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Popular Accountability and State Constitutional Law

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EXECUTIVE SUMMARY

In this article, Professor Jonathan Marshfield highlights a crucial difference between the U.S. Constitution and state constitutions: how they define "democracy." He explains that while the U.S. Constitution is designed to protect against rash majoritarianism through complex checks and balances, state constitutions are grounded in what he calls "popular accountability constitutionalism." That term refers to the idea that state governments should remain ultimately accountable to the preferences of the state's median voter, not just indirectly through elected representatives but also through direct mechanisms like the initiative, referendum, recall, and constitutional conventions.

Part I explains how the U.S. Constitution limits popular influence through structural design. The Framers feared factionalism and intentionally created a system that diffuses democratic energy through representation, federalism, and entrenched rules.

Part II contrasts this with state constitutions, which emerged from a different set of concerns. State founders worried more about elite corruption than majority overreach and designed constitutions that embraced mechanisms of direct democratic intervention. Professor Marshfield traces how this popular accountability has persisted and evolved through history, from elected governors and judges to constitutional agencies and ballot initiatives. He provides data showing that nearly every state constitution contains numerous provisions explicitly designed to foster accountability to the people. These provisions help explain why state constitutions are often longer, more detailed, and more frequently amended than their federal counterpart.

In Part III, Professor Marshfield argues that courts interpreting state constitutions should take this structural difference seriously. He provides a framework for judicial decision-making rooted in the idea that limitations on popular accountability should be questioned. Courts should also be skeptical of doctrines borrowed from federal law that are premised on institutional arrangements that don't exist in state systems. Professor Marshfield shows that this framework has implications across legal doctrines—from structural questions to rights and remedies. He illustrates how popular accountability can help explain the unique features of state constitutions and supports a more

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independent and authentic approach to state constitutional interpretation. He concludes that while this approach may not always yield clear answers, it offers a more principled way to understand and develop state constitutional law on its own terms.

Finally, in Part IV, Professor Marshfield argues that popular accountability in state constitutional law has implications for jurists who follow originalist and non-originalist approaches to constitutional adjudication.

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American constitutionalism operates against the backdrop of democratic processes, but there are critical differences between how the federal and state constitutions have institutionalized democratic accountability. The federal constitution is built to fend off rash majoritarianism through internal checks and balances and siphoning democratic accountability into a few highly mediated representative bottlenecks – elections for President and Congress. State democratic structure is different. State constitutions do not reflect a categorical commitment to representative democracy. Through processes like the citizen initiative, referendum, recall, popular constitutional conventions, judicial elections, and elections for multiple executive and local officials, state constitutional democracy is built around parallel commitments to the purifying virtues of representation and the potency of direct popular interjection in governance – what I call "popular accountability constitutionalism."

These differences between federal and state democracy should inform how courts decide constitutional cases. Specifically, courts should embrace popular accountability as a legitimate and important state constitutional priority with no clear analog in federal constitutional doctrine. This shift in orientation should empower state courts to depart from federal doctrines that unduly limit or undermine popular democratic involvement in state governance.

This paper explores this idea in detail and provides practical frameworks for state courts. It identifies specific areas where state courts should reconsider federal constitutional precedent and grapples with how state courts might implement a more authentic version of state constitutional structure.

Introduction

American constitutionalism operates against the backdrop of democratic processes, but there are critical differences between how the federal and state constitutions have structured democracy.[1] The federal constitution is designed to perpetuate a highly mediated, representative, and stable form of democratic governance.[2] Through federalism, the tripartite separation of powers, bicameralism, the electoral college, judicial independence, and the omission of any forms of direct democracy, the federal constitution places great trust in representation and divided

[1] *See* 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, 89-90 (Elliot Abrams ed. 2002).

[2] *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006); RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION (2016).

powers to help mitigate the dangers of national populism and rash majoritarianism.[3] As Madison proudly explained in *Federalist 63*, the United States Constitution is defined by "the total exclusion of the people in their collective capacity" from day-to-day governance.[4]

State democratic structure is different.[5] Unlike the federal constitution, state constitutions do not reflect a categorical commitment to representative democracy.[6] Through processes like the citizen initiative, referendum, recall, popular constitutional conventions, elected judges, and "unbundled" executives, state constitutions reflect a deep skepticism of elected officials and great trust in active popular majorities to correct and control government.[7] This is not to suggest that state constitutions wholly displace representative democracy.[8] They do not. However, as compared to the federal constitution, state constitutions reflect parallel commitments to the purifying virtues of representation and the potency of direct popular interjections in governance.[9] In the state tradition, both are necessary for good and accountable government.

My core claim in this article is that state constitutionalism is uniquely committed to what I call "popular accountability constitutionalism." I define popular accountability constitutionalism to mean that state government outputs should ultimately align with the preferences of the state's median voter. Popular accountability is not unrestrained majoritarianism, nor does it seek day-to-day direct popular governance.[10] Indeed, popular accountability recognizes that representation can help steer government towards better outcomes and that some misalignment is even desirable, but it also recognizes that representation is susceptible to corruption and malignant misalignment.[11] Thus, popular accountability aspires to overlay representative governance with institutions and processes that empower extant majorities to intervene when they deem it necessary and worthwhile. The driving principle is that government is built to enlist representatives in the yeomen's work of governance, but final settling of government outputs ends with extant majorities. Representation is a means, but not the end of good governance.

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[3] *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 667 (2011); KENNETH MILLER, DIRECT DEMOCRACY AND THE COURTS 19-21 (2009).

[4] *Federalist 63*.

[5] *See* Tarr, *supra* note 1, at 89.

[6] *Id*.

[7] G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 78 n.73 (1998) (noting that state constitutions were constructed to protect and empower political majorities against corrupt elite minorities and that the "contrast with Federalist no. 10 . . . could hardly be more striking"). This perspective on state constitutional orientation is prolific in the state constitutional convention debates where these documents were forged and reformed. *See* IND. 1850-51, 683 ("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 spend money enough to carry"); 2 *Mass*. 1917-19, 946-47 ("We have found that in our 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").

[8] *See* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 598-99 (2023) (exploring historical push-and-pull between representative democracy and direct democracy in state constitutional design).

[9] *Id*.

[10] Popular accountability often runs parallel with well-known processes of direct democracy like the initiative, referendum, and recall, but it is a broader and deeper constitutional principle that views direct democracy as a means rather than an end. That is, direct democracy can produce outcomes that both undermine and facilitate popular accountability. For example, if a successful initiative does not reflect the actual preferences of a state majority, then it has not obviously contributed to popular accountability.

[11] Thus, popular accountability does not aim to replace representative governance with direct democracy, but it refuses to accept representation as democracy's endpoint.

The federal constitution does not embrace popular accountability as I define it here. To be sure, the federal constitution is built on democratic norms and has become more democratic over time, but it remains "wholly republican."[12] That is, national popular majorities have no direct line of interjection into federal governance. The federal constitution funnels all pathways of political accountability back into representative offices and mediated institutions. Congress is not popularly accountable because the Senate regulates whatever popular gains accrue in the House of Representatives.[13] Even the Presidency, the office most tightly connected to national popular majorities, is moderated in favor of federalism through the electoral college and various horizontal checks on executive power.[14] Federal courts are, of course, even more entrenched and mediated than either the President or Congress.[15] To top it off, the Constitution does not provide any popular mechanism for changing these structures because Article V's amendment rules run through super-majorities in Congress and the states.[16] As Professor Sanford Levinson has concluded, the federal constitution is a series of "undemocratic" arrangements locked away from popular majorities by Article V's "iron cage."[17]

State constitutions are built around a wholly different theory.[18] Rather than organize power to moderate popular majorities, state constitutions universally draw on them for legitimacy and preservation.[19] For example, since 1776, the first Article of Virginia's constitution has made clear that all power is vested in the people and that "whenever any government shall be found inadequate . . . , a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal."[20] The story of state constitutionalism since the Founding has been about how to operationalize and stabilize this deep and extreme commitment to popular accountability. The states have taken many twists and turns on this journey: from unrestrained populist legislatures to frequent constitutional conventions, elected judges, recall, referenda, and the initiative. Throughout this history, representative governance was part of the calculus, but popular accountability remained an unwavering state constitutional polestar.[21]

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[12] *See Federalist 39*; MADISON, ON THE VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (1787); BARNETT, *supra* note 2, at 52-61.

[13] *Id*. at 25.

[14] *See* LEVINSON, *supra* note 2, at 79.

[15] *Id*. at 123.

[16] *See* U.S. CONST. art. V.

[17] LEVINSON, *supra* note 2, at 159. This was, of course, by design and serves various important purposes – especially as a national constitution. My point is not that this reflects bad normative choices in constitutional design. My point is that state constitutions and the federal constitution have a fundamentally different orientation regarding the structure of democracy.

[18] *See* TARR, *supra* note 1, at 78.

[19] *See id*.; *infra* Part II.B (figure charting popular sovereignty and agency provisions in all extant state constitutions).

[20] *See* VA. DECL. RIGHTS 1776 § 2; VA CONST. 1971 §§2-3.

[21] Indeed, the Massachusetts Constitution (along with several others), makes this explicit: "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. part 1 art. V; *see also* VA CONST. 1971 §2 ("That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them."); VT CONST. chpt 1 art 6 ("That all power being originally inherent in and co[n]sequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.").

Recognizing popular accountability as deeply embedded in state constitutionalism helps explain why state constitutions look different than the federal constitution. Unlike the federal constitution, which is a sparse framework document designed to last for generations, state constitutions are long, detailed, unstable, and include many provisions that look more like statutes or agency rules than higher law.[22] As a result, it's easy to discount state constitutions as frivolous and devoid of any meaningful underlying structure or theory.[23] However, popular accountability helps make sense of these features. State constitutions are not framework documents designed to set up entrenched government beyond the reach of majorities. Instead, they are self-described active instruments of popular control over government. Their principal purpose is to launch government on behalf of the people and formalize realistic tools for ongoing popular accountability. Thus, they reflect fits-and-starts of popular intervention in governance as majorities have, from time to time, realigned state government. Sometimes these adjustments make detailed changes to misaligned substantive policy.[24] Other times, they change political processes and institutions to address structural failures.[25] In any event, a state constitution is fundamentally an account of the push-and-pull between a state's people and their government.

Recognizing popular accountability as uniquely embedded in state constitutionalism should also inform how state courts decide state constitutional cases and assess non-binding federal precedent. I offer two practical implications to help guide state courts. First, when state courts adopt doctrines that impede popular accountability, they, unlike federal courts, should provide an explanation for how those rules cohere with the commitment to popular accountability.[26] It is inherently improper for state courts to assert that limiting popular accountability is a self-justifying objective. To be sure, limitations on popular accountability are appropriate (and prevalent) in state constitutional law, but such intrusions cannot be legitimated on the basis that they are intrinsic to the nature of American constitutionalism. State constitutions explicitly reject this.

Second, and relatedly, state courts should be deeply suspicious of any federal doctrine that is based on federal institutional analysis.[27] Consistent with its underlying design logic, the federal constitution has produced a relatively stable set of institutions and processes with archetypal functions designed to entrench the status quo. In contrast, state constitutions have produced a dizzying array of highly contextual and idiosyncratic institutions, processes, and detailed text reflecting fits and spurts of popular reaction to recalcitrant government.[28] State courts should be careful to take these arrangements seriously as a core feature of state constitutionalism and resist doctrines that reduce them down to inapposite Federalist tropes.

To illustrate, consider a recent example from administrative law. In 2022, in *West Virginia v.*

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[22] *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CH. L. REV. 1641 (2014); Mila Versteeg & Emily Zackin, *Constitutions Un-Entrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. P. SCI. REV. 657 (2016).

[23] *See* LEONARD W. LEVY, THE EMERGENCE OF A FREE PRESS 184 (1985) (describing state constitutions as "primitive", "ineffective", "flabby", and "namby-pamby.").

[24] *See* JOHN DINAN, STATE CONSTITUTIONAL POLITICS 153-265 (2018) (documenting and cataloging the thousands of state policy amendments over time).

[25] *See id*. at 37-73 (documenting and cataloguing structural amendments over time).

[26] *See infra* Part III.A.1 (developing and defending this).

[27] *See infra* Part III.A.2 (same).

[28] *See generally* Marshfield, *supra* note 8, at 560-72 (exploring structural arrangements over time in state constitutions); DINAN, *supra* note 24, at 37.

EPA,[29] the Supreme Court adopted a broad version of the so-called major-questions doctrine. The doctrine provides that agencies may regulate issues of great "economic and political significance" only when Congress has passed a clear and explicit authorization.[30] A principal justification for the rule is that Congress should have the presumptive authority to make important policy decisions rather than unaccountable agencies and bureaucrats.[31] By funneling important policy decisions back through the full legislative process and away from insulated agencies, the rule is ostensibly a democracy-enhancing measure within the federal government.[32]

Within days of the Supreme Court's ruling in 2022, state courts began to reference the major-questions doctrine in cases involving the authority of state agencies.[33] In many of these cases, courts parroted the Supreme Court's democratic accountability rationale, suggesting that state legislatures must be the presumptive home of policy-making authority for state government to remain democratically accountable.[34] Applying the rule, state courts have invalidated agency rules and executive orders as *ultra vires*, and the doctrine continues to spread across state courts.[35]

But this rapid wholesale adoption by state courts might be more complicated and even counter-productive if we look at the issue through the lens of state popular accountability constitutionalism.[36] From the Supreme Court's perspective, federal agencies are accountable only to Congress and the President.[37] Thus, there is understandable concern that independent agencies might lack public accountability if they can grow their own power through opaque and expansive statutory construction.[38] However, if we approach the question of state agency accountability with sensitivity to how states have pursued popular accountability in their constitutional structures, there is a lot to see that does not exist at the federal level.

Consider, for example, the legislative veto for agency rules.[39] Congress can't do this because

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[29] 597 U.S. 697 (2022).

[30] *Id*. at 721.

[31] *Id*. at 720-22; *id*. at 737-38 (Gorsuch, J, concurring) ("It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable ministers."). This rationale works in conjunction with another principal rationale: courts decide law.

[32] *See id*. at 737-38 (Gorsuch, J., Concurring). Critics of the rule argue that it works against democracy because it gives courts more power than agencies. *See* Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CAL. L. REV. 899 (2024); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. 1009 (2023) ("It supplies an additional means for minority rule in a constitutional system that already skews toward minority rule").

[33] *See, e.g.*, Roberts v. State, 512 P.3d 1007, 1017-18 (Ariz. 2022) (decided 8 days after *West Virginia v. EPA*); Evan C. Zoldan, *The Major Questions Doctrine in the States*, 101 WASH. U. L. REV. 359, 375 (2023) (tracing early state court reliance on *West Virginia v. EPA*).

[34] *See, e.g.*, Abbott v. Harris County, 672 S.W.3d 1 (Tex. 2023) (invalidating executive action because of "enormity" of issue and importance of having legislature – rather than governor – speak on issue); Associated Builders & Contractors of Michigan v. Dep't of Tech., Mgmt., & Budget, No. 363601, 2024 WL 387089, at *5 (Mich. Ct. App. Feb. 1, 2024) (endorsing doctrine wholesale but finding it did not apply to state statute).

[35] *See* Zoldan, *supra* note 32, at 375.

[36] *See also id*. (providing reasons why states should be cautions in adopting doctrine).

