. CONST. art. III, § 3.5 (providing that an administrative agency may not declare a statute unenforceable or refuse to enforce it because of the agency's determination that the statute is unconstitutional or conflicts with federal law unless an appropriate court has done so).

Florida	2022	Yes	Art. II, § 3	No	No	Yes
Georgia	1777	Yes	Art. I	No	Yes	No
Georgia	1789	No	N/A	N/A	N/A	N/A
Georgia	1798	Yes	Art. I, § 1	No	No (leg.)[515]	Yes
Georgia	1861	Yes	Art. II, § I, ¶ 1	No	No (leg.)	Yes
Georgia	1865	Yes	Art. II, § I, ¶ 1	No	No (leg.)	Yes
Georgia	1868	Yes	Art. I, § XXXI[516]	Yes	No	Yes
Georgia	1877	Yes	Art. I, § I, ¶ XXIII[517]	Yes	No	Yes
Georgia	1945	Yes	Art. I, § I, ¶ XXIII[518]	Yes	No	Yes
Georgia	1976	Yes	Art. I, § II, ¶ IV[519]	Yes	No	Yes
Georgia	1982	Yes	Art. I, § II, ¶ III[520]	Yes	No	Yes
Georgia	2022	Yes	Art. I, § II, ¶ III[521]	Yes	No	Yes
Hawaii	1950	No	N/A	N/A	N/A	N/A
Hawaii	2022	No	N/A	N/A	N/A	N/A

515. These entries reflect that the state constitution includes a stand-alone separation-of-powers provision located within the legislature article of the state constitution.

516. Article I of the 1868 constitution is the bill of rights.

517. Article I of the 1877 constitution is the bill of rights.

518. Article I of the 1945 constitution is the bill of rights.

519. Article I of the 1976 constitution is the bill of rights.

520. Article I of the 1982 constitution is the bill of rights.

521. Article I of the 2022 constitution is the bill of rights.

Idaho	1889	Yes	Art. II, § 1	No	Yes	Yes
Idaho	2023	Yes	Art. II, § 1	No	Yes	Yes
Illinois	1818	Yes (2)	Art. I, §§ 1 & 2	No	Yes	Yes
Illinois	1848	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes
Illinois	1870	Yes	Art. III	No	Yes	Yes
Illinois	1970	Yes	Art. II, § 1	No	Yes	No
Illinois	2023	Yes	Art. II, § 1	No	Yes	No
Indiana	1816	Yes	Art. II	No	Yes	Yes
Indiana	1851	Yes	Art. III, § 1	No	Yes	Yes
Indiana	2023	Yes	Art. III, § 1	No	Yes	Yes
Iowa	1846	Yes	Art. IV, § 1	No	Yes	Yes
Iowa	1857	Yes	Art. III, § 1	No	Yes	Yes
Iowa	2022	Yes	Art. III, § 1	No	Yes	Yes
Kansas	1859	No	N/A	N/A	N/A	N/A
Kansas	2022	No	N/A	N/A	N/A	N/A
Kentucky	1792	Yes (2)	Art. I, §§ 1 & 2	No	No (leg.)	Yes
Kentucky	1799	Yes (2)	Art. I, §§ 1 & 2	No	Yes	Yes
Kentucky	1850	Yes (2)	Art. I, §§ 1 & 2	No	Yes	Yes
Kentucky	1891	Yes (2)	§§ 27 & 28	No	Yes[522]	Yes

522. The 1891 Kentucky constitution uses headings, not numbered articles, to divide up its sections. Sections 27 and 28 are the only sections under the heading: "Distribution of the Powers of Government."

Kentucky	2022	Yes (2)	§§ 27 & 28	No	Yes[523]	Yes
Louisiana	1812	Yes (2)	Art. I, §§ 1 & 2	No	Yes	Yes
Louisiana	1845	Yes (2)	Tit. I, art. 1 & 2	No	Yes	Yes
Louisiana	1852	Yes (2)	Tit. I, art. 1 & 2	No	Yes	Yes
Louisiana	1861	Yes (2)	Tit. I, art. 1 & 2	No	Yes	Yes
Louisiana	1864	Yes (2)	Tit. II, art. 3 & 4	No	Yes	Yes
Louisiana	1868	No	N/A	N/A	N/A	N/A
Louisiana	1879	Yes (2)	Art. 14 & 15	No	Yes[524]	Yes
Louisiana	1898	Yes (2)	Art. 16 & 17	No	Yes[525]	Yes
Louisiana	1913	Yes (2)	Art. 16 & 17	No	Yes[526]	Yes
Louisiana	1921	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes
Louisiana	1974	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes
Louisiana	2022	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes
Maine	1819	Yes (2)	Art. III, §§ 1 & 2	No	Yes	Yes
Maine	2022	Yes (2)	Art. III, §§ 1 & 2	No	Yes	Yes

523. The current Kentucky constitution also uses headings, not numbered articles, to divide up its sections. Sections 27 and 28 are the only sections under the heading: "Distribution of the Powers of Government."

524. The 1879 Louisiana constitution uses headings to divide up its articles. Articles 14 and 15 are under the heading: "Distribution of Powers."

525. The 1898 Louisiana constitution uses headings to divide up its articles. Articles 16 and 17 are under the heading: "Distribution of Power."

526. The 1913 Louisiana constitution uses headings to divide up its articles. Articles 14 and 15 are under the heading: "Distribution of Powers."

Maryland	1776	Yes	Decl. of Rts., art. VI	Yes	No	No
Maryland	1851	Yes	Decl. of Rts., art. 6	Yes	No	No
Maryland	1864	Yes	Decl. of Rts., art. 8	Yes	No	No
Maryland	1867	Yes	Decl. of Rts., art. 8	Yes	No	No
Maryland	2022	Yes	Decl. of Rts., art. 8	Yes	No	No
Massachu-setts	1780	Yes	Pt. I, art. XXX [527]	Yes	No	No
Massachu-setts	2023	Yes	Pt. I, art. XXX [528]	Yes	No	No
Michigan	1835	Yes	Art. III, ¶ 1	No	Yes	Yes
Michigan	1850	Yes (2)	Art. III, §§ 1 & 2	No	Yes	Yes
Michigan	1908	Yes (2)	Art. IV, §§ 1 & 2	No	Yes	Yes
Michigan	1963	Yes	Art. III, § 2	No	No	Yes
Michigan	2022	Yes	Art. III, § 2	No	No	Yes
Minnesota	1857	Yes	Art. III, § 1	No	Yes	Yes
Minnesota	2023	Yes	Art. III, § 1	No	Yes	Yes
Mississi-ppi	1817	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes
Mississi-ppi	1832	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes

527. Part I of the Massachusetts 1780 constitution is the declaration of rights. MASS. CONST. of 1780, pt. I.

528. Part I of Massachusetts's modern constitution is the declaration of rights. MASS. CONST. pt. I.

Mississippi	1869	Yes (2)	Art. III, §§ 1 & 2	No	Yes	Yes
Mississippi	1890	Yes (2)	Art. I, §§ 1 & 2	No	Yes	No
Mississippi	2023	Yes (2)	Art. I, §§ 1 & 2	No	Yes	No
Missouri	1820	Yes	Art. II	No	Yes	Yes
Missouri	1865	Yes	Art. III	No	Yes	Yes
Missouri	1875	Yes	Art. III	No	Yes	Yes
Missouri	1945	Yes	Art. II	No	Yes	Yes
Missouri	2023	Yes	Art. II, § 1	No	Yes	Yes
Montana	1889	Yes	Art. IV, § I	No	Yes	Yes
Montana	1972	Yes	Art. III, § 1	No	No	Yes
Montana	2022	Yes	Art. III, § 1	No	No	Yes
Nebraska	1866	No	N/A	N/A	N/A	N/A
Nebraska	1875	Yes	Art. II, § 1	No	Yes	Yes
Nebraska	2022	Yes	Art. II, § 1[529]	No	Yes	Yes
Nevada	1864	Yes	Art. III, § 1	No	Yes	Yes
Nevada	2022	Yes	Art. III, § 1	No	Yes	Yes
New Hampshire	1776	No	N/A	N/A	N/A	N/A

529. *See also* NEB. CONST. art. II, § 2 (providing that, despite § 1, "supervision of individuals sentenced to probation, released on parole, or enrolled in programs or services established within a court may be undertaken by either the judicial or executive department, or jointly, as provided by the Legislature").

New Hampshire	1784	Yes	Pt. I, art. XXXVII[530]	Yes	No	Yes*[531]
New Hampshire	2022	Yes	Pt. I, art. 37[532]	Yes	No	Yes*
New Jersey	1776[533]	Yes	Art. I	No	Yes	No
New Jersey	1844	Yes	Art. III, para. 1	No	Yes	Yes
New Jersey	1947	Yes	Art. III, para. 1	No	Yes	Yes
New Jersey	2022	Yes	Art. III, para. 1	No	Yes	Yes
New Mexico	1911	Yes	Art. III, § 26	No	Yes	Yes
New Mexico	2022	Yes	Art. III, § 1	No	Yes	Yes
New York	1777	No	N/A	N/A	N/A	N/A
New York	1822	No	N/A	N/A	N/A	N/A
New York	1846	No	N/A	N/A	N/A	N/A

530. Part I of New Hampshire's 1784 constitution is the bill of rights.

531. These starred entries indicate provisions that do not contain explicit escape clauses, but they include additional language implying the escape concept. *See, e.g.*, N.H. CONST. of 1784, pt. I, art. XXXVII ("In the government of this state the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from and independent of each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.").

532. Part I of New Hampshire's modern constitution is the bill of rights. N.H. CONST. art. 37, pt. I.

533. Article I of the 1776 New Jersey constitution says "[t]hat the government of this Province shall be vested in a Governor, Legislative Council, and General Assembly" without making explicit the exclusive spheres of power of each of the branches. N.J. CONST. of 1776, art. I. Yet, in historical context, this provision suggests a recognition of the connection between written constitutions, popular sovereignty, and the positive act of curating government structure. Thus, I have flagged it as an example of an early separation-of-powers provision.

New York	1894	No	N/A	N/A	N/A	N/A
New York	2022	No	N/A	N/A	N/A	N/A
North Carolina	1776	Yes	Decl. of Rts., § IV	Yes	No	No
North Carolina	1868	Yes	Ch. I, art. I, § 8[534]	Yes	No	No
North Carolina	1970	Yes	Art. I, § 6[535]	Yes	No	No
North Carolina	2022	Yes	Art. I, § 6[536]	Yes	No	No
North Dakota	1889	No	N/A	N/A	N/A	N/A
North Dakota	2022	No	N/A	N/A	N/A	N/A
Ohio	1802	No	N/A	N/A	N/A	N/A
Ohio	1851	No	N/A	N/A	N/A	N/A
Ohio	2022	No	N/A	N/A	N/A	N/A
Oklahoma	1907	Yes	Art. IV, § 1	No	Yes	Yes
Oklahoma	2022	Yes	Art. IV, § 1	No	Yes	Yes
Oregon	1857	Yes	Art. III, § 1	No	Yes	Yes
Oregon	2022	Yes (4)	Art. III, § 1[537]	No	Yes	Yes

534. Article I of the 1868 North Carolina constitution is the declaration of rights. N.C. CONST. of 1868, art. I.

535. Article I of the 1970 North Carolina constitution is the declaration of rights. N.C. CONST. of 1970, art. I.

536. Article I of North Carolina's modern constitution is the declaration of rights. N.C. CONST. art. I.

537. *See also* OR. CONST. art. III, § 2 (authorizing the legislature "to establish an agency to exercise budgetary control over all executive and administrative state officers, departments, boards, commissions and agencies of the State Government"); *id.* § 3 (authorizing the legislature to establish a "joint committee" of its own members to exercise emergency budget control); *id.* § 4 (allowing the legislature to make all gubernatorial appointments for state offices subject to

Pennsylvania	1776	No	N/A	N/A	N/A	N/A
Pennsylvania	1790	No	N/A	N/A	N/A	N/A
Pennsylvania	1838	No	N/A	N/A	N/A	N/A
Pennsylvania	1873	No	N/A	N/A	N/A	N/A
Pennsylvania	1968	No	N/A	N/A	N/A	N/A
Pennsylvania	2022	No	N/A	N/A	N/A	N/A
Rhode Island	1842	Yes	Art. III	No	Yes	No
Rhode Island	1986	Yes	Art. V	No	Yes	No
Rhode Island	2022	Yes	Art. V	No	Yes	No
South Carolina	1776	No	N/A	N/A	N/A	N/A
South Carolina	1778	No	N/A	N/A	N/A	N/A
South Carolina	1790	No	N/A	N/A	N/A	N/A
South Carolina	1861	No	N/A	N/A	N/A	N/A
South Carolina	1865	No	N/A	N/A	N/A	N/A
South Carolina	1868	Yes	Art. I, § 26[538]	Yes	No	No

senate confirmation). The structure of Art III of the the Oregon constitution places §§ 2–4 under the general heading of "Distribution of Powers." These specific and contextual carveouts/customizations relative to the default separation-of-powers provisions in § 1 demonstrate the state approach to separation-of-powers theory.

538. Article I of the South Carolina 1868 constitution is the declaration of rights. S.C. CONST. of 1868, art. I.

South Carolina	1895	Yes	Art. I, § 14[539]	Yes	No	No
South Carolina	2022	Yes	Art. I, § 8[540]	Yes	No	No
South Dakota	1889	Yes	Art. II	No	Yes	Yes*
South Dakota	2022	Yes	Art. II	No	Yes	Yes*
Tennessee	1796	No	N/A	N/A	N/A	N/A
Tennessee	1835	Yes (2)	Art. II, §§ 1 & 2	No	No (leg.)	Yes
Tennessee	1870	Yes (2)	Art. II, §§ 1 & 2	No	No (leg.)	Yes
Tennessee	2022	Yes (2)	Art. II, §§ 1 & 2	No	Yes	Yes
Texas	1845	Yes	Art. II	No	Yes	Yes
Texas	1861	Yes	Art. II, § 1	No	Yes	Yes
Texas	1866	Yes	Art. II, § 1	No	Yes	Yes
Texas	1869	Yes	Art. II, § 1	No	Yes	Yes
Texas	1876	Yes	Art. II, § 1	No	Yes	Yes
Texas	2022	Yes	Art. II, § 1	No	Yes	Yes
Utah	1895	Yes	Art. V, § 1	No	Yes	Yes
Utah	2022	Yes	Art. V, § 1	No	Yes	Yes

539. Article I of the South Carolina 1895 constitution is the declaration of rights. S.C. CONST. of 1895, art. I.

540. Article I of South Carolina's modern constitution is the declaration of rights. S.C. CONST. art. I.

Vermont	1777	Yes[541]	Ch. II, §§ I–IV	No	No	Yes*
Vermont	1786	Yes	Ch. II, § VI	No	No	No
Vermont	1793	Yes	Ch. II, § VI	No	No	No
Vermont	2022	Yes	Ch. II, § V	No	No	No
Virginia	1776	Yes (2)	Const., § III; Decl. of Rts., § 5	Yes/No	No	No
Virginia	1830	Yes (2)	Const., Art. II; Bill of Rts., § 5	Yes/No	No/Yes	No
Virginia	1851	Yes (2)	Const., Art. II; Bill of Rts., § 5	Yes/No	No/Yes	No
Virginia	1864	Yes (2)	Const., Art. II; Bill of Rts., § 5	Yes/No	No/Yes	No
Virginia	1869	Yes (2)	Art. I, § 7;[542] art. II	Yes/No	No/Yes	Yes
Virginia	1902	Yes (2)	Art. I, § 5;[543] art. III	Yes/No	No/Yes	Yes

541. Vermont's 1777 constitution established government "by a Governor, Deputy Governor, Council, and an Assembly of the Representatives of the Freemen." VT. CONST. of 1777, ch. II, § I. Further, it stated that "[t]he supreme legislative power shall be vested in a House of Representatives," *id.* § II, "[t]he supreme executive power shall be vested in a Governor and Council," *id.* § III, and that "[c]ourts of justice shall be established in every county in this State," *id.* § IV. But it did not explicitly state that each branch wielded its power to the exclusion of the others.

542. Article I of the Virginia 1869 constitution is the bill of rights. VA. CONST. of 1869, art. I.

543. Article I of the Virginia 1902 constitution is the bill of rights. VA. CONST. of 1902, art. I.

Virginia	1970	Yes (2)	Art. I, § 5;[544] art. III, § 1	Yes/No	No/Yes	No*
Virginia	2022	Yes (2)	Art. I, § 5;[545] art. III	Yes/No	No/Yes	No*
Washing-ton	1889	No	N/A	N/A	N/A	N/A
Washing-ton	2022	No	N/A	N/A	N/A	N/A
West Virginia	1863	Yes	Art. I, § 4	No	No	No
West Virginia	1872	Yes	Art. V, § 1	No	Yes	No
West Virginia	2022	Yes	Art. V, § 1	No	Yes	No
Wisconsin	1848	No	N/A	N/A	N//A	N/A
Wisconsin	2022	No	N/A	N/A	N/A	N/A
Wyoming	1889	Yes	Art. II, § 1	No	Yes	Yes
Wyoming	2022	Yes	Art. 2, § 1	No	Yes	Yes

544. Article I of the Virginia 1970 constitution is the bill of rights. VA. CONST. of 1970, art. I.

545. Article I of Virginia's modern constitution is the bill of rights. VA. CONST. art. I.