

LOCKSTEPPING STRUCTURE

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The new judicial federalism is now entering its early middle age. As it has matured—moving from rights to structure—it has become more complicated in its application. For if one were to take arguments about state experimentation and interpretive flexibility to their logical conclusion, there is no reason state legislative, executive, and judicial powers should stay in lanes demarcated by federal constitutional law. Easily amended state constitutions and elected judges support theories of judicial function more akin to statewide legislative policymakers than passive judicial magistrates. Positive rights in state constitutions would seem to demand recalibration of the rules of standing and the ranking of first- and second-order rights. The very fact that state constitutions often specify the creation, maintenance, and entrenchment of an administrative state seems to counsel a completely different theory of administrative discretion, executive power, and judicial deference than the one currently supplied by federal separation-of-powers jurisprudence. Nevertheless, many state courts continue to reflexively cite federal constitutional principles in construing the structure of their state constitutions. This Essay looks at the phenomenon of lockstepping state constitutional law to federal precedent once the question turns from rights to structure.

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INTRODUCTION

The new judicial federalism, championed by the likes of Judge Jeffrey Sutton, Professors Jessica Bulman-Pozen, Miriam Seifter, G. Alan Tarr, and others, is now entering its early middle age. Taking up the cause from the previous generation of scholars, these authors have argued that state judicial personnel should free themselves from the shackles of “lockstepping” and instead adjudicate state constitutional rights on their own merits, without regard to what the Supreme Court of the United States has done with analogous federal rights provisions.

Judge Sutton’s *51 Imperfect Solutions*¹ was a pivotal text in this revival, and it hit at just the right time. Neither the Right nor the Left knew where the Supreme Court’s rights jurisprudence was headed. In June 2018, when *51 Imperfect Solutions* was published, Justice Anthony Kennedy had yet to announce his retirement, Justice Ruth Bader Ginsburg enjoyed pop-culture status amidst her active caseload, and Justice Neil Gorsuch remained a cipher.² Public interest advocates of every ideological stripe saw a second shot at victory in state court with the new judicial federalism. Care about reproductive rights, property rights, gun rights, gender equality, criminal justice reform, or economic liberty? State constitutional rights were the untapped well.

Almost eight years later, that kind of exuberant ideological ecumenicalism among judicial federalists has given way to something more measured and complicated. A significant factor for the change is affective polarization and the nationalization of political disputes.³ Part of the change has to do with the politics of the Supreme Court, where conservatives have cemented a 6–3 majority. Part of it has to do with the significant disruption of previously settled understandings of federal separation-of-powers jurisprudence in the Roberts Court. But part also has to do with the move of judicial federalism from rights to structure.

For if one were to take arguments about state experimentation and interpretive flexibility to their logical conclusion, there is no reason state legislative, executive, and judicial powers should stay in lanes

1. See generally JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (2018) (urging lawyers, judges, and academics to pay more attention to state constitutions as the source of judicially enforceable individual rights and liberties). Compare *id.* at 22–190 (discussing individual rights), with JEFFREY S. SUTTON, *WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION* 15–302 (2022) [hereinafter SUTTON, *WHO DECIDES?*] (discussing state constitutional structure).

2. See *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/CW24-CT5R] (last visited Sep. 30, 2025).

3. Neal Devins, *State Constitutionalism in the Age of Party Polarization*, 71 RUTGERS U. L. REV. 1129, 1133 (2019) (“National interest groups and a growing homogeneity in both red and blue states stand as a barrier to state court innovation.”).

demarcated by federal constitutional law. Easily amended state constitutions and elected judges support theories of judicial function more akin to statewide legislative policymakers than passive judicial magistrates. Positive rights in state constitutions—to public education, to a clean environment, and to open courts—taken seriously, would demand recalibration of the rules of standing and the ranking of first- and second-order rights. The very fact that state constitutions often specify the creation and maintenance of an administrative state—from university bureaucrats to reapportionment commissions—seems to counsel a completely different theory of administrative discretion, executive power, and judicial deference than the one currently supplied by federal separation-of-powers jurisprudence. This Essay looks at the phenomenon of lockstepping once the question turns from rights to structure.

Part I identifies those areas of state constitutional structure where states have used federal law as a guide to expressly or functionally lockstep state structural decisions with federal precedent. From state decisions on review of administrative decisions, to the scope of permissible delegation, to the determination of state court standing, state courts use federal law as a guide to adjudicate power allocations in state constitutions.