[37] *See, e.g.*, *West Virginia*, 597 U.S. 737-38 (Gorsuch, J., concurring).

[38] *See* Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, STANFORD UNIVERSITY, THE HOOVER INSTITUTION CENTER FOR REVITALIZING AMERICAN INSTITUTIONS (2023).

[39] On the legislative veto in the states, see DINAN, *supra* note 24, at 58-59; DEREK CLINGER & MIRIAM SEIFTER, UNPACKING STATE LEGISLATIVE VETOES 9 (2023); Miriam Seifter, *State Legislative Vetoes and State Constitutionalism*, 99 N.Y.U. L. REV. 2017 (2024).

the Supreme Court held it unconstitutional in *Chadha v. INS*.[40] However, most states reject *Chadha* and provide a formal process for legislators to review, reject, suspend, or modify agency rules before they are finalized.[41] This means that state agency rules are already reviewed by state legislators as a matter of course in many states. In North Carolina, for example, legislators recently vetoed nearly 100 agency rules per year.[42] Thus, it's unclear why the major-questions doctrine is necessary in these states to prevent agency creep through self-interested statutory construction, because elected state legislators already have a veto process.[43]

Moreover, state agencies are often checked by other unique state forces.[44] They work in an environment where other powerful institutions actively compete.[45] Elected state courts, for example, have explicit rule-making powers and set policy on a broad range of issues that directly affect agencies.[46] Elected executive officials also have important policy-making powers.[47] The initiative and referendum process also allows voters in many states to affect policy directly, and voters often mobilize in response to state agency failures.[48] In short, state agencies are not nearly as insulated from democratic forces as federal agencies can be. In many respects, state agencies are just one link in the state-policy chain, and they are subject to many unique and potent democratic checks that the states have strung together over time.

Additionally, many states have explicitly incorporated key agencies into their constitutional text and created independent boards to run those agencies.[49] This model grew from public concern about serious legislative failures in areas where legislatures were dominated by special interests (such as railroad regulation, conservation, and, more recently, marijuana legalization).[50] In those instances, voters chose to strip state legislatures of authority and create constitutional agencies protected from legislative influence and more visible to the public.[51] For those constitutional agencies, the major-questions doctrine is a perversion. The whole purpose of the constitutional agency is to enhance democratic accountability by protecting the agency from legislative dysfunction. It makes little sense to adopt a rule in the name of democratic accountability that skews power towards the legislature, the avowed source of the democratic failure.

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[40] 462 U.S. 919, 928 (1983).

[41] CLINGER & SEIFTER, *supra* note 39, at 1 (surveying legislative veto in states and finding "in at least 24 states, statutes (and sometimes state constitutions) establish a "legislative veto" system in which the state legislature—or a subset of the legislature—can reject or temporarily suspend agency rulemaking outside of the conventional lawmaking process, while 11 more states utilize models of legislative involvement that are close cousins").

[42] *Id*. at 2.

[43] As I explain in Part III.B.1, popular accountability constitutionalism can help tee up an even more nuanced perspective on the legislative veto. As it turns out, some states implement the veto in ways that undermine democratic review of agency rules because they empower small legislative subcommittees to mute agency rules.

[44] *See* Jonathan L. Marshfield, *Popular Regulation? State Constitutional Amendment and the Administrative State*, 8 BELMONT L. REV. 342 (2021). For an important account of how state agencies lack public accountability in unique ways, see Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018).

[45] *See* Zoldan, *supra* note 32, at 376-95.

[46] *See* Adam B. Sopko, T*he Supervisory Power of State Supreme Courts*, 98 S. CAL. L. REV. (forthcoming 2024).

[47] *See* Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 499 (2107).

[48] *See* Marshfield, *supra* note 44, at 358-70 (reviewing various forms of initiative amendments directed at regulatory state).

[49] *See* Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537 appendix A (2019); Marshfield, *supra* note 44, at 360-64 (tracing history of constitutional agencies).

[50] *See* Marshfield, *supra* note 44, at 360-64.

[51] *See id*.

All of this suggests that the Supreme Court's democratic accountability rationale from *West Virginia v. EPA* may, at best, be an unnecessary interjection into state administrative law. At worst, it could frustrate democratic accountability because it pulls state agency decisions away from the unique processes of accountability already developed in the states and siphons them into courts for adjudication under a federally concocted standard. Looking at this issue through the lens of state popular accountability reveals these possible disconnects. It might also suggest more constructive and authentic state alternatives. For example, it might make sense for state courts to incorporate the legislative veto into their statutory analysis. If a challenged regulation relies on a plausible interpretation of an agency's law, and the regulation was subject to a democratically robust legislative veto, courts could defer to the legislature's acquiescence and uphold the regulation without the same legislative accountability concerns that may exist under the federal constitution.

Of course, viewing state constitutional disputes through the lens of popular accountability is not a panacea that will always generate clear and predictable outcomes. In fact, it will likely raise new and difficult questions. My modest claim is that popular accountability is a useful and largely underappreciated framework for authentically domesticating constitutional ideas under state constitutions. Understanding how state constitutions approach popular accountability helps decode some of the most cryptic features of state constitutions and provides a useful polestar in resolving state constitutional disputes.

This Article proceeds in four major parts. Part I outlines the features of federal democratic accountability. Part II explores how state democratic structure is different and argues that popular accountability is deeply embedded in state constitutional history, text, and structure. Part III proposes a framework for incorporating popular accountability into state constitutional doctrine and explores it in the context of real cases. Some of the cases illustrate how state courts have already invoked modes of reasoning grounded in popular accountability. Other cases illustrate how popular accountability could help state courts better assess constitutional disputes. Finally, Part IV offers a few brief thoughts on how popular accountability is a useful framework for state court judges of all interpretive persuasions.

I. THE STRUCTURE OF FEDERAL ACCOUNTABILITY

The federal constitution is built to retain power in the people but protect against rash majoritarianism. The founders were not shy about this,[52] and I believe it to be a mostly uncontested assessment of the federal constitution's (un)democratic structure. In this section, I trace what this means for the structure of democratic accountability. I argue that the pathways for democratic accountability are intentionally limited to elections for Congress and the President, and decentralizing power to the states. To be sure, these choices present some complex scenarios, but as compared to the states, they offer a very limited structural matrix, and they exclude any direct popular interjections in federal governance. Charting this environment is important because it helps showcase how the states are different, and, as a result, how state constitutional law might diverge from federal law in principled and authentic ways.

[52] *See, e.g*, Federalist 39.

A. Republican Government and Accountability

The federal founders were deeply committed to popular sovereignty, but they also "obsessed" over the dangers of rash majoritarianism.[53] The principal challenge in designing the federal constitution, according to Madison, was to build a "popular government" that could also "provide a proper cure" for the "violence of faction."[54] Madison's 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.[55] 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.[56]

To solve this problem, the founders built the federal constitution around several important ideas that can loosely be described as republican government.[57] First, popular sovereignty would be preserved by subjecting certain government officials to regular and frequent elections.[58] As Madison (or Hamilton) explained in Federalist 52, "[f]requent elections are unquestionably the only policy by which" to ensure that government has "an immediate dependence on, and an intimate sympathy with, the people." This strategy was uncontroversial for members of the House, and it ultimately prevailed (in a form moderated by the electoral college) for selection of the president.[59]

Second, the federal constitution should reject any form of direct popular involvement in governance.[60] That is, representation should displace "pure democracy," which Madison described "as a society consisting of a small number of citizens, who assemble and administer the government in person."[61] According to Madison, representation and democratic scale were essential strategies for curing the ills of majority faction.[62] Electing representatives from large districts was more likely

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[53] Jack N. Rakove, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 55 (2d. ed. 2002); 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").

[54] *Federalist 10* ("The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it.").

[55] *Federalist 51*; RAKOVE, AMERICAN REPUBLIC, *supra* note 53, at 55.

[56] Letter from Madison to Jefferson (Oct. 17, 1788), *in* JACK N. RAKOVE, DECLARING RIGHTS 160, 161-62 (1998).

[57] BARNETT, *supra* note 2, at 52.

[58] *Federalist 37* ("the genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those [e]ntrusted with it should be kept in dependence on the people, by a short duration of their appointments."); *Federalist 51* ("A dependence on the people is, no doubt, the primary control on the government").

[59] *Federalist 68*.

[60] *See* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON (1994)

[61] *Federalist 10.*

[62] *Id*. ("pure democracy, . . . can admit of no cure for the mischiefs of faction. . . . A republic, by which I mean a

to produce a deliberative body of wise and patriotic rulers who together would "enlarge the public views," avoid "temporary or partial considerations," and "discern the true interest of their country."[63] Thus, Madison believed that "the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves."[64] As Kenneth Miller has explained, the Founder's theory of popular sovereignty was that "the people exercised power, but indirectly, through the mediation of representatives."[65]

Third, the Founders concluded that elections were not enough to protect against the ills of pure democracy and tyranny.[66] The constitution needed "auxiliary precautions" to ensure that it worked towards the common good.[67] To do this, they constructed various internal checks on political power and erected various layers of separation between popular majorities and government outputs. One layer was the exclusion of direct democracy. A second layer was bicameralism with a malapportioned senate. A third was the electoral college. A fourth was an independent judiciary. There are more, 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 hope was that these layers and checks would temper and purify majoritarian impulses by "insulating [officials] from the heat of majoritarian political pressure."[68]

Of course, the federal constitution has evolved and changed since the Founding. The Seventeenth Amendment, for example, made senators directly elected by state populations.[69] The Fifteenth, Nineteenth, and Twenty-Sixth Amendments expanded the franchise in important ways.[70] However, despite these and other changes, the federal constitution remains "wholly republican." That is, national popular majorities have no way of interjecting directly into federal governance or holding the federal government accountable other than through presidential or congressional elections.

Indeed, even as the Roberts Court has emphasized "democracy" in many of its recent structural rulings,[71] it continues to affirm that federal accountability flows exclusively through the President and Congress.[72] As Justice Gorsuch recently explained regarding the President, without "presidential responsibility, there can be no democratic accountability for [federal] executive

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government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking [i.e., majority faction").

[63] *Id*.; *see also Federalist 41* ("the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.").

[64] *Federalist 10*.

[65] MILLER, *supra* note 3, at 21.

[66] *Federalist 51* ("A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.").

[67] *Id*.

[68] Daryl J. Levinson, *Rights and Votes*, 121 YALE L. J. 1286, 1295 (2012).

[69] U.S. CONST. amend. XVII.

[70] U.S. CONST. amend amend. XV (prohibiting denial of franchise based on "race, color, or previous condition of servitude"); U.S. CONST. amend XIX (prohibiting denial of franchise "on account of sex"); U.S. CONST. amend amend. XXVI (prohibiting denial of franchise to citizens 18 or older).

[71] *See, e.g.*, Arizona Leg. v. Arizona Ind. Rest. Comm'n, 576 U.S. 787 (2015); *see also* Jacob Eisler, *Populist Primacy* (forthcoming paper).

[72] *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 239 (2020) (Thomas, J., concurring with Gorsuch, J.); United States v. Arthrex, Inc., 594 U.S. 1, 4 (2021).

action."[73] The same exclusive republican logic still applies to the Court's understanding of Congress's lawmaking authority.[74] Again, Justice Gorsuch recently explained in *West Virginia v. EPA*: "[B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure not only that all power would be derived from the people, but also that those entrusted with it should be kept in dependence on the people."[75] Thus, to the extent federal constitutional doctrine turns on democratic accountability, it is about siphoning power to either Congress or the President.

B. Federalism and Accountability

In sketching the structure of democratic accountability under the federal constitution, it is important to note that federalism functions in at least three different ways, all of which reinforce the indirect structure of federal democratic accountability.

First, federalism is part of the overall strategy to create layers between popular majorities and federal government outputs.[76] For example, the electoral college and equal state representation in the Senate both mean that the preferences of national popular majorities are checked by local state interests.[77] In this way, federalism works in conjunction with the structures of republican government to ensure that majoritarianism is filtered through other public interests (specifically, the discrete interests of smaller, minority states). No matter the congressional election returns, Congress will always be malapportioned because of the Senate. No matter the popular vote, presidential politics will always be mediated by the state-based chunking of electoral college votes. Under the federal constitution, even the most direct pathways of federal democratic accountability are highly mediated by federalism.

The second way that federalism impacts democratic accountability is through a vertical system of checks and balances. Madison famously theorized that federalism would help protect liberty because it would pit state and federal ambitions against each other.[78] Each level of government would jealously guard its own jurisdiction, thereby holding each in check and preventing a tyrannical accumulation of power at any one level. Scholars have deeply criticized this scheme on theoretical and empirical grounds.[79] However, for present purposes, it is most important to recognize that this is yet another mediated form of accountability. Even if federalism functions as Madison envisioned, it is not a structure that empowers democratic oversight. Indeed, it works in the opposite direction by creating oppositional forces within government to stymie any rapid corrections.

The third way that federalism impacts democratic accountability is by enforcing decentralized policymaking. Federalism preserves plenary authority to the states and authorizes federal preemption only in enumerated areas.[80] Protecting state authority can indirectly enhance the overall democratic accountability of the federal system under certain conditions. When the federal

[73] United States v. Arthrex, Inc., 594 U.S. 1, 28 (2021) (Gorsuch, J., concurring).

[74] *West Virginia*, 597 U.S. at 697.

[75] *Id*. at 750 (Gorsuch, J., concurring) (internal citations and quotation marks omitted).

[76] *See* Levinson, *supra* note 31, at 670 (describing federalism as part of Madison's institutional scheme to control majoritarian politics and entrench norms).

[77] LEVINSON, *supra* note 2, at 25 (Senate); *id*. at 79 (President).

[78] *Federalist 45*; Levinson, *supra* note 31, at 669-70.

[79] Levinson, *supra* note 31, at 670-71.

[80] U.S. CONST. amnd X.

government leaves an issue to the states, states can enact policies that best align with their statewide communities. Applying a Tieboutian model, we can hypothesize that overall alignment between voter preferences and government policy will increase when a policy is decentralized.[81]

The Supreme Court has frequently adopted this thinking when discussing the proper allocation of power between federal and state governments. In *Dobbs*, for example, the Court buoyed its text-and-history analysis with the structural assertion that overturing *Roe* was more respectful of the Constitution's democratic norms.[82] Writing for the Court, Justice Alito said: "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."[83] Scholars have criticized this reasoning for making false assumptions about the health of democracy in the states.[84] For present purposes, it is most important to recognize that, once again, the federal constitution pursues democratic accountability through very indirect and mediated processes. Here, it promotes democratic outcomes by defederalizing issues and assuming that the states will implement effective accountability.

C. Entrenched Framework Constitutionalism

The federal constitution is designed to be general, stable, and outside the reach of ordinary politics and extant majorities. It's "whole purpose," according to Justice Scalia, "is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away."[85] Indeed, Madison argued forcefully that the federal constitution should be deeply entrenched so that it would bind future generations.[86]

This approach to constitutionalism – what Mila Versteeg and Emily Zackin call the "entrenched model of constitutional design" – has several important features.[87] First, it is based on the idea that a constitution should be outside the reach of majorities and very difficult to change.[88] Entrenchment helps to stabilize politics, protect minority rights, and guarantee certain political rights necessary for democratic accountability to operate.[89] Entrenchment is achieved (at least in theory) by including onerous amendment rules that require supermajorities and impose other hurdles to reform.[90]

Second, to accommodate entrenchment, constitutions should be very general and short. As Chief Justice Marshall explained, "only [the constitution's] great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."[91] Generality and brevity aid entrenchment because the text of the document is intrinsically more accommodating and does not require technical changes

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[81] *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

[82] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).

[83] *Id*.

[84] *See* Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (2024).

[85] ANTONIN SCALIA & AMY GUTMAN, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (1997).

[86] *Federalist 49*; Versteeg & Zackin, *supra* note 22, at 1668-70 (recounting debate between Jefferson and Madison regarding constitutional entrenchment).

[87] Versteeg & Zackin, *supra* note 22, at 659-60.

[88] *Id*.

[89] *Id*.

[90] *Id*. *But see* Levinson, *supra* note 31, at 659 (arguing that actual entrenchment is much harder to explain).

[91] M'Culloch v. Maryland, 17 U.S. 316, 407 (1819).

whenever adjustments happen, thereby allowing the document to remain stable.[92]

Entrenched constitutions can help protect government from the ills of rash majoritarianism.[93] By locking politics into certain processes and institutions, ordinary government outputs can be funneled through representatives and subjected to persistent checks and balances.[94] Specific minority protections can also be placed outside ordinary politics.[95] Entrenched constitutions also help mitigate majoritarianism because they tend to evolve and change informally through highly mediated processes like judicial review and diffused sub-textual norms, rather than popular flares of formal legal reform.[96]

For all these reasons, entrenched constitutions are intrinsically counter-majoritarian to some degree. They are built to ensure that majorities honor the rules of the game, and they are designed to remove certain substantive policies from the political realm altogether. This can create legitimacy concerns.[97] As Thomas Jefferson famously argued, each generation should write its own constitution because "the earth belongs in usufruct to the living."[98]

Most importantly for present purposes, the entrenched nature of the federal constitution binds together the deeply republican and federal structure of federal democracy. By design, Article V provides no easy pathway for popular involvement in constitutional reform. Amendments must pass through super-majorities in Congress and/or the states, and malapportionment in the Senate cannot be changed without each affected states' agreement.[99] Article V locks in the federal constitution's overall strategy to protect republican government from majoritarian impulses.

II. THE STRUCTURE OF STATE POPULAR ACCOUNTABILITY

State constitutions are built differently from the federal constitution. As a matter of history, text, and structure, state constitutions work to ensure that statewide popular majorities have multiple formal processes for correcting misaligned state policy. The state constitutional commitment to popular majorities is deep and multi-dimensional. In this section, I argue that the theoretical roots of state constitutions, as well as their contemporary texts and structure, all point towards a version of constitutionalism committed to empowering statewide popular majorities as the final arbiters of governance. To be sure, state constitutionalism relies on representative institutions, but it ultimately rests on the idea that state constitutions must enable popular accountability rather than foreclose and diffuse it.

A. State Constitutional Theory in Historical Perspective

[92] Versteeg & Zackin, *supra* note 22, at 659-60.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] The infamous countermajoritarian difficulty as applied to the United States Supreme Court is the classic example. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962).
[98] Letter from Thomas Jefferson to James Madison (Sept 6, 1789), *in* THE PAPERS OF THOMAS JEFFERSON 392, 392, 396 (Julia P. Boyd, ed. 1958).
[99] U.S. CONST. art. V.

State constitutions originated from a different fear than the dread of "majority faction" that dominated federal constitutional design. State constitutions grew out of a fear that corruption sprang mostly from government structures that distanced representatives from the people.[100] That distance fostered opportunities for corruption by personal ambition and special interests.[101] State constitutions were built to close the distance between representatives and the people. They originated as active instruments of popular control over government rather than entrenched constraints on popular majorities. This theoretical frame dominated the first state constitutions and has been ratified through various moments in state constitutional history where state governments failed the public, and the public responded with new adaptations reasserting popular accountability.

1. Revolutionary Origins of Popular Accountability Constitutionalism

The first state constitutions were an exigency of the Revolution and were animated by a deep distrust in ruling elites.[102] By the end of 1775, as British governors retreated from their posts, there was mounting pressure for the colonies to institute new forms of government.[103] Following a series of petitions from the states to the Continental Congress for guidance, Congress issued two famous Resolutions on May 10 and 15, 1776, calling on the states to establish governments "fixed on genuine principles" of popular sovereignty.[104]

But crafting these constitutions was complicated. Revolutionary Americans had a clear commitment to popular sovereignty, but they had no useful precedent for how to operationalize a government where all power was "vested in and derived from the people."[105] It was quickly obvious to them that the people could not govern themselves *en masse*.[106] However, selecting representatives and appointing leaders raised serious concerns.

By 1776, Americans were deeply suspicious of government officials. In particular, the Whigs believed that King George III had slowly manipulated and circumvented popular representation in Parliament by using various forms of "borough-mongering" and "royal patronage" to manipulate representatives.[107] By the middle of the eighteenth century, Whigs understood the Crown to be "tearing up the [British] constitution by the roots" and "bribing its way into tyranny."[108] For Whigs, this confirmed their general belief that the greatest danger to liberty came from rulers who were "separated from the rest of the community."[109]

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[100] TARR, *supra* note 1, at 78. A full conceptual history of state constitutional theory is beyond the scope of this article, but I have contributed to that enterprise in other work by examining the convention debates from all known state constitutional conventions since 1776 (approximately 233 conventions with debate records for 115 of those). *See* Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 118 (2019); Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 877-93 (2022); Marshfield, *supra* note 8, at 583-600. The account I present here draws on that prior work.

[101] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 147, 164-65 (1998).

[102] *Id*. at 129.

[103] W. PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 28-29 (1980).

[104] WOOD, *supra* note 101, at 128-29.

[105] TARR, *supra* note 1, 69 (quoting N.C. CONST. pmbl).

[106] WOOD, *supra* note 101, at 164.

[107] *Id*. at 33.

[108] *Id*. at 33.

[109] *Id*. at 22-23.

The structure of power in the American colonies further reinforced Whig ideas. Americans were especially troubled by the governors' effectiveness in subverting the entire community for their own benefit.[110] Governors were deft at circumventing and capturing legislative assemblies, which ostensibly represented local community interests.[111] They used various tactics, but it was common to manipulate representatives by appointing them (or close family members) to well-paid positions.[112] Governors would also grant lucrative licenses or government contracts in exchange for favorable votes.[113] And, because governors controlled the timing and frequency of legislative elections, they would postpone elections while the assembly suited their interests.[114]

Consequently, early constitutionalists had a growing distrust of even their own elected legislative representatives.[115] This fueled apprehension regarding representative democracy. Although representation was the most practical way for the people to "express their voice in the making of law and the management of government,"[116] representation 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."[117] Ultimately, early state constitutionalists concluded that representation "was a necessary evil" to be handled with great caution.[118] It had to be carefully structured and monitored. Most importantly, it had to be subject to frequent and direct popular accountability.[119]

It was against this backdrop that early state constitutionalists began to construct the first state constitutions. Not surprisingly, these early documents were wildly populist in their language and structure. They almost universally began by asserting, in their declarations of rights, that all power belonged to the people, who retained an inalienable right to abolish and reform government as they see fit.[120] They bluntly asserted that representatives were mere "servants" of the people, and they captured the Whig belief that officials are inherently prone to recalcitrance because political power separates their personal interests from the common good.[121]

The structure of these constitutions was also deeply majoritarian and reflected great distrust in representation.[122] The overall strategy was to consolidate power in the legislature and tie the legislature to the people as closely as possible.[123] Governors were stripped of almost all power and were appointed by the legislature, as were most judges and local officials.[124] To enhance popular control over legislatures, lower houses were very large, with representatives elected from very small

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[110] *Id*. at 146-47, 157.

[111] EVART B. GREEN, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 157-59 (1898) (providing specific examples); Louis E. Lambert, *The Executive Article*, *in* STATE CONSTITUTIONAL REVISION 185, 185-86 (W. Graves, ed. 1960).

[112] GREEN, *supra* note 111, at 158 (including as sheriffs, law enforcement, or mayors).

[113] *Id*. at 158; WOOD, *supra* note 101, at 157.

[114] GREEN, *supra* note 111, at 154.

[115] WOOD, *supra* note 111, at 165, 328.

[116] *Id*. at 164.

[117] MARC W. KRUMAN, BETWEEN AUTHORITY & LIBERTY 41 (1997).

[118] WOOD, *supra* note 111, at 165.

[119] *Id*. at 164-65.

[120] *See* Marshfield, *supra* note 100, at 882-86 (surveying all eighteenth-century texts).

[121] *Id*.

[122] See Robert F. Williams, *The Influence of Pennsylvania's 1776 Constitution on American Constitutionalism During the Founding Decade*, 112 PA. MAG. HIST. & BIO. 25 (1988).

[123] *Id*.

[124] *See* Marshfield, *supra* note 8, at 561.

districts, and a few states even adopted unicameral legislatures.[125] State constitutions also required legislative sessions to be public (a stark contrast from the practice of colonial assemblies),[126] mandated annual elections (and even 6-month elections in the case of New Hampshire),[127] and protected the right of constituents to "instruct" their representatives on how to vote.[128] As Professor Randy Barnett has concluded, these arrangements "made the legislature as responsive to majoritarian sentiments as possible."[129]

2. The Persistence of Popular Accountability

It is undisputed that this structure did not work well. State legislatures pursued various disastrous policies because of overt corruption and rash populist influence.[130] Indeed, Madison frequently referred to the failures of these documents when arguing for a more representative and republican federal structure, and it seems that the Philadelphia Convention was deeply influenced by the problems that these constitutions created.[131]

However, the story of state constitutionalism did not end at the Philadelphia Convention as many seem to assume.[132] After federal ratification, the states continued to reform and revise their own constitutions. Indeed, there have been hundreds of state constitutional conventions and 10,000s of state constitutional amendments since 1787.[133] Many of those reforms included greater reliance on republican ideas, but that is only one side of how state constitutions evolved after 1787.[134] Almost without exception, for every republican adaptation that spread through state constitutions, there was a related development that ratified popular accountability as a state constitutional polestar.[135] Consider how this trend is visible in the evolution of state executive, judicial, and legislative powers.

After the disastrous early state constitutions, legislative power was offset by giving governors more power, especially the veto.[136] In this sense, it is tempting to conclude that state constitutions abandoned their majoritarian roots in favor of greater republican checks and balances analogous to the federal constitution. However, expanded gubernatorial power coincided directly with the shift

[125] Tarr, *supra* note 1, 87, 89-90 (Vermont and Pennsylvania adopted unicameral legislatures).

[126] *See* KRUMAN, *supra* note 117, at 81.

[127] *See* BARNETT, *supra* note 2, at 55.

[128] *See* Marshfield, *supra* note 8, at 561.

[129] BARNETT, *supra* note 2, at 53.

[130] *See id*.

[131] *See* Williams, *supra* note 122, at 38 (gathering references to early state constitutional failures in federal convention debates and ratification materials).

[132] *See, e.g*., BARNETT, *supra* note 2, at 60 ("One by one, each state soon replaced its more democratic constitution with a variation of the new republican one.").

[133] The best accounts of the full state constitutional tradition are TARR, *supra* note 7, JOHN DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION (2009), and DINAN, *supra* note 24.

[134] TARR, *supra* note 7, at 95 ("In no period is the divergence between the state and federal constitutional experiences clearer than in the nineteenth century.").

[135] *See* Marshfield, *supra* note 8, at 560-72 (tracing this); TARR, *supra* note 7, at 122-25; Tarr, *supra* note 1, at 94 ("The introduction of checks and balances might suggest that they were emulating the federal Constitution; but despite some surface similarities to the federal model, the state reforms were primarily concerned with preventing faithless legislators from frustrating the popular will, not with checking majority faction.").

[136] Governors also got greater appointment powers, longer gubernatorial terms, and increased budget authority. *See* Marshfield, *supra* note 8, at 560-72.

to statewide popular election of governors.[137] Gubernatorial power expanded primarily because governors emerged as especially responsive to popular majorities.[138] 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."[139] Gubernatorial power grew because a popularly elected governor provided a more direct line of accountability to statewide majorities.[140] The gubernatorial veto was not principally a counter-majoritarian restraint on hasty actions by the legislature,[141] it was a method of holding the legislature accountable to the public.

Additionally, 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.[142] At first, this involved only key posts, such as the lieutenant-governor, secretary of state, treasurer, auditor, and attorney general.[143] But it later continued into most aspects of state government, including very specialized positions.[144] The trend eventually abated, but in 2002, there remained more than 10,000 independently elected state and local officials nationwide.[145]

State constitutions have also increasingly codified portions of the administrative state as a way to democratize regulation.[146] They have done this by using the constitution to create agencies, establish processes for staffing and funding those agencies, and set the scope of agency rulemaking and adjudication authority.[147] As noted earlier, states have also used constitutions to single out the regulation of particular industries for more searching popular oversight following legislative failures in those areas.[148] Various constitutional agencies, boards, and commissions are set aside from legislatures and governors so that the public can keep a more watchful eye on state policy in those areas.[149]

Regarding the judiciary, after ratification of the federal constitution, state constitutions gradually granted courts more independence from state legislatures and executives.[150] This is

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[137] TARR, *supra* note 7, at 122-23 (noting the shift to popular election ran "parallel" with various measures to strengthen office); MARY B. MCCARTHY, THE WIDENING SCOPE OF AMERICAN CONSTITUTIONS 52 (1928) (listing number of states by decade that adopted popular election of governors).

[138] TARR *supra* note 7, at 122-23.

[139] NEW JERSEY 1844 CONVENTION DEBATES at 351.

[140] Tarr, *supra* note 1, at 93-94.

[141] *Federalist 73* ("The primary inducement to conferring the power in question [i.e., the veto power] upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design.")

[142] TARR, *supra* note 7, at 122-23.

[143] MCCARTHY, *supra* note 137, at 50-54 (focusing on the shift to popular election of these offices).

[144] TARR, *supra* note 7, at 122 (citing NY Const. 1846 art. 5, sec. 2 and 3 providing for the statewide election of a canal commissioner, state surveyor, and prison inspector).

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

[146] *See* Seifter, *supra* note 44, at 1555.

[147] *Id*.

[148] *See supra* notes 44 and accompanying text.

[149] *See* Marshfield, *supra* note 44, at 360-64.

[150] TARR, *supra* note 7, at 46, 73n.48, 49, 157; G. ALAN TARR, WITHOUT FEAR OR FAVOR – JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES (2012); JED H. SHUGERMAN, THE PEOPLE'S COURTS – PURSUING JUDICIAL INDEPENDENCE IN AMERICA 30 (2012).

especially true regarding the selection of judges.[151] However, this coincided with various reforms to ensure that courts were more closely accountable to the people.[152] Through judicial elections, recall, mandatory retirement, and various other reforms, state courts grew less dependent on the other branches of government but more tightly accountable to popular majorities.[153] Indeed, a key reason that many states transitioned to elected judges was to empower them to oppose legislative and executive recalcitrance on the people's behalf.[154] By giving courts their own popular mandate directly from the electorate, state reformers hoped that courts would be better positioned to contribute to popular accountability.[155]

The same story unfolded regarding reform to state lawmaking.[156] After the dismal performance of early state constitutions, states adopted various reforms that targeted state legislatures.[157] These reforms were accelerated during the financial crisis of 1837, when state legislatures succumbed to the influence of private infrastructure corporations and drove nine states into default.[158] What is often missed is that these reforms focused more on restructuring and enhancing popular accountability than mediating popular influence.[159] For example, several states adopted single-subject and title requirements to promote public transparency and curb legislative logrolling and vote-trading that had fueled corruption and capture.[160] States also adopted prohibitions on special legislation to address the same problems.[161] They also constitutionalized rules of legislative process to encourage transparency and popular oversight, and limited legislative sessions and resources as an indirect control on legislative power.[162] Additionally, following the 1837 economic crisis, popularly-run conventions adopted a variety of very specific, statutory-like constitutional restrictions for public finance as a way to rein in recalcitrant legislatures.[163] This set in motion the now commonplace practice of constitutionalizing substantive policy through constitutional amendment to protect popular control of legislation.[164]

But the most dramatic and revealing reforms to legislative power were the adoption of the

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[151] SHUGERMAN, *supra* note 150, at 30-56.

[152] *Id*.; TARR, *supra* note 150, at 4 (Progressive Era reformers "championed judicial elections and sought additional weapons, such as the recall of judges and judicial decisions, to enforce judicial conformity with the popular will").

[153] TARR, *supra* note 150, at 4.

[154] *Id*. at 10 ("Almost all of these conventions turned to judicial elections as a way to separate courts from the other branches and to enforce the 'people's' constitutional rights against government excess.").

[155] *Id*.; *see also* DINAN, *supra* note 133, at 123-36 (exploring many state constitutional convention debate about how to restructure or limit judicial review to conform to popular will).

[156] *See generally* Tarr, *supra* note 1; DINAN, *supra* note 133, at 136-83 (recounting rigorous date constitutional debates regarding bicameralism that continued long after Founding).

[157] TARR, *supra* note 7, at 93-135.

[158] *Id*. at 111-12.

[159] *Id*. at 122-25; G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 NYU ANN. S. AM. L. 329, 334 (2003).

[160] *See* Tarr, *supra* note 1, at 94 ("Few believed that checks and balances were sufficient to achieve" accountability from state legislatures; instead they adopted various reforms to "increase transparency of the legislative process, thereby facilitating popular control and deterring legislative misbehavior").

[161] *Id*.; Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39 (2014).

[162] *See* Tarr, *supra* note 1, at 94.

[163] *See* TARR, *supra* note 7, at 112.

[164] *See* Versteeg & Zackin, *supra* note 22, at 664 (noting process is commonplace and likely began during the nineteenth century).

referendum, initiative, and recall.[165] 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.[166] These processes were explicit carveouts from the otherwise plenary and exclusive legislative power of state legislatures.[167] They allowed statewide majorities to bypass legislatures and directly adopt or veto laws.[168] As a result, state legislative power is a complex patchwork of representative institutions, detailed regulations in constitutional text, and powerful forms of direct democracy.[169] Elizabeth Garrett has referred to this as "hybrid democracy" because of the various complex interactions that occur between legislatures, direct lawmaking, and popular constitutional amendment.[170]

The recall, which has been adopted in at least nineteen states, allows citizens to petition for a statewide referendum on recalling an official from office.[171] The recall generally applies to elected legislators and executive officials, but a few states also allow recall of judges and appointed officials.[172] The recall is deeply connected to popular accountability because it allows popular majorities to interrupt representative government and remove recalcitrant officials when the people believe it to be necessary.[173]

3. State Constitutional Amendment & Popular Accountability

The evolution of state constitutional amendment practices deserves special mention because it has both preserved and mutated the nature of popular accountability in state constitutional structure.[174] As noted above, the federal constitution is a deeply entrenched framework text that helps cabin and control majoritarianism through stable representative institutions and rights as trumps on ordinary politics. State constitutions have not followed this path.

During the first wave of state constitution-making in the eighteenth century, the states pioneered a novel American invention – the popular constitutional convention.[175] The convention solved a serious theoretical and practical problem: If a constitution was to operate as higher law on behalf of the people to constrain government, then what institution was appropriate for drafting

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[165] TARR, *supra* note 7, at 150-162.

[166] M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC (2003) (charting adoption of direct democracy devices by state).

[167] *E.g*. OREGON 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").

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

[169] *See* Tarr, *supra* note 1, at 94.

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

[171] NATIONAL COUNCIL OF STATE LEGISLATURES, REPORT – RECALL OF STATE OFFICIALS (2025).

[172] *Id*.

[173] *See* DINAN, *supra* note 133, at 66 n. 13; THE RECORDS OF THE ARIZONA CONVENTION OF 1910, 242-46 (describing the purpose of recall as grounded in the belief that "all officers should be responsible to the voters who choose them and that no man should hold office after he fails to represent the sentiments of his constituents, we favor the recall of delinquent officers").

[174] The best account of the full arc of development in state amendment design and purpose is DINAN, *supra* note 133, at 29-64; *see also* Marshfield, *supra* note 100, at 88-105 (connecting that account to the history and theory of the constitutional convention).

[175] *See* Marshfield, *supra* note 100, at 88-105.

and amending it?[176] One cheap solution was to allow legislatures as lawmaking bodies to draft constitutional law, but that created serious concerns because the constitution's principal function was to constrain government, including the legislature, on behalf of the people.[177]

To solve this problem, the states carefully designed the constitutional convention as a unique popular institution. The convention has very particular features. It must be authorized by popular initiative in some form (usually by a referendum). It must be unicameral in structure and populated by delegates selected at a special election from representative districts for the sole purpose of constitution-making. It must generate constitutional law through the deliberation and debate of those delegates, subject to popular affirmation. These features help ensure that popular majorities retain control over constitution-making and that the incumbent government has minimal influence. In other words, the state constitutional convention is emblematic of popular accountability over state government.[178]

The states relied heavily on the convention to rein in state governments during most of the nineteenth century.[179] Indeed, they held 64 conventions before the onset of the Civil War and the cessation conventions of 1861.[180] Those conventions addressed important popular concerns of the Jacksonian Era, including malapportionment in state legislatures, improper influence by private corporations, public finance reform, and expanding the suffrage.[181] Then, during the Gilded Age and Progressive Era, the states called another 58 conventions to address another set of popular concerns regarding malapportionment, corporate capture, judicial obstructionism, labor reform, and other popular changes to state government and policy.[182]

Beginning in the twentieth century, states began to rely more heavily on ad hoc amendments via statewide referenda than full-scale conventions.[183] This shift reflected a variety of concerns focused on enhancing popular accountability. First, conventions were costly and inefficient, which limited the public's ability to use them regularly and surgically.[184] Second, during the Progressive Era, courts often struck down popular social and economic legislation under freedom-of-contract theories.[185] To clear these roadblocks to popular reform, the states significantly liberalized their constitutional amendment rules so that legislatures could easily and quickly send proposed amendments directly to statewide majorities at referenda.[186] The main idea was that the state

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[176] *See* TARR, *supra* note 7, at 69.

[177] *See* Marshfield, *supra* note 100, at 88-105.

[178] JAMES QUAYLE DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS 258 (1915) ("[The convention] is the great agency through which democracy finds expression. In its latest form, that of a body made up of delegates elected from districts of equal population, it is one of the greatest of our political inventions. Through it popular rights may be secured in the constitution, legislative tyranny restrained, and powerful interests subordinated.").

[179] *See* TARR, *supra* note 7, at 94-94.

[180] *See* John Dinan John Dinan, *Explaining the Prevalence of State Constitutional Conventions in the Nineteenth & Twentieth Centuries*, 34 J. POL'Y HIST. 297 (2022).

[181] *See id*.

[182] *See id*.

[183] *See* TARR, *supra* note 7, at 136-39.

[184] *See* WALTER FAIRLEIGH DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 120 (1910); *see also* DEBATES IN THE CONVENTION FOR THE REVISION AND AMENDMENT OF THE CONSTITUTION OF THE STATE OF LOUISIANA 101 (1864) (framing the legislative model for amendment in terms of the need to bypass cumbersome conventions).

[185] *See* DINAN, *supra* note 133, at 48-49.

[186] *See id*. at 50 ("a principal benefit of adopting more flexible amendment procedures, in the view of these Progressive Era delegates, was therefore to permit a more ready reversal of errant judicial rulings.").

constitution should not function as an immoveable bulwark against popular reform.[187] On the contrary, it should be an instrument for popular accountability when government (including the judiciary) strays too far from its mandate.[188] Streamlining amendment rules around the referendum enabled this. Similarly, the Progressive Era saw the introduction of the citizen initiative for constitutional amendments so that citizens could bypass non-responsive legislatures and obstructionist courts altogether.[189]

These reforms to state amendment rules reflect a wholly different approach to constitutional design than Madison's entrenchment model. Mila Versteeg and Emily Zackin have explained, for example, that state constitutions reflect an "unentrenched" model where the constitution exists principally to constrain government on behalf of the people rather than majorities.[190] Voters use the constitution to hold government accountable by leveraging amendment rules to insert new detailed language that limits government discretion.[191]

This theory fits nicely with the underlying structure of state constitutional design. It is also consistent with how states have used amendment processes (and how frequently). As John Dinan has painstakingly documented, the states use amendment processes regularly to react to whatever issues percolate through state government but ultimately misalign with motivated state majorities.[192] Sometimes those issues manifest through unpopular state court rulings (e.g., economic freedom rulings striking maximum hours laws during the Progressive Era).[193] Sometimes they result from legislative inaction on popular reforms (e.g., marijuana legalization in the twenty-first century).[194] In any event, state constitutional amendment politics is ultimately about providing statewide majorities with a process for keeping state government accountable. And they use it regularly. The average state constitution has been amended 150 times at a rate of 1.3 amendments per year.[195] As Dinan notes, this rate is "more than ten times the federal amendment and twenty times the post-1791 federal amendment rate."[196]

Predictably, this approach to state constitutions has transformed them into long, detailed, and dynamic texts that contain basic structural arrangements and conventional rights alongside specific policy pronouncements, detailed regulatory interventions, and idiosyncratic institutions and rights. Indeed, Versteeg and Zackin have quantified the length, scope, and detail of state constitutions as of 2016.[197] They found that because of high amendment rates, the median state constitution was almost four times longer than the U.S. Constitution, covered twice as many topics, and included significantly more detail.[198]

The critical point is that these characteristics of state constitutions are an outworking of their

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[187] *See id*.

[188] *See id*. at 50 (quoting Progressive Era delegate from Massachusetts: "Let us tell the people that they have what our Constitution says they may have – a right to amend that Constitution when their liberty and their happiness and their welfare require it.").

[189] *See id*. at 59-62.

[190] *See* Versteeg & Zackin, *supra* note 22, at 660-61.

[191] *See id*.

[192] *See* DINAN, *supra* note 24 (describing this as "governing by amendment").

[193] *See* DINAN, *supra* note 133, at 48-51.

[194] *See* DINAN, *supra* note 24, at 242-43.

[195] *See id*. at 23-24.

[196] *See id*. at 23.

[197] Versteeg & Zackin, *supra* note 22, at 661-64.

[198] *Id*.

underlying design logic. Just as the text of the federal constitution has remained relatively short, general, and unchanged because of its "wholly republican" structure, state constitutions bear the features of a document regularly accessed and utilized by active majorities to redirect misaligned government.

B. Popular Accountability in Contemporary State Constitutions

The history that I offer above reflects general trends in the shared development of state constitutions. There are, of course, important differences and nuances between states and across time. Thus, it is worth turning to extant state constitutions to see whether and to what degree they manifest an ongoing commitment to popular accountability constitutionalism. In this section, I first describe state constitutional provisions that affirm a commitment to popular accountability, I then survey state constitutional structures that implement popular accountability. In both areas, I focus on provisions and structures with no clear federal analogs to illustrate the unique state commitment to popular accountability.

1. Contemporary Texts

Contemporary state constitutional texts are replete with provisions reaffirming a commitment to popular accountability constitutionalism. Indeed, several state constitutions include explicit accountability provisions. The Massachusetts Constitution, for example, declares: "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*."[199] Several states also have provisions declaring that officials are the people's "servants," and the people have a "right to instruct their representatives."[200] Popular accountability is explicit in state constitutions.

Relatedly, in 2021, Professors Jessica Bulman-Pozen and Miriam Seifter surveyed state constitutional texts for evidence of the "democracy principle," which they define as "popular sovereignty, majority rule, and political equality."[201] They found an astonishing amount of textual support for those commitments across a diverse array of provisions in contemporary state constitutions.[202] For example, they found that every state constitution but New York's still includes an explicit commitment to the people as "the source and end of political power."[203] Those provisions also tend to include a specific reference to the people's right to alter, reform, or abolish government.[204] Pennsylvania's provision is illustrative:

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[199] *See, e.g.*, MASS. CONST. part 1 art. V (emphasis added).

[200] *See, e.g.*, W.V. CONST. art. III, § 2 ("All power is vested in, and consequently derived from, the people. Magistrates are their trustees and servants, and at all times amenable to them"); CAL. CONST. art. I § 3 ("The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.").

[201] Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 879 (2021).

[202] *See id.* at 869-79.

[203] *See id*. at 869 n.48 (listing all the provisions).

[204] *See id*.

> All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.[205]

Professors Bulman-Pozen and Seifter found myriad other provisions across a diverse range of topics that affirm a commitment to democracy, including provisions ensuring proportional representation in both houses (and sometimes lodging districting authority in independent commissions), provisions regulating legislative procedure in favor of transparence and popular oversight, provisions mandating a public purpose for government policy, provisions providing explicit protection for free and fair elections, and, among other things, provisions declaring lawmaking power to inhere in the people rather than the legislature.[206]

To illustrate the scope and breadth of state constitutional provisions addressing popular accountability, I draw on Professors Bulman-Pozen and Seifter's survey as well as the work of Professor Joshua Douglas (who has surveyed states constitutional voting and election provisions)[207] and my own independent survey of state bills of rights to tabulate provisions across all fifty states.[208] I focus on the following eight provisions listed below because they clearly connect to popular accountability and have no tight federal analogs. However, these provisions are not exhaustive of state constitutional expressions of popular accountability.[209]

1. Accountability – Whether the constitution states that officers are limited agents of the people and at all times accountable to them, can "be reduced to a private station," or are subject to instruction.[210]
2. Popular Sovereignty – Whether the constitution explicitly declares that all power inheres in the people.
3. Right to Abolish/Alter Government – Whether the constitution explicitly declares that the people have an inherent and inalienable right to abolish or alter government as they see fit.
4. Right to Vote – Whether there is an explicit affirmative right to vote.
5. Free Elections – Whether there is an explicit collective guarantee to free and fair elections.
6. Specific Voting Protections – Whether there are specific affirmative protections for voting, such as immunity from arrest on voting day, protection of residency status, protection for secret ballot, etc.

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[205] *See* PA. CONST. art. I § 2.

[206] *See* Bulman-Pozen & Seifter, *supra* note 201, at 869-79.

[207] Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014).

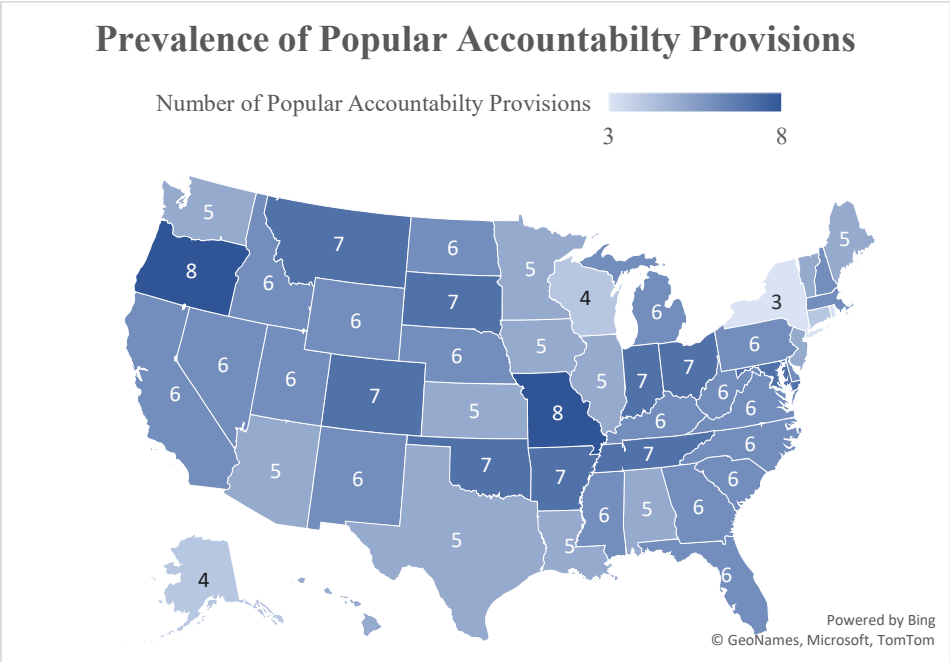
[208] Marshfield, *supra* note 100.

[209] *See e.g.*, CAL CONST. art. IV § 22 ("It is the right of the people to hold their legislators accountable. To assist the people in exercising this right, at the convening of each regular session of the Legislature, the President pro Tempore of the Senate, the Speaker of the Assembly, and the minority leader of each house shall report to their house the goals and objectives of that house during that session and, at the close of each regular session, the progress made toward meeting those goals and objectives.").

[210] VA. CONST. art. I § 5. I also included states with provisions that state: "The people of this state have the inherent, sole and exclusive right to regulate the internal government and police thereof." *E.g.*, MO. CONST. art. I § 3.

7. Term Limits – Whether there are any constitutional term limits for elected representatives to ensure rotation in office.
8. Single-Subject Rule – Whether legislation must be limited to a single subject or limited to the contents of its title.

The results of this survey show universal expression of popular accountability as a state constitutional commitment. Indeed, all state constitutions include at least three of these provisions. Forty-five states have five or more of these provisions. The median is six out of eight provisions, and two state constitutions (Oregon and Missouri) contain all eight provisions. The full results are illustrated in the figure below.



2. Contemporary Structures

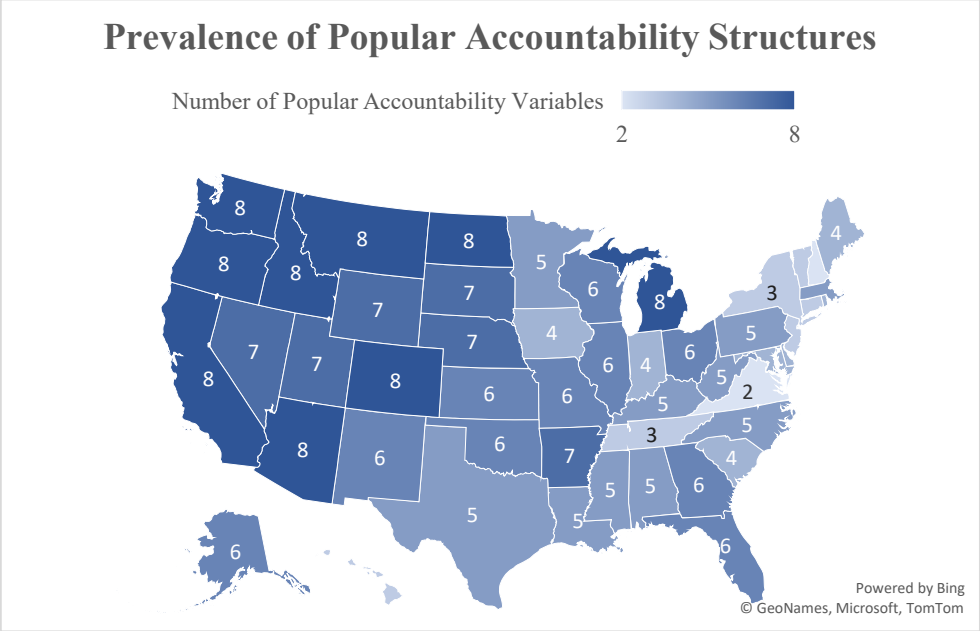
The contemporary structure of state government also confirms a deep institutional commitment to popular accountability. To illustrate this, I identify eight structural features indicative of a commitment to popular accountability, and I chart those across all fifty states. These eight features are not exhaustive of the characteristics of popular accountability constitutionalism.[211] However, they are useful for illustrating how broadly the states remain committed to popular accountability. Each of the following eight features has a clear connection to popular accountability and no analog

[211] Many other more idiosyncratic accountability mechanisms exist in state constitutions. *See, e.g.*, N.H. CONST. Pt 1, art. 8th ("The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision."); N.D. CONST. art. XIV § 3 ("In order to strengthen the confidence of the people of North Dakota in their government, and to support open, ethical, and accountable government, the North Dakota ethics commission is hereby established.").

under the federal constitution:

1. Judicial Elections – Whether justices on the state's highest court are subject to statewide popular elections for selection or retention.[212]
2. Unbundled Executives – Whether more than one executive official is subject to an independent statewide election.
3. Constitutional Agencies – Whether any state regulatory agency has a commissioner or board subject to statewide or district-based election.
4. Recall – Whether any statewide officials are subject to popular recall petitions.
5. Initiative – Whether the state constitution provides for statewide legislation or constitutional amendment by citizen initiative (direct or indirect).
6. Legislative Referendum – Whether the state constitution allows for statewide referenda on legislation.
7. Amendment Referendum – Whether the state constitution requires statewide referenda on constitutional amendments.[213]
8. Convention Referendum – Whether the state constitution requires statewide referenda on calling a constitutional convention.

The results show a universal commitment to popular accountability across at least two of the eight structural variables. Forty-eight states register at least three variables (only Virginia and New Hampshire register two), and forty-two states have at least four. The median is five variables, and nine states register all eight variables. The figure below illustrates the results.



[212] I excluded all states where judges are elected but exclusively from sub-state districts rather than a statewide basis.

[213] Delaware is the only state that does not require a referendum on legislatively referred constitutional amendments, but it requires super-majority approval in two successive legislative sessions and requires a referendum on amendments proposed by a constitutional convention.

III. TOWARD A STATE JURISPRUDENCE OF ACCOUNTABILITY

In this section, I shift to exploring how the state commitment to popular accountability might impact state constitutional doctrine. I first suggest a framework for how to appropriately incorporate popular accountability into doctrine. I then explore real cases addressing rights, structure, and remedies to illustrate how state courts already implement analysis grounded in popular accountability and how they sometimes might benefit from applying my framework.

A. Developing a Framework

If state constitutions are uniquely committed to popular accountability in their text, history, and structure, then this should influence how state courts decide constitutional cases. However, the scope and nature of this influence is nuanced and complicated. Popular accountability sits alongside other commitments and operates in a complex environment. All state constitutions, for example, have always relied on representative institutions as their principal governance mechanisms (often because of their mediating and moderating effects), and basic rule-of-law values lie beneath all state constitutions. Moreover, states are very different from each other. As the above surveys show, some states have broadly adopted many mechanisms and expressions of popular accountability. Others have not. California is not the same as New Hampshire, for example.

These complexities and nuances are important and cannot be ignored. To constructively and authentically incorporate popular accountability into state doctrine, we cannot treat all state constitutions the same, nor can we pretend that popular accountability is the only value that matters. Nevertheless, all state constitutions rely on statewide popular majorities for their legitimacy and preservation and have incorporated this foundational commitment into their democratic structures to some degree. This categorically distinguishes them from the federal constitution. Popular accountability should, therefore, be a unique polestar in state constitutional adjudication.

But how should this high-level commitment influence specific legal doctrine? In this section, I begin the process of building a framework for systematically incorporating popular accountability into state constitutional law. I argue that popular accountability invites state courts to rethink constitutional doctrine in at least two ways.

1. Limitations on Popular Accountability are not Axiomatic

When state courts adopt doctrines that impede existing commitments or mechanisms of popular accountability, they, *unlike federal courts*, should provide an explanation for how those rules cohere with the commitment to popular accountability. It is inherently improper for state courts to assert that limiting popular accountability is a self-justifying objective. To be sure, limitations on popular accountability are appropriate (and prevalent) in state constitutional law, but such intrusions cannot be legitimated on the basis that they are intrinsic to the nature of American constitutionalism. State constitutions explicitly reject this.[214]

[214] For an argument in the exact opposite direction that equates state constitutions with republicanism and cast a

Justifying an intrusion on popular accountability can take many forms consistent with all the conventional modalities of constitutional construction. For example, a state court might find historical, textual, or structural evidence that a particular state institution exists to protect political minorities from swift popular attacks.[215] From that evidence, a court might conclude that certain mechanisms of popular accountability are properly restricted relative to those minority protections.[216] As this example makes clear, the point is not that state constitutions don't, can't, or shouldn't limit popular accountability. The point is that courts should not presume that limiting popular accountability is an intrinsic objective under state constitutions. That might be true for the federal constitution, but it is not true for state constitutions.

This approach also helps domesticate and authenticate state constitutional law. It ensures that courts construe state constitutions consistent with their underlying logic and purpose (popular accountability) while honoring a state's specific choices regarding how to operationalize popular accountability. The Illinois constitution, for example, incorporates the citizen initiative process for constitutional amendments, but only for changes to the legislative article.[217] This choice by Illinois reflects a different approach to popular accountability than Colorado, for example, where the initiative is mostly unrestricted.[218] Nevertheless, Illinois's unique limitation is perfectly proper because it is clear from an ordinary modality of constitutional construction (the text of the Illinois Constitution).

But taking popular accountability seriously can also be tricky. For example, New Hampshire does not have the initiative, referendum, judicial elections, or an unbundled executive. This might suggest that the New Hampshire Constitution is structured to foreclose frequent popular interjections in a manner more analogous to the federal constitution. But New Hampshire does include the following provision:

> The public has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision.[219]

In 2021, a taxpayer sued under this provision, alleging that the state failed to provide child welfare services as required by law because it severely underfunded child welfare programs.[220] The court held that the plaintiff did not have standing because generalized underfunding claims would

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shroud of suspicion and limitation on all process of popular accountability see *Washington State Farm Bureau Fed'n v. Gregoire*, 174 P.3d 1142, 1157 (Wash. 2007) (Chambers, J., concurring).

[215] In Massachusetts, for example, there are explicit subject-matter limitations on the initiative process that precludes its use for (among other things) "reversal of a judicial decision" or alterations to certain rights, including freedom of religion. MASS CONST. art. XLVIII § 2.

[216] It's clear in Massachusetts, for example, that decisions regarding freedom of religion must pass through representative lawmaking processes.

[217] ILL. CONST. art. XI § 3.

[218] COL. CONST. art V § 1.

[219] N.H. CONST. part 1st art. 8.

[220] Carrigan v. New Hampshire Dep't of Health & Hum. Servs., 262 A.3d 388 (N.H. 2021).

require the court to intrude on executive and legislative prerogatives regarding funding priorities.[221] While it is certainly true that judicial review in this context would intrude on the political branches, it's not clear why the taxpayer standing provision does not authorize this type of intrusion when a taxpayer alleges *unlawful* underfunding. Why assume that vague Federalist separation-of-powers theories trump the accountability strategy explicitly embodied in the taxpayer standing provision?[222] All else being equal, why not construe the provision in favor of accountability rather than separation of powers? After all, New Hampshire has held more popular constitutional conventions than any state (seventeen conventions from 1776-1984).

The point is not that popular accountability is a panacea for hard cases. Enforcing funding provisions, for example, only makes cases harder to decide and oversee. Instead, popular accountability can help authenticate state constitutional doctrine and weed out constitutional tropes that are a poor fit for state constitutional law. One tip for unleashing this type of analysis is to question limitations on mechanisms and expressions of popular accountability that claim to be self-justified.

2. Doctrines Grounded in Federal Institutional Analysis are Suspect

Relatedly, popular accountability constitutionalism should make state courts deeply suspicious of federal doctrines that are based on federal institutional analysis because state constitutions are built to achieve different goals through different means. The federal constitution has produced a relatively stable set of institutions and processes with archetypal functions designed to entrench the status quo. This is consistent with the underlying goal of moderating rash majoritarianism. On the other hand, state constitutions have produced a dizzying array of highly contextual and idiosyncratic institutions, processes, and provisions reflecting fits and spurts of popular reaction to recalcitrant government. If we accept this as a feature of state constitutionalism rather than a bug, state courts should be careful to take these arrangements seriously rather than reduce them down to inapposite federal archetypes that pervert the essence of popular accountability.

For example, consider federal standing doctrine. In general, a plaintiff in federal court must have a concrete, redressable injury to sue.[223] This rule has a textual basis in Article III's "case and controversy" requirement, but it is principally a doctrine grounded in federal institutional analysis.[224] Federal courts should not entertain abstract questions because that would accumulate too much power in the courts and upset the Constitution's checks-and-balances.[225] At first blush, this seems like a sound position with salience in tri-partite constitutional systems. However, the states have long dispensed with the idea that courts should be nothing more than insulated

[221] *Id*. at 395.

[222] This is not to say that the court's holding is wrong. I mean only to illustrate some of its reasoning. If the plaintiff's claim was that the law required a certain level of funding for child-welfare services, and the political branches were not allocating that amount, it's unclear why a court would not require them to defend that allocation in light of the strong popular accountability rationale embedded in the taxpayer spending provision.

[223] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

[224] *See Valley Forge*, 454 U.S. at 475.

[225] *See id.* at 474-75.

adjudicators of concrete disputes.[226] State courts have broad rulemaking powers.[227] Many have explicit authority to issue advisory opinions.[228] Most importantly, the principal check on state courts is the people themselves through elections.[229] In many states, courts were restructured so that they could engage in active judicial governance on behalf of the people rather than passive dispute resolution.[230] In state constitutional structure, courts are "democratically embedded actors, not countermajoritarian interlopers."[231] Thus, there is good reason to question the applicability of federal standing doctrine in state court because federal institutional analysis is inapposite.[232]

The important point is that popular accountability helps make sense of an otherwise chaotic series of state institutions and structures, which can then empower state courts to critically analyze the relevance of federal institutional analysis. Once it is clear that a state court has been restructured to draw upon its own popular mandate to oversee the political branches through a variety of unique mechanisms – like New Hampshire's taxpayer standing provision, for example – it is easier to explain and justify departures from federal standing precedent and chart a new path grounded in popular accountability rather than checks-and-balances.

B. Illustrating the Framework

At this point, it is helpful to illustrate these perspectives and suggestions in real cases. I focus on cases in three general areas: (1) structural disputes; (2) constitutional rights; and (3) constitutional remedies. Some of these cases illustrate how state courts have already invoked modes of reasoning grounded in popular accountability. Other cases illustrate further opportunities for state courts to engage constructively with popular accountability, and how popular accountability might have helped produce better reasoning and result. These categories and cases are not exhaustive. My more modest goal is to selectively illustrate how courts might practically implement popular accountability as a mode of constitutional reasoning under state constitutions.

1. Accountability and Structure

State courts face many disputes regarding the constitutional allocation of power. In this section I examine how state courts have responded to two issues well-know from marque Supreme Court structural rulings: deference to agency legal interpretations (*Chevron*-deference); and the legislative veto of agency rules (*Chadha*).

Before the Supreme Court's ruling in *Loper Bright v. Raimondo*,[233] several states followed *Chervon* and deferred to reasonable agency interpretations of ambiguous provisions in agency

[226] *See supra* part II.A.2.
[227] *See* Sopko, *supra* note 46.
[228] *See* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 333-34 (2d ed. 2023).
[229] *See supra* Part II.A.2.
[230] *See* SHUGERMAN, *supra* note 150, at 10.
[231] Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality Review*, 123 COLUM. L. REV. 1855, 1856 (2023).
[232] *See* Helen Hershkoff, *State Courts and the Passive Virtues: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).
[233] 603 U.S. 369 (2024).

statutes.[234] Of course, in 2024, the Supreme Court overruled *Chevron* in *Loper Bright* and held that federal courts should resolve statutory ambiguities without deference to agencies.[235] *Loper Bright* provided an occasion for *Chevron*-following states to evaluate whether they too would reverse course. The few early cases that have engaged with the issue illustrate how popular accountability has the potential to enrich state constitutional jurisprudence.

For example, in *Rosehill v. State*, the Hawaii Supreme Court reviewed a determination by the Hawaii Land Use Commission (LUC) that "farm dwellings" on agricultural land could not be used as short-term vacation rentals.[236] In making that determination, the LUC had to interpret its authorizing statute to determine the meaning of "farm dwelling."[237] The Hawaii Supreme Court held that it would not follow *Loper Bright*.[238] In support of this conclusion, the court explained that it agreed with Justice Kagan's *Loper Bright* dissent arguing that "*Chevron* made for good, balanced governance, whereby Congress made laws while agencies, subject to accountability from a duly-elected President, implemented those laws and reasonably filled in the gaps."[239] The court further explained that *Chevron* was important because regulation requires professional experts to address "exceedingly complicated areas of American life, including worker safety, air quality, food and drug safety, airplane safety, telecommunications, and the integrity of our financial markets."[240] Thus, the Hawaii Supreme Court held that it would defer to the LUC's reasonable definition of "farm dwelling."[241]

The Hawaii Supreme Court's analysis illustrates how popular accountability might help bolster and authenticate state divergence from Supreme Court precedent. Although it seems plausible that Hawaii's constitutional structure is better suited to *Chevron* deference than the holding in *Loper Bright*, the Hawaii Supreme Court missed an opportunity to connect Hawaii's unique structure to *Chevron* and to explain how the LUC was an appropriate recipient of deference. For example, it's unclear from the court's analysis how the constitutional relationship between the Hawaii courts, legislature, and the LUC is analogous to the dynamics between Congress, the Supreme Court, and the long list of highly technical, professional, and bureaucratic federal agencies that the court recites from Justice Kagan's analysis. Justice Kagan may be correct that the federal regulatory landscape works best when courts defer to agencies, but that conclusion is based on various facts about federal constitutional structure that may not hold true for Hawaii's constitutional structure.

Popular accountability constitutionalism can help here because it shifts orientation towards authentic state structural questions. For example, a focus on popular accountability would ask whether *Chevron* helps popular majorities respond to agency failures or protects agencies from unhelpful popular interjection. Either can be appropriate depending on Hawaii's constitutional structure, but the court's analysis missed an opportunity to engage with these more salient questions of state constitutional law and demonstrate that Hawaii's commitment to agency deference arises from its own structure rather than Justice Kagan's federal institutional analysis – which is not an axiomatic fit.

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[234] *See* Aaron J. Saiger, *Chevron Deference in State Administrative Law*, 83 FORDHAM L. REV. 555 (2014).
[235] *Id*. at 412.
[236] 556 P.3d 387, 403-04 (Hawaii 2024).
[237] *Id*.
[238] *Id*. at 405.
[239] *Id*. at 404-05.
[240] *Id*. at 405.
[241] *Id*.

Popular accountability constitutionalism would also ask poignant questions about the LUC. If the LUC is a highly professional agency engaged in complex technical regulation, *Chevron* may fit for reasons articulated by Justice Kagan. But state agencies are far more diverse in their purpose, structure, and composition than federal agencies. Indeed, LUC commissioners are appointed by the Governor, but they are unpaid volunteers appointed from each county. If the LUC is mostly a layperson agency designed to ensure that local interests are not ignored or overrun by statewide land-use planning or captured by wealthy, outside developers,[242] then the applicability of *Chevron* is more complex. *Chevron* may still be a good fit, but some of Justice Kagan's rationales may have less force because the LUC may be very different than the federal agencies that Justice Kagan relied on for her analysis.[243]

In contrast, consider how state courts have responded to the legislative veto process that the United States Supreme Court ruled unconstitutional in *INS v. Chadha*.[244] *Chadha*'s reasoning was highly formalistic.[245] The Court held that the legislative veto was effectively an act of legislation that evaded bicameralism and presentment.[246] Because Congress cannot legislate without following the full legislative process, the legislative veto is impermissible under the federal constitution.[247] Various state courts have analyzed the issue differently and with greater sensitivity and nuance regarding popular accountability under state constitutions.[248]

A good example is *Barker v. Manchin*.[249] In *Barker*, the West Virginia Administrative Procedure Act created the Legislative Rule-Making Review Committee to approve all agency rules.[250] The committee was comprised of six senators and six house members appointed by the majority leader of each chamber.[251] The West Virginia court held that this arrangement was unconstitutional for various reasons, including a very detailed analysis of how it would obscure the ordinary pathways of popular accountability and free the legislature from existing constitutional restrictions designed to promote accountability.[252]

The court was especially concerned that placing great power in a small legislative subcommittee would foster improper decision-making dynamics that further reduce accountability to statewide majorities.[253] Specifically, the court was concerned that because the subcommittee would necessarily include representatives from only a subset of the "local electorates," there was good

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[242] LUC commissioners are appointed by the Governor, but they are all "non-paid volunteers who represent a cross-section of the community." https://luc.hawaii.gov/about/history-3/.

[243] This is not to suggest that *Chevron* deference would be inappropriate. My point instead is that popular accountability provides a basis for the court to more authentically justify departure from *Loper Bright* than simply registering agreement with Justice Kagan's assessment of federal constitutional structure.

[244] 462 U.S. 919, 928 (1983).

[245] *See id*. at 945-52.

[246] *See id*. at 952.

[247] *See id*.

[248] *See* Miriam Seifter, *State Legislative Vetos and State Constitutionalism*, 99 N.Y.U. L. REV. 2017 (2024).

[249] 279 S.E.2d 622 (W.V. 1981).

[250] *Id*. at 626.

[251] *Id*.

[252] *Id*. at 632 ("The power of a small number of Committee members to approve or to disapprove otherwise validly promulgated administrative regulations, and of the entire legislative body to sustain or to reverse such actions either by concurrent resolution or by inertia, constitutes a legislative veto power comparable to the authority vested in the Governor, and reverses the constitutional concept of government whereby the Legislature enacts the law subject to the approval or the veto of the Governor.")

[253] *Id*. at 635.

reason to believe that it would not act in a manner consistent with statewide interests and would be misaligned with statewide popular preferences.[254] The court concluded that because the West Virginia constitution went to great lengths to construct a legislative process that would hold the legislature accountable to the broader public,[255] the subcommittee veto mechanism was unconstitutional.[256]

Barker is a masterclass in independent state constitutionalism grounded in popular accountability. The West Virginia court carefully examines the details of the challenged legislative veto process in light of its impacts on the constitution's existing accountability objectives and strategies. In doing so, it arrives at a well-reasoned and truly independent state constitutional analysis that rejects the legislative veto because it would undermine existing constitutional accountability strategies.

2. Accountability and Rights

Before discussing illustrative cases, some background regarding the development of state constitutional rights jurisprudence is necessary. Since the 1970s, the independent adjudication of state constitutional rights has received much attention from scholars and jurists.[257] Justice Brennan, building on the pioneering efforts of Justice Hands Linde, brought attention to state constitutional rights as an extra source of protection when federal rights regressed or fell short.[258] This movement, known as the New Judicial Federalism, called on state judges to avoid blind lock-stepping with federal precedent and reach independent judgements about the proper scope of rights under state constitutions.[259]

The New Judicial Federalism was significant, but it was also met with backlash and academic criticism.[260] Backlash came mostly in the form of responsive constitutional amendments that scaled back rights, but there were also judicial recalls and responsive judicial election campaigns.[261] Academic criticism varied, but most argued in some form that independent state rulings were

[254] *Id*. at 635.

[255] *Id*. at 632 (listing all the provisions that guide and limit the legislature in pursuit of public accountability).

[256] By way of contrast, consider Iowa's legislative veto process, which allows the legislature to "nullify an adopted administrative rule of a state agency by the passage of a resolution by a majority of all of the members of each house of the general assembly." IOWA CONST. art. III, § 40.

[257] *See* WILLIAMS & FRIEDMAN, *supra* note 228, at 137-165 (providing history of New Judicial Federalism).

[258] *See id*. at 137-38. Justice Brennan's famous article is: William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). One of Justice Linde's early and influential articles was: Hans A. Linde, *E Pluribus— Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 196– 97 (1984).

[259] *See* WILLIAMS & FRIEDMAN, *supra* note 228, at 137-165. The canonical academic article in support of independent state court analysis is Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984).

[260] *See id*. at 154.

[261] *See* John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007); John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105 (2012); Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223 (1984); Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153, 153 (1987); Kenneth P. Miller, *Defining Rights in the States*, 76 ALB. L. REV. 2061, 2064 (2013); KENNETH MILLER, DIRECT DEMOCRACY AND THE COURTS 155 (2009).

unprincipled and results-oriented, based on dissatisfaction with trends at the Supreme Court.[262] In any event, state courts struggled to fully embrace or develop an independent state jurisprudence of constitutional rights – in part because court opinions were constantly displaced by popular amendments and also because scholars and judges struggled to develop a principled method for their work.[263]

We are now experiencing a revival of interest in independent state constitutional rights adjudication. The Supreme Court's ruling in *Dobbs* has put state courts and state constitutions in the spotlight regarding reproductive rights, and animated new calls from civil liberties groups for state courts to broaden rights rather than lockstep with the Supreme Court. The conservative legal movement has also taken notice of state constitutions, suggesting that originalism might provide a sound theoretical basis for state rights adjudication.[264]

Amidst all this jostling regarding state constitutional rights, few scholars or jurists have asked this basic question: What is the underlying purpose of constitutional rights within the broader structure of a state constitution? This question has been mostly lost or ignored in favor of grander theories about how state constitutional rights can contribute to the overall federal system. Those inquiries are important, and they are part of the story of state constitutional rights, but they tend to obstruct inquiries into state constitutional rights on their own terms. They make state constitutional rights overly derivative of federal constitutional politics, and they stunt an authentic understanding of state constitutional rights.

In other work, I have tried to enhance our understanding of state constitutional rights on their own terms by focusing on their role within the broader history, structure, and texts of state constitutions.[265] I collected and reviewed all known state constitutional convention debates where state declarations of rights were forged and reformed (105 conventions from 1818 to 1984).[266] Those state-centered sources revealed that states view their declarations of rights very differently from how the Supreme Court has viewed the federal Bill of Rights following the Civil Rights Era and incorporation through the Fourteenth Amendment.[267]

Traditionally, the Supreme Court has understood the federal Bill of Rights as a bulwark against abusive majorities and a key instrument for federal courts to enforce a small set of critical counter-majoritarian constraints on politics.[268] This has generated two connected doctrinal prongs. When a claimed right is not "fundamental" (or nowadays explicitly textual and historically supported), the Supreme Court is incredibly deferential to the political branches because it assumes that the political branches are more democratic and best suited to regulate in those areas.[269] The Court applies heightened review only for "fundamental" (or textually explicit and historically rooted)

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[262] *See, e.g.*, Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANN. AM. AC. POL. SC. 98 (1998); Paul Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); James A Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

[263] *See* Justin R. Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41 (2006); *see also* Bulman-Pozen & Seifter, *supra* note 231, at 1881-1891 (emphasizing the lack of theoretical frame to support independent state constitutional rights jurisprudence).

[264] *See, e.g.*, Clint Bolick, *Principles of State Constitutional Interpretation*, 53 ARIZ. ST. L.J. 771 (2021); Justice R. Patrick DeWine, *Ohio Constitutional Interpretation*, 86 Ohio St. L.J. (forthcoming 2025).

[265] *See* Marshfield, *supra* note 100, at 886-926.

[266] *See id*.

[267] *See id.*

[268] *See id*.

[269] I am describing, of course, rational basis review.

rights.[270] This framework is designed to empower federal courts as a counter-majoritarian force regarding core rights but also to constrain federal courts (which are among the most democratically insulated institutions in American government) regarding everything else. In this way, federal rights jurisprudence is often a boon for the political branches, which need only present a rational justification to defeat the vast majority of rights claims so long as they head a small (and probably shrinking) set of fundamental rights.

This is not how states have understood the underlying purpose or structure of their declarations of rights.[271] To the contrary, the states have approached constitutional rights as a critical mechanism for empowering popular majorities to protect themselves from wayward government on all manner of issues.[272] Indeed, most state declarations of rights begin by declaring a collective right of the people to amend their constitutions as necessary to rein in government.[273] The convention debates also show that the states have mostly engaged with rights as instruments of popular control over government and not entrenched counter-majoritarian constraints.[274] Indeed, John Dinan and Alan Tarr have found that before the 1970s, state courts very rarely engaged in meaningful rights adjudication because the people enforced rights themselves through various political processes that held government accountable, including through frequent constitutional conventions, ad hoc amendments, and populist legislatures.[275]

This state-centered perspective on constitutional rights explains their unusual structure and content. Most declarations of rights include broad invocations of popular sovereignty and the collective rights of the people, a list of general rights that overlap with the federal Bill of Rights, and then a host of idiosyncratic and detailed rights that were clearly responsive to particular government failures.[276] This last category includes things like prohibitions on debtors prisons,[277]

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[270] Here, heightened review comes in the form of strict scrutiny (and its means-end variants) or a search for historically analogous, constitutional regulations. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1285 (2007); Andrew Willinger, *History and Tradition as Heightened Scrutiny*, 60 WAKE FOREST L. REV. (forthcoming 2025).

[271] *See* Marshfield, *supra* note 100, at 858.

[272] *See id.* at 858-59; Wesley W. Horton, *Annotated Debates of the 1818 Constitutional Convention*, 65 Conn. Bar J. 3, 17 (1991) (describing the Connecticut bill of rights as an "ordinance of the people" because "it could not be improper to settle certain points—the people were possessed of certain rights, to abridge the power of the legislature, and enlarge the power of the executive or judiciary" and noting further that "[s]ome of the states had made such regulations, and confined their legislatures within such limits, as to prevent the enacting of any law on certain subjects"); PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 3264 (1868) ("The theory of our actions so far, has been that we cannot trust the legislature, because from various causes the legislature would often disregard what was required . . . and therefore it is necessary to provide for this in the organic law"); PROCEEDINGS OF THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1844, at 170 (N.J. Writer's Project of the Works Projects Admin 1942) ("How dark are the evils that unbridled legislation has inflicted on the community. We are called upon . . . to guard all the avenues by the which people's rights may be invaded. By adopting the declaration of rights, we will circumscribe the actions of the legislature")

[273] These provisions are ubiquitous in current state bills of rights. *See supra* Part II.B.1; Steven G. Calabresi, *Individual Rights under State Constitutions in 2018*, 94 NORTE DAME L. REV. 49, 133 (2018) (as of 2018, forty-nine states have provisions).

[274] *See* Marshfield, *supra* note 100, at 893-926 (surveying modes of argument and issues in convention debates).

[275] *See* JOHN DINAN, KEEPING THE PEOPLE'S LIBERTIES 32 (1998); TARR, *supra* note 7, at 162-63.

[276] *See* Bulman-Pozen & Seifter, *supra* note 231, at 1862-81.

[277] *See, e.g.*, KY. CONST. BILL OF RIGHTS § 18 ("The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law.").

the right to hunt, fish, and access navigable waters,[278] rights related embryonic stem cell research,[279] the right to work,[280] the right to unionize,[281] the right to pick your own healthcare insurance (or not),[282] the rights of crime victims,[283] and the list goes on.

This structure can seem dysfunctional if state constitutional rights must function like the federal Bill of Rights. State declarations of rights do not look like a list of stable fundamental commitments that should be entrenched beyond the reach of popular majorities. Instead, they look like a hodgepodge of popular grievances across time mixed in with deeper collective commitments, basic individual freedoms, and broad structural blueprints. But the state convention debates suggest that this is by design. State declarations of rights were built to ensure that the ultimate right of the people to control government would be realized.[284] They weren't built to function as a higher law beyond the people's reach. They were built to function as a higher law beyond the reach of government but always within the people's reach.

So what does this mean for contemporary state rights jurisprudence? It suggests that state courts should rethink the degree to which federal rights paradigms cohere with state constitutional structure. Specifically, it seems odd that state courts would reduce most rights down to rational basis review or elevate all state rights to fundamental status.[285] Moreover, because many state courts have been restructured around popular elections to empower active judicial monitoring of government on behalf of the people, it seems proper for state courts to consider more searching standards of review across a broader set of rights.[286]

In this regard, Miriam Seifter and Jessica Bulman-Pozen have argued that state courts should apply a form of "proportionality review."[287] Proportionality review has various components, but a key feature is its emphasis on judicial balancing between the significance of a private interest at stake and the government's methods and purpose for infringing a right.[288] Another key component is the willingness to "engage in remedial tailoring in lieu of all-or-nothing dispositions."[289] "Remedial tailoring" invites courts to "draw on their common law tradition" to "do justice in individual cases."[290]

As Professors Seifter and Bullman-Pozen argue, proportionality review may be especially well-

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[278] *See, e.g.*, ALA. CONST. art I § 24 ("That all navigable waters shall remain forever public highways, free to the citizens of the state . . ."); FL. CONST. art. I § 28 ("Fishing, hunting, and the taking of fish and wildlife, including by the use of traditional methods, shall be preserved forever as a public right")

[279] *See, e.g.*, MICH. CONST. art I § 27 (detailed provision regarding embryonic stem cell research).

[280] *See, e.g.*, ARIZ. CONST. art I § 36.05 ("It is hereby declared to be the public policy of Alabama that the right of persons to work may not be denied or abridged. . .").

[281] *See, e.g.*, ARK. CONST. amd. 34 RIGHTS OF LABOR § 1 ("No person shall be denied employment because of membership in or affiliation with or resignation from a labor union.").

[282] *See, e.g.*, OHIO CONST. art. I § 21 ("No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system.").

[283] *See, e.g.*, ILL. CONST. art I § 8.1 (Crime Victims' Rights).

[284] *See supra* note 272 (providing examples); *See* Marshfield, *supra* note 100, at 893-926.

[285] *See* Bulman-Pozen & Seifter, *supra* note 231, at 1891.

[286] Additionally, it's important to keep in mind that state court rulings on rights are rarely the final word precisely because amendment is more accessible under state constitutions. Thus, if state courts get things wrong, voters can usually respond.

[287] Bulman-Pozen & Seifter, *supra* note 231, at 1857.

[288] *See id.*

[289] *See id*. at 1921.

[290] *See id*. at 1860.

suited to state constitutional rights adjudication for various reasons. First, it accommodates the array and variable significance of rights in state constitutions.[291] Proportionality review allows courts to recognize that rights have varying degrees of significance that can justify varying degrees of government intrusion. When adjudicating the right to play bingo, for example, this seems like a useful and authentic framework.[292] Second, unlike federal courts, state courts are "democratically embedded actors, not countermajoritarian interlopers."[293] Proportionality review empowers courts to actively participate in governance. This is problematic for federal courts, which have extreme independence from popular accountability and are immune to corrective amendments. But state courts are deeply connected to the public through various factors and are called to monitor the government on behalf of the public. Their decisions are easily corrected through liberal amendment processes, and they are well-suited to craft outcomes that hold government accountable based on a synthesis of popular preferences expressed across the entire state constitution. Thus, something like proportionality review seems more aligned with popular accountability constitutionalism. Importantly, Professor Seifter and Bulman-Pozen note that state courts already tend to engage in something like proportionality review from time to time.[294]

Here, I use two cases addressing the right to hunt and fish to illustrate how state courts might engage with state constitutional rights in a manner more compatible with the underlying structure of state constitutions than dominant federal frames.

First, a constructive example. In *California v. San Luis Obispo Sportsman's Association*, anglers sued under the state constitutional right to fish because a public utility commission denied them fishing access to a state-owned reservoir.[295] The utility commission argued that it was allowed to ban fishing to protect the quality of the water, which was used for public consumption.[296] The anglers asserted that the right to fish on public land was mostly absolute.[297] The California Declaration of Rights says:

> The people shall have the right to fish upon and from the public lands of State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; . . . . provided, that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.[298]

In deciding the case, the court conducted a form of proportionality review.[299] The court held that the right to fish was not absolute because it applied only to state-owned lands used by the state in a manner compatible with public fishing.[300] The court noted, for example, that state land

[291] *See id*. at 1895.
[292] *See id*. (using this example).
[293] *See id*. at 1856.
[294] *See id*. at 1912.
[295] 584 P.2d 1088, 1088 (Cal. 2021).
[296] *See id*. at 1093.
[297] *See id*.
[298] CAL. CONST. art. I, § 25.
[299] *See* San Luis, 584 P.2d at 1091-92.
[300] *See id*.

used for "prisons or mental institutions" would not be subject to the public's right to fish.[301] However, the court found that the commission's interest in protecting water quality was not wholly incompatible with public fishing and inadequate to justify a total ban.[302] The court recognized that the utility commission was subject to competing lawful obligations (water quality versus public fishing).[303] Thus, the court balanced all the interests and constructed a proportional remedy.[304] It ordered that the utility commission institute a program that would accommodate limited public fishing in a manner that allowed the commission to control water quality.[305] The court's order also addressed cost allocation for the new program.[306]

The court's analysis in *San Luis* is illustrative of how proportionality review can cohere with popular accountability constitutionalism. The court located all the competing interests and constructed a remedy that balanced those interests. This, no doubt, was an intrusion on legislative and executive discretion. Indeed, the court asserted that the utility commission had to install bathrooms and surveillance to protect water quality, and also addressed how much of the reservoir the utility had to open for fishing.[307] But this intrusion reflects an effort to take the public's competing constitutional preferences seriously and not allow the government to disregard one preference because it prefers another. The court's balancing approach held the government accountable to the public's expectations expressed in the right-to-fish provision while also honoring the public's other interests and preferences.

Now consider a different example. In *Hunters of Vermont v. Winooski Valley Park District*, a municipal park district prohibited hunting and trapping on all its public lands (almost 2,000 acres).[308] The district justified its ban by asserting that it planned to use the lands solely for recreation and conservation, which were inconsistent with hunting and trapping.[309] A hunting and trapping association sued under a provision in the Vermont Constitution, which provides: "The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, . . . under proper regulations, to be made and provided by the General Assembly."[310] The hunters argued that they had a right to hunt on the land, and they presented evidence that the land could safely accommodate hunting, recreation, and conservation.

In upholding the ban, the Vermont Supreme Court effectively applied rational basis review. It held that the state legislature had delegated regulatory authority to the district regarding the proper

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[301] *See id*. at 1091.
[302] *See id*. at 1091-93.
[303] *See id*. at 1094-95.
[304] *See id*.
[305] See *id.* at 1095-96.
[306] *See id*. at 1095-96 ("From the foregoing, it appears that appellants are under a duty to provide access to the public for fishing under [the state constitutional right to fish]. They are also under a duty to protect the purity of the water supplied from the reservoir to domestic users. . . . Since a fishing program consisting of sanitary facilities and surveillance is necessary to fulfill these dual obligations, we think that the trial court properly concluded that appellants have a duty to provide such a fishing program. We further think that the trial court reasonably apportioned the cost of the program on the basis of the parties' agreement as to the sharing of operating and maintenance costs of the reservoir.").
[307] *See id*. at 1095.
[308] 913 A.2d 391 (Vt. 2006).
[309] *Id*. at 393-94, 398.
[310] VT. CONST. ch. II, § 67.

scope of hunting and fishing on district lands.[311] As a result of this delegation, the court concluded that the district's decision was entitled to deference as a reasonable regulation given its interests in promoting conservation and recreation.[312]

The court's analysis illustrates the potential benefits of shifting towards popular accountability constitutionalism. Although the right to hunt and fish is probably not a fundamental right entitled to absolute protection and heightened scrutiny, the Vermont Constitution surely provides some degree of protection greater than rational basis. Indeed, rational basis review essentially equates the right to hunt with generic due process and thereby renders the right to hunt redundant of generic constitutional structures. By failing to craft a standard of review concomitant with the specific, detailed language of Vermont's right-to-hunt provision, rational basis review undermines the people's expressed preferences in the declaration of rights. This sort of analysis is hard to reconcile with the deep structure of state constitutional design, the commitment to popular accountability, and deep distrust of legislative action.

3. Accountability and Remedies

Popular accountability should also impact how state courts approach constitutional remedies. As noted above, state courts should be willing to synthesize and balance multiple expressions of public will into substantive rulings that keep government accountable to the state constitution's detailed text. But state courts should also rethink their remedial jurisprudence. If popular accountability means that state courts should more actively engage in governance, it follows that state courts should think critically about the types of remedies they construct.

Here, I use two cases that address the proper scope of structural injunctions – injunctions that require a political branch of government to take specific measures to comply with the constitution. The first case locksteps state remedial jurisprudence with the Supreme Court's institutional analysis under the federal constitution. The second case takes an independent approach that better accounts for popular accountability constitutionalism.

In *Iowa Citizens for Community Improvement v. State*, plaintiffs sued the state (including various state environmental agencies and officials) because of high levels of nitrogen and phosphorus in the Raccoon River.[313] The plaintiffs claimed that the state was in violation of its legal duty to preserve public lands because it failed to address known pollution by farmers.[314] Plaintiffs sought an injunction requiring the state to regulate in a manner that would reduce levels of nitrogen and phosphorus in the river.[315] The Supreme Court of Iowa agreed that the state had a legal duty on behalf of the public to effectively regulate pollution into the River, but it rejected the claim because

[311] *Hunters of Vermont*, 913 A.2d at 395.

[312] The court did not explain how a total ban is a reasonable regulation, but it seems to have assumed that a total ban was reasonable in light of the district's stated purpose for the land (recreation and conservation).

[313] 962 N.W.2d 780, 785 (Iowa 2021).

[314] *Id*. at 785-87.

[315] *Id*. Specifically, they sought "an injunction requiring the state to adopt and implement a mandatory remedial plan to restore and protect public use that requires agricultural nonpoint sources and CAFO's [confined animal feeding operations] to implement nitrogen and phosphorus limitations in the Raccoon River watershed." *Id*. They also sought "an injunction against the State authorizing the construction and operation of new medium and large animal feeding operations and confined animal feeding operations in the Raccoon River watershed" until the remedial program was operational. *Id*.

the relief sought was improper under federal remedies and justiciability doctrines.[316]

In rejecting the claim, the court explicitly relied on the federal political question doctrine as described by the Supreme Court in *Rucho v. Common Cause*.[317] Quoting *Rucho*, the Iowa Supreme Court explained that the plaintiffs' requested injunction was improper because it would stretch the judicial role beyond adjudicating legal rights in a one-time judgment.[318] The court said:

> Where the plaintiffs have put forth claims that we cannot meaningfully resolve as a court using accepted methods of judicial decision-making, we should invoke the political question doctrine. We do so here and leave this dispute where it stands at present: with the branches of our government whose duty it is to represent the public. In the end, we believe it would exceed our institutional role to "hold the State accountable to the public." Those words, used by the plaintiffs to describe what they ask of us, go beyond the accepted role of courts and would entangle us in overseeing the political branches of government.[319]

The court was especially worried about how it would ensure compliance from the legislature and state regulators. The court further explained:

> How does one balance farming against swimming and kayaking? How should additional costs for farming be weighed against additional costs for drinking water? Even if courts were capable of deciding the correct outcomes, they would then have to decide the best ways to get there. Should incentives be used? What about taxes? Command-and-control policies? In sum, these matters are not "claims of legal right, resolvable according to legal principles, [but] political questions that must find their resolution elsewhere.'" [(quoting *Rucho*)].[320]

This analysis highlights several ways in which popular accountability constitutionalism might enhance and reorient the analysis to better reflect state constitutional structure. First, the court did not examine the institutional reasoning underlying the federal political-question doctrine or consider whether Iowa's constitutional structure might support a different conclusion. Federal justiciability doctrines are tied directly to Article III's "case and controversy" language and the federal constitution's republican design logic.[321] Iowa's constitution and judicial structure exhibit meaningful differences. Iowa courts are common law courts of general jurisdiction with broad remedial powers and a history of entertaining all manner of equitable relief. Indeed, the Iowa Constitution says that the Supreme Court "shall have power to issue all writs and process necessary to secure justice to parties,"[322] and Iowa's district courts are courts of general common law and

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[316] *See id*. at 797.

[317] *See id*. (citing Rucho v. Common Cause, 588 U.S. 684 (2019)).

[318] *See id*. 797.

[319] *Id*. at 799.

[320] *Id*. at 796–97.

[321] *See Rucho*, 588 U.S. at 695 ("Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies.' We have understood that limitation to mean that federal courts can address only questions historically viewed as capable of resolution through the judicial process.") (internal citations and quotation marks omitted).

[322] IOWA CONST. art. V § 4. Contrast this language with Article III, which includes not language regarding federal court's remedial powers, and the All Writs Act, which is far more restrictive of federal court remedial powers. See

equity jurisdiction with the power to issue all remedies.[323] Relatedly, all Justices on the Iowa Supreme Court and all trial judges are subject to popular retention elections.[324] Thus, it's unclear why "accepted methods of [*federal*] judicial decision-making,"[325] should dictate the scope of authority exerted by Iowa's courts over Iowa government on behalf of Iowans.

Second, the Iowa Supreme Court adopted the federal presumption that it is fundamentally improper for courts to oversee policy determinations by the political branches because those branches have a constitutional obligation to "represent the public" *to the exclusion of the courts*.[326] This may be true under the federal constitutional structure, but it is not axiomatic under Iowa's constitutional structure. The Iowa Constitution says that "all political power is inherent in the people" and that all "state government is instituted for the protection, security, and benefit of the people."[327] And, as noted above, Iowa judges are subject to elections. Moreover, Iowans have added vast amounts of policy detail to their constitution, reflecting popular demands and expectations for state government, including an explicit 2010 amendment that creates "a natural resource and outdoor recreation trust fund" for "the purposes of protecting and enhancing water quality and natural areas in this state."[328] This overall structure suggests a more active role for Iowa courts (especially regarding conservation) than the role proscribed under Article III for federal courts.[329]

Of course, this does not mean that the Iowa Supreme Court's administrability concerns are misplaced. Judicial oversight of structural injunctions is difficult and may be improper in many cases (perhaps even in *Iowa Citizens for Community Improvement*).[330] My comment here is not about the outcome; it's about the mode of reasoning. The court does not engage with Iowa's constitutional structure to arrive at a remedies decision that reflects Iowa's commitment to popular accountability. Administrability costs and difficulties are surely relevant, but they should be weighed against Iowa's constitutional policy mandates and structure to arrive at an outcome that holds government accountable to the constitution. Instead, the court relied on federal institutional analysis and assumptions to circumscribe the role of state courts and thereby devalue the details

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28 U.S.C. § 1651 ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

[323] IOWA CONST. art V § 6; IOWA CODE ANN. § 602.6101 (West) ("The district court has exclusive, general, and original jurisdiction of all actions, proceedings, and remedies, civil, criminal, probate, and juvenile, except in cases where exclusive or concurrent jurisdiction is conferred upon some other court, tribunal, or administrative body. The district court has all the power usually possessed and exercised by trial courts of general jurisdiction, and is a court of record."); Pottawattamie Cnty. Dep't of Soc. Servs. v. Landau, 210 N.W.2d 837, 841 (Iowa 1973) (district courts have all common law remedies).

[324] IOWA CONST. art. V § 17.

[325] *Iowa Citizens for Community Improvement*, 962 N.W.2d at 799.

[326] *See id*.

[327] IOWA CONST. art. I § 2.

[328] IOWA CONST. art. VII § 10.

[329] The conservation trust fund that voters approved in 2010 is a tricky amendment. It includes language requiring the legislature to fund the trust if taxes are raised from their rates on the date of the amendment. *See* IOWA CONST. art. VII § 10. The legislature has not raised the applicable taxes or funded the trust, which raises questions about the true expressive value of the conservation trust provision. It was approved by 63% of Iowa voters.

[330] *But see* Ching v. Case, 449 P.3d 1146, 1182 (Hawaii 2019) ("It is not uncommon for courts to issue generally-stated orders requiring government agencies to submit plans to remedy constitutional violations and then evaluate the adequacy of the plans prior to their implementation. And the Hawai'i Supreme Court has prescribed intensive monitoring to ensure specific compliance with terms of a broadly phrased order").

and structure of the Iowa Constitution.

Now consider a different example. In *New York Lawyer's Association v. State*, private lawyers challenged a state law that set caps on public compensation to private lawyers assigned to represent indigent parties who were entitled to lawyers under the New York Constitution.[331] The plaintiffs argued that the caps were unconstitutional because they "rendered hollow the constitutional right to counsel and obstruct[ed] the judiciary's right to function."[332] The plaintiffs sought an injunction lifting the cap and requiring better compensation for assigned lawyers.[333]

In granting injunctive relief, the court acknowledged that "the expenditure of funds for the purpose of indigent defense . . . is a complex societal and governmental issue best left to the legislative and executive branches."[334] However, the court found a strong likelihood "that indigent litigants in the New York City family and criminal courts are being denied effective assistance of counsel."[335] Moreover, the court found that ineffective assistance of counsel was impairing the judiciary's constitutional function.[336] Most importantly, the court examined its equitable powers under the New York Constitution and concluded that it had "all powers reasonably required" to perform its judicial functions, which included enforcing the constitution.[337] Thus, the court concluded: "Long standing maxims rooted in the doctrine of separation of powers must yield in equity on a showing that the State's failure to raise the current compensation rates adversely affects the judiciary's ability to function and presumptively subjects innocent indigent citizens to increased risks of adverse adjudications and convictions merely because of their poverty."[338]

The value of this illustration is the structure of the court's analysis, not the outcome. Rather than limit equitable relief based on federal separation-of-powers analysis, the court engaged in a balancing of the various interests, costs, and constitutional obligations. On the one hand, the New York Constitution contains a liberal right to counsel for indigent defendants and imposes an obligation on courts to fairly decide cases. On the other hand, separation-of-powers principles generally require courts to defer to the political branches regarding funding policies. On balance, the court determined that general separation-of-powers principles should yield because the court had an obligation (and equitable power) to hold the political branches accountable to more specific constitutional obligations.

Of course, these types of remedies come with significant costs and consequences. Structural injunctions of this type require continued judicial monitoring for compliance, which can draw out litigation for decades. I do not mean to diminish these costs and consequences. I mean only to argue that popular accountability constitutionalism requires state courts to actively assess these costs rather than avoiding the analysis by invoking inapposite federal justiciability doctrines.

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[331] 745 N.Y.S.2d 376 (N.Y. Sup. Ct. N.Y. County 2002). The right to a lawyer under the New York Constitution is broader than the Sixth Amendment right to counsel under the federal constitution. *See* Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State*, 25 TOURO L. REV. 31 (2009). In New York, indigent parents subject to child custody proceedings are entitled to counsel under the state constitution.

[332] *New York Lawyer's Association*, 745 N.Y.S.2d at 380.

[333] *See id*.

[334] *See id*. at 385.

[335] *See id*.

[336] *See id*.

[337] *See id*. at 388.

[338] *See id*.

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The illustrations I provide above are merely anecdotes that demonstrate how state courts might engage more directly with popular accountability constitutionalism in constructive ways. These illustrations show that while there is precedent for incorporating popular accountability constitutionalism into state doctrine, state courts must do so deliberately and must avoid the temptation to be guided by broad Federalist tropes rather than the details of their own state's constitutional text and structure. At a minimum, state courts should be critical of doctrines that limit popular accountability as a matter of unjustified first principles and doctrines that rely on institutional analysis under the federal constitution.

IV. POPULAR ACCOUNTABILITY & INTERPRETIVE APPROACHES

At this point, a few brief comments regarding methods of constitutional interpretation are warranted. A full discussion is beyond the scope of this article,[339] but I offer preliminary thoughts on how the theory of state constitutionalism I defend above is relevant to jurists who follow originalist and non-originalist approaches to constitutional interpretation. In short, I believe it is relevant to both.

A. Non-Originalist Approaches

Popular accountability constitutionalism is relevant to lawyers and judges who ascribe to interpretive techniques beyond text and history. Indeed, the theory of state constitutionalism that I describe above is mostly a holistic structural account of state constitutions that is also grounded in text and history. My claim is that state constitutions (today and in the past) organize government around a deep commitment to popular accountability and that constitutional rules should be tested against that polestar.

Structural reasoning was famously espoused by Charles Black as a useful way to locate constitutional meaning by drawing inferences from constitutional institutions and processes.[340] Of course, structural reasoning is often criticized as being too indeterminate and open-ended.[341] But even Charles Black recognized that structural reasoning does not "supplant" other modalities of constitutional construction, such as text, history, and precedent.[342] Structural reasoning is useful when integrated with other modalities to help triangulate constitutional meaning.

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[339] In another ongoing project, I am exploring how originalism maps onto the unique features of state constitutionalism. For various reasons, this is an important and emerging inquiry that should be informed by an accurate understanding of state constitutional structure and development. For example, as I describe below, there is a temptation among judges and lawyers to assume that, after the Founding, Federalist logic and thinking predominates all public understanding of American constitutionalism. But state constitutional convention debates, and the statewide referenda campaigns that ratified them suggest that this is not the case. During the Progressive Era, for example, popular state understanding regarding the role of the judiciary was vastly different from the Federalist account offered at the founding. State voters personally ratified various constitutions with the very clear understanding and expectation that courts would more actively engage in governance on behalf of the people than they had prior.

[340] CHARLES BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); *see* Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L. J. 833, 834 (2004) (describing structural method).

[341] BLACK, *supra* note 340, at 31.

[342] *See id*.

My account of state constitutionalism draws on structural reasoning in at least two ways. First, structural reasoning (along with text and history) reveals and validates the state constitutional commitment to popular accountability. Non-originalist jurists will find significant evidence in the orientation and structure of state constitutions to support the claim that those constitutions are committed to popular accountability. Second, in exploring how popular accountability should impact doctrine, I have assumed that popular accountability is a core pillar in constitutional structure and have reasoned from it to evaluate when doctrine should be augmented or adjusted. This type of analysis should be within the pale of most non-originalist approaches to constitutional adjudication.

For example, when courts review a regulation that imposes higher burdens on the citizen initiative, popular accountability constitutionalism should play some role in assessing that restriction. It may not play a decisive role. And it does not necessarily tip the scales one way or the other.[343] But it should help guide and orient courts as they assess other sources of constitutional meaning.

In short, if you accept my account above, a state judge (especially a non-originalist judge amenable to structural reasoning) should think about how any proposed constitutional rule interacts with the constitution's commitment to popular accountability. This is no different than a United States Supreme Court Justice asking how a proposed rule would affect federalism.

B. Originalist Approaches

The relationship with originalism is perhaps a bit more complicated. Originalism comes in different forms, and a survey of all the variations is beyond the scope of this article.[344] Nevertheless, I understand all major originalist accounts to embrace some version of the "fixation thesis," which holds that "the meaning of the constitutional text is fixed when each provision is framed and ratified."[345]

A committed originalist might find popular accountability constitutionalism useful in at least three ways. First, some originalists argue that structural reasoning can "illuminate" original meaning.[346] Michael Stokes Paulsen, for example, has argued that "it is not at all improper constitutional interpretation to deduce from the document certain rules of law that flow logically from others contained in the text or discernible from its structure and operation, even if this sometimes yields mildly surprising conclusions."[347] Paulsen further explains that the process is like devising a geometric proof: "if the constitutional postulates are sound, and the logical inferences

[343] After all, strong regulation of the initiative is important for the initiative's accuracy and reliability.

[344] *See generally* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

[345] *See id*. at 29. Identifying the substance of original meaning can be complicated and there are different theoretical approaches. A dominant approach is original *public* meaning, which focuses on how an ordinary adult at the time of ratification would understand the constitution. A less prominent strand focuses on the drafter's subjective intentions. Another focuses on the original methods of legal interpretation at the time of ratification. *See id*.

[346] *See* Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, so Help me God!*, 81 U. CHI. L. REV. 1385, 1385 (2014) ("The text of course must be understood in terms of the original public meaning of its words and phrases, in the linguistic, social, and political contexts in which they were written: history and context illuminate textual meaning; so does constitutional structure; so can precedent, at least sometimes.").

[347] *Id*. at 1394.

and deductions are rigorous and justified, the resulting theorems are also correct – justified, ultimately, by the constitutional text."[348]

The arguments I have made above are grounded in the text of existing state constitutions and the structures that they create, buoyed by a corroborating historical account. My core claim is that state constitutional text, structure, and history demonstrate that popular accountability is a first-order state constitutional commitment. In many states, that argument does not require inferences or deductions – it's explicit in the opening sections of the state constitution and corroborated by various derivative structural features. To use Professor Paulsen's analogy, popular accountability is an eminently sound state constitutional postulate from which to reason in deciding other constitutional cases. Of course, it must be incorporated into the analysis alongside other substantiated postulates, but it should be on the list even for an originalist.

Second, various "originalist" Supreme Court opinions embrace structural reasoning grounded in historical context even when detached from any particular constitutional provision.[349] In *Printz v. United States*, for example, Justice Scalia began his analysis of the federal commandeering issue by saying: "Because there is no constitutional text speaking to this precise question, the answer to the . . . challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[350] Originalist scholars have sparred over whether to embrace these opinions, but many jurists recognize them as within the originalist canon because of their reliance on fixed meaning at the time of ratification, even if they are formally decided on extratextual grounds.[351]

In this regard, the ideas of popular accountability are as deeply embedded in state constitutional history and historical consciousness as federalism and checks and balances were to the Federalists. There is a temptation among judges and lawyers to assume that after 1789, Federalist logic and thinking predominated all public understanding of *all* American constitutions. But a large literature on state constitutional development shows that since the Founding, there have been hundreds of popular conventions and thousands of rigorous statewide ratification referenda where state voters embraced wildly different understandings of constitutional structure than those espoused by the Federalists.[352] During the Progressive Era, for example, popular state understandings regarding the proper role of the judiciary were vastly different from the Federalist account. Progressive Era voters ratified many of today's state constitutions with the clear understanding and expectation that courts would actively engage in popular governance in a manner wildly inconsistent with Madisonian logic.

Third, and relatedly, state jurists embarking on originalist inquiries should recognize the significant role that popular accountability has played as a background condition overshadowing state constitutional development. Just as Madison's fear of majority faction infused all of his constitutional design, popular accountability has remained ever-present in the development of state constitutional law. To some degree, this is not surprising because so much of today's state constitutional text was forged by popular state constitutional conventions convened as a result of dissatisfaction with government. Nevertheless, when exploring historical state constitutional

[348] *Id*.
[349] *See generally* Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297 (2019).
[350] 521 U.S. 898 (1997).
[351] *See* Colby, *supra* note 349, at 1299-1300.
[352] *See supra* note 100 (listing sources from this literature).

sources, it is important to keep this context in mind and not read sources with a bias towards Federalist assumptions about constitutional design. The states did not hold hundreds of constitutional conventions and ratify thousands of constitutional amendments to rehash Madison *ad nauseam*. They have been working on an entirely different project with a different set of background assumptions and conditions.

I will end with one final illustration of how this context is important for understanding state constitutional history. Unlike the federal constitution, most state constitutions include an explicit provision declaring a separation of powers between the three branches. Vermont's provision is representative: "The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."[353] When contemporary state courts encounter these provisions, they often infer that they reflect a super-charged commitment to horizontal checks and balances within state government. Why else would a state constitution make separation of powers explicit when the federal constitution, with its Newtonian emphasis on checks and balances, leaves it to implication?

The irony is that the states adopted these provisions for a wholly different reason related to popular accountability. Blending responsibility between branches was a well-known shell game that colonial leaders used to obfuscate responsibility and avoid accountability. State constitutions hoped to cure this by clearly itemizing government responsibilities for public audit. They adopted separation-of-powers provisions as a way to reinforce the detailed allocation of power spelled out in the remainder of the constitution so that the public would know which department to hold accountable for particular functions. 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."[354]

Conclusion

Interpreting state constitutions is difficult. They are long, detailed, and constantly changing. They also share many striking textual similarities with the United States Constitution and have overlapping histories. However, it is important that state constitutions are allowed to speak for themselves. It's important that scholars and jurists take them seriously on their own terms rather than orient them around the Federalist themes that dominated constitutional design during ratification of the Federal Constitution. The states have charted their own constitutional paths, and they have pursued other ideas for how government should function. At the very core of the state constitutional experience is an enduring commitment to creating, maintaining, and stabilizing government that is truly accountable to its contemporary constituents. This commitment should be recognized by state courts, and it should influence how state courts decide constitutional cases.

[353] VT CONST. chpt II § 5.
[354] SAMUEL WILLIAMS, THE NATURAL AND CIVIL HISTORY OF VERMONT 343 (1794).