Part II grounds objections to lockstepping in constitutional theory. Put bluntly: No conventional theory of textualism or originalism can justify lockstepping federal structural decisions in state court. Many state constitutions specify a completely different arrangement of governmental powers from that of the federal government. Besides well-known distinctions like plural executives, many states have entrenched administrative agencies—like boards of higher education and public utilities commissions—into their state constitutions. This makes federal precedent on the scope and meaning of Article II power, as well as the bulk of federal administrative law, singularly inapt as a matter of textualism and/or originalism to address questions of state administrative power and independence. Equally challenging, many states contain positive constitutional rights that, if truly understood as “rights,” could require a far different theory of judicial power than the familiar Article III doctrines of jurisdiction, standing, and ripeness. Finally, many state constitutions post-date the Federal Constitution by decades, if not centuries, making reliance upon “original public meaning” tied to a set of institutional arrangements articulated in 1787 or “liquidated” in the ensuing decades after the Founding indefensible as a matter of textualist or originalist methodology.

Part III then acknowledges the federal constitutional limits on state experimentation for which lockstepping serves as an imperfect proxy. This Part argues that the due process guarantees of the Fourteenth Amendment as well as the prohibition on bills of attainder serve as an outer limit for how far a state may experiment with structure. While they

do not dictate any particular form state governance institutions must take, they do fashion a federal constitutional perimeter, albeit generous, within which state design must operate.

I. LOCKSTEPPING STRUCTURE

Despite Professor G. Alan Tarr's injunction, now over two decades old, that "American states require a distinctive separation-of-powers jurisprudence,"⁴ state courts across the country persist in using federal law to interpret the structural provisions of their own constitutions.⁵ The focus of this Essay is specifically on administrative law as well as jurisdiction and justiciability, although there are other examples.

A. Administrative Law

Federal administrative law jurisprudence lately has undergone a revolution, evidenced by two Supreme Court cases. In *Loper Bright Enterprises v. Raimondo*,⁶ the Court held that federal courts may no longer defer to agency interpretations of statutes, overruling four decades of federal administrative law jurisprudence.⁷ In *West Virginia v. EPA*,⁸ the Court articulated an aggressive anti-delegation presumption, called the "major questions" doctrine, that severely limits administrative agency ability to craft public policy.⁹

Both of these cases, *Loper Bright* and *West Virginia*, sound in separation of powers—the first between the judicial and the executive branch and the second between the legislative and the executive branch.

4. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 340 (2003). Professor Tarr advocates that this distinctive jurisprudence should "reflect[] the distinctive text, history, political theory, and institutional design embedded in state constitutions." *Id.*

5. Robert F. Williams, *The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 977 (2020) [hereinafter Williams, *The State of State Constitutional Law*] ("[M]any state courts continue in lockstep with federal law" with respect to separation-of-powers provisions, "even though state courts will be much more involved with separation of powers disputes than federal courts, even intra-branch disputes."); *see also* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 761 (2010) (noting that educational provisions in state constitutions have routinely been evaluated through a federal separation-of-powers lens). Granted, state practice following federal law in state structural constitutional interpretations is not uniform among the states. But the claim here is less about the absolute number of states looking to federal law for state structural guidance, and more about why they should find these cases useful at all.

6. 144 S. Ct. 2244 (2024).

7. *Id.* at 2271, 2273.

8. 142 S. Ct. 2587 (2022).

9. *See id.* at 2609, 2614.

These cases are also grounded in specific textual, historical, and structural reasoning about the Federal Constitution. Yet, despite significant differences in institutional arrangements in state constitutions, discussed in more detail in Part II, state courts have occasionally reflexively followed federal jurisprudence in this area.

For over forty years, federal courts deferred to executive agency interpretations of ambiguous statutes. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁰ the Supreme Court held that where Congress had not directly spoken on an issue in a statute, or where its intentions were ambiguous, the statute should be understood to delegate authority from the legislature to the agency administering that statute to make a policy decision.¹¹ In such a case, courts are not to impose their own policy views but to examine only “whether the agency’s answer [to the question at issue] is based on a permissible construction of the statute.”¹² *Chevron* deference, as it came to be known, was the key feature of federal administrative law for four decades.

At the state level, a plurality of state courts engaged in *Chevron*-like deference to state administrative bodies.¹³ Professor Christopher J. Walker and Neena Menon write that “states as diverse as Alabama, Massachusetts, and Kentucky adopted *Chevron* deference, absorbing the language and posture of federal deference.”¹⁴ Even those state supreme courts that rejected *Chevron* “rarely acknowledge the differences between state and federal constitutional structures.”¹⁵

Then, in 2024, the Supreme Court overturned *Chevron*. In *Loper Bright*, the Court addressed an agency construction of fishery protection provisions of the Magnuson-Stevens Fishery Conservation and Management Act.¹⁶ Although Chief Justice John Roberts framed the decision to abandon *Chevron* as required by the Administrative Procedure Act,¹⁷ the separation-of-powers justifications in *Loper Bright* burst through. From his repeated citation of Chief Justice John Marshall’s *Marbury* decision to his citation of Federalist 78— “[j]udges have always been expected to apply their ‘judgment’ *independent* of the political

10. 467 U.S. 837 (1984), *overruled by*, *Loper Bright*, 144 S. Ct. 2244.

11. *See id.* at 843, 866.

12. *Id.* at 843.

13. Christopher J. Walker & Neena Menon, *Chevron’s 51 Imperfect Solutions*, 2024 WIS. L. REV. 1585, 1590 (“More than fourteen states by our count have at some point adopted a deference regime that was just as or more deferential than *Chevron*, and more than seven additional states have adopted *Chevron*-lite standards that still offer significantly higher deference than de novo review or *Skidmore*.”).

14. *Id.* at 1588.

15. *Id.* at 1608.

16. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2254–56 (2024).

17. *Id.* at 2273.

branches when interpreting the laws those branches enact”—Chief Justice Roberts’s sympathies were noticeable.¹⁸ Justice Clarence Thomas concurred, emphasizing the separation-of-powers issues that the Chief Justice seemed content to keep in *sotto voce*. “*Chevron* deference compromises . . . separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies’ executive power beyond constitutional limits.”¹⁹ For Justice Thomas, overruling *Chevron* was welcome on any ground, but *Chevron*’s “profound problems should not be overlooked. Regardless of what a statute says, the type of deference required by *Chevron* violates the Constitution.”²⁰

Now that the Supreme Court has abandoned *Chevron*, some states have pivoted to *Loper Bright* to analyze state administrative law cases. The Arkansas Court of Appeals permitted supplemental briefing “to address the impact of the United States Supreme Court’s ruling in *Loper Bright Enterprises v. Raimondo* on the applicable standard of review.”²¹ A court of appeals judge in Georgia counseled that “[i]t is long past time for our Supreme Court to drive a *Loper*-like stake in the heart of what remains of *Chevron*-style deference here in Georgia.”²² A justice of the Texas Supreme Court cited *Loper* to urge his fellow justices to “assess critically an agency’s power to rewrite, under the guise of interpretation, the statutory criteria that limit benefits awards.”²³ Granted, some states that adopted *Chevron* have concluded that *Loper Bright* is not relevant to state law and have retained *Chevron*,²⁴ or have hedged.²⁵ The matter is

18. *Id.*

19. *Id.* at 2274 (Thomas, J., concurring).

20. *Id.* at 2275 (Thomas, J., concurring).

21. *Tarr v. Ark. State Bd. of Nursing*, 2025 Ark. App. 195, at 6, 711 S.W.3d 799, 803 (citation omitted).

22. *Bd. of Comm’rs of Brantley Cnty. v. Brantley Cnty. Dev. Partners, LLC*, 905 S.E.2d 685, 706 (Ga. Ct. App. 2024) (Dillard, J., concurring fully and specially); see also *Lexington Coal Co. v. Energy & Env’t Cabinet*, No. 2024-CA-0190-MR, 2025 WL 1716938, at *4 (Ky. Ct. App. June 20, 2025) (pointing to the “erosion of the deference policy” under Kentucky law based on the “persuasive reasoning underlying the rejection of” *Chevron* at the federal level).

23. *Accident Fund Ins. Co. of Am. v. Tex. Dep’t of Ins., Div. of Workers’ Comp.*, 707 S.W.3d 110, 115 (Tex. 2025) (Young, J., concurring in the denial of the petitions for review).

24. The Supreme Court of Hawai’i was the most emphatic in rejecting *Loper Bright*: “Now, the U.S. Supreme Court considers itself and other federal courts the experts on 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. We do not believe the expertise of courts outstrips that of the agencies charged with implementing complex regulatory schemes on a day-to-day basis.” *Rosehill v. State*, 556 P.3d 387, 404–05 (Haw. 2024) (footnotes omitted).

25. See Robin Kundis Craig, *The Impact of Loper Bright v. Raimondo: An Empirical Review of the First Six Months*, 109 MINN. L. REV. 2671, 2690 (2025).

likely to remain unsettled until state courts begin to directly address the issue.²⁶

West Virginia v. EPA represents the other major change in federal administrative law. In *West Virginia*, the Court examined whether a regulation of the Environmental Protection Agency concerning greenhouse gas emissions fell “within the power granted to it by the Clean Air Act.”²⁷ The Court held it did not.²⁸ “Under [the major questions] doctrine, . . . courts ‘expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.’”²⁹ The major questions doctrine is a form of clear statement rule that requires Congress to be express when it intends to delegate major questions to the agencies.³⁰ “[B]oth separation of powers principles and a practical understanding of legislative intent” mandate such a rule.³¹

Given the United States Supreme Court has curbed an agency’s ability to make policy in areas of “vast economic and political significance,”³² some states have begun to follow suit in construing agency action in their own states. Arizona, for instance, has adopted the Supreme Court’s major questions doctrine to address the scope of administrative power.³³ And a Michigan Court of Appeals decision

26. *Id.* at 2746; *see also Okla. Gas & Elec. Co. v. Okla. Corp. Comm’n*, 571 P.3d 729, 732 n.3 (Okla. 2025) (stating that *Loper Bright* is not controlling but also noting how the court’s “limited *de novo* review of Oklahoma Corporation Commission orders interpreting statutes . . . is consistent with some of the principles discussed in *Loper Bright*”).

27. *West Virginia v. EPA*, 142 S. Ct. 2587, 2600 (2022).

28. *Id.* at 2615–16.

29. *Id.* at 2605 (quoting 84 Fed. Reg. 32529 (2019)).

30. Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899, 901 (2024) (describing the doctrine as a “clear statement rule or a presumption against agency authority”).

31. *West Virginia*, 142 S. Ct. at 2609.

32. *See id.* at 2605 (quoting 84 Fed. Reg. 32529 (2019)).

33. *Roberts v. State*, 512 P.3d 1007, 1018 (Ariz. 2022) (citing *West Virginia*, 142 S. Ct. at 2616) (“The decision whether to incorporate the Portal Act into Arizona law for law enforcement officers—thereby determining whether time spent on certain activities is compensable—is the very definition of the type of major policy question that the legislature alone may determine.”); *cf. N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 16 N.E.3d 538, 547 (N.Y. 2014) (“By choosing between public policy ends in these ways, the Board of Health engaged in law-making beyond its regulatory authority”); *In re Plan for Abolition of Council on Affordable Hous.*, 70 A.3d 559, 574 (N.J. 2013) (“In construing a statute, we cannot infer that a branch of government has delegated its power to another branch on a major question without an express statement to that effect.”). For more on state adoption of the major questions doctrine, both before and after *West Virginia*, see Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1749 (2021); Evan C. Zoldan, *The Major Questions Doctrine in the States*, 101 WASH. U. L. REV. 359, 375

recently stated that “Michigan’s nondelegation doctrine has always essentially paralleled the federal doctrine, and this [major questions] ‘doctrine’ is closely aligned with, if not a part of, the nondelegation doctrine that is applied in extraordinary cases involving executive actions on significant economic or political matters.”³⁴

Whether these Supreme Court cases represent a departure from state court deference to administrative agencies or a confirmation of it, the peculiarity remains: It is doubtful what relevance Supreme Court separation-of-powers jurisprudence has to the varied and quite different structure of most state constitutions. The very fact that state courts gauge their behavior as a reaction to these changes at the federal level shows the gap between a truly independent form of state structural constitutionalism and the present nature of state constitutional adjudication.

B. Jurisdiction and Justiciability

State courts have also resorted to federal law to construe their doctrines of jurisdiction and justiciability, notwithstanding structural differences between state courts and their federal counterparts. The canonical case on federal standing is *Lujan v. Defenders of Wildlife*.³⁵ In *Lujan*, the Court considered whether environmentalists could challenge a rule by the Secretary of the Interior that interpreted aspects of the Endangered Species Act.³⁶ Justice Scalia, writing for the plurality, began his opinion by referring to separation of powers: “[T]he Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.”³⁷ The scope of the judicial power—given to courts through Article III of the Constitution—is to adjudicate “cases” or “controversies,” and “the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”³⁸ Three elements comprise “the irreducible constitutional minimum of standing” according to *Lujan*: (1) “the plaintiff must have suffered an

(2023). See also SUTTON, WHO DECIDES?, *supra* note 1, at 225 (discussing the major questions doctrine).

34. *Associated Builders & Contractors of Mich. v. Dep’t of Tech., Mgmt., & Budget*, No. 363601, 2024 WL 387089, at *5 n.4 (Mich. Ct. App. Feb. 1, 2024) (citations omitted).

35. 504 U.S. 555 (1992).

36. *Id.* at 557–58.

37. *Id.* at 559–60; see also CHARLES ALAN WRIGHT, CHARLES H. KOCH, JR. & RICHARD MURPHY, 33 FEDERAL PRACTICE & PROCEDURE § 8333 (2d ed. 2018) (discussing conservative justices’ stance that “[Article III] standing is a bulwark protecting separation of powers from overreaching courts”).

38. *Lujan*, 504 U.S. at 560.

‘injury in fact’”;³⁹ (2) “there must be a causal connection between the injury and the conduct complained of”;⁴⁰ and (3) “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”⁴¹ *Lujan* has been the touchstone of federal standing jurisprudence for over thirty years.⁴²

Just about half of the states have adopted *Lujan* in full or in part to administer their own standing doctrine.⁴³ Montana has construed its state constitutional grant of judicial power to be equivalent to the “case or controversy” requirement of Article III of the Federal Constitution.⁴⁴ Alabama, for example, states that its judicial power extends only to “cases or controversies” despite no such language in its state constitution.⁴⁵ Ohio has stated expressly that the three *Lujan* factors—“injury, causation, and redressability—constitute ‘the irreducible constitutional minimum of standing.’”⁴⁶ Nevada has construed its separation-of-powers provisions in a similar fashion, specifically citing Supreme Court precedent to deny organizational and associational standing in state courts.⁴⁷

39. *Id.* The court further described this injury in fact as requiring “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Id.* (cleaned up).

40. *Id.* Again, the court elaborated that this element required the injury “to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’” *Id.* at 560 (alteration in original) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)).

41. *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

42. See WRIGHT, KOCH, JR. & MURPHY, *supra* note 37, § 8332 (referring to these as “the canonical requirements for constitutional standing”).

43. Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1232–33 (2021); Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC. & NAT. RES. L. 349, 353 (2016).

44. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 226 P.3d 567, 569 (“[T]he ‘cases at law and in equity’ language of Article VII, Section 4(1) [of the Montana Constitution] embodies the same limitations as are imposed on federal courts by the ‘case or controversy’ language of Article III [of the U.S. Constitution].” (citing *Olson v. Dep’t of Revenue*, 726 P.2d 1162, 1166 (Mont. 1986); *Seubert v. Seubert*, 2000 MT 241, ¶ 17, 13 P.3d 365, 368)).

45. *Ex parte Jenkins*, 723 So. 2d 649, 656 (Ala. 1998) (“Thus, the core judicial power is the power to declare finally the rights of the parties, in a particular case or controversy”); see also *Ex parte McKinney*, 87 So. 3d 502, 513 (Ala. 2011) (Murdock, J., dissenting) (“Although the Alabama Constitution does not have the same Article III language as is found in the Federal Constitution, this Court has held that Section 139(a) of the Alabama Constitution limits the judicial power of our courts to ‘cases and controversies’ and to ‘concrete controversies between adverse parties.’”).

46. *Moore v. City of Middletown*, 2012-Ohio-3897, 975 N.E.2d 977, at ¶ 22 (quoting *Lujan*, 504 U.S. at 560).

47. See *Bd. of Pharmacy v. Cannabis Equity & Inclusion Cmty.*, No. 85756, 2024 Nev. LEXIS 593, at *3 (Nev. Aug. 5, 2024) (citing *FDA v. All. for Hippocratic*

A related phenomenon occurs when states apply the federally-fashioned “political question” doctrine in state court. The political question doctrine is hard to reduce to a certain case; it has been invoked in federal jurisprudence in a number of contexts stretching back to the early republic.⁴⁸ But the clearest expression of the political question doctrine comes from *Baker v. Carr*,⁴⁹ where the Court stated that political questions arise when there is:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁵⁰

The political question doctrine, according to the *Carr* Court, is “essentially a function of the separation of powers,”⁵¹ although the Court has used it to avoid deciding, for example, partisan gerrymandering cases.⁵²

The Texas Supreme Court reiterated that the political question test crafted to address federal separation-of-powers concerns is applicable to

Med., 602 U.S. 367, 380 (2024)) (“Though Nevada’s Constitution does not share Article III’s ‘case or controversy’ requirement, it includes a robust separation of powers clause that imposes justiciability requirements and requires plaintiffs to make the same showings of an injury-in-fact, causation, and redressability.”). *But cf. Wasserman v. Franklin County*, 911 S.E.2d 583, 598 (Ga. 2025) (“Georgia’s law of constitutional standing is not compatible with federal-style third-party standing . . .”).

48. Wright, Koch, Jr., and Murphy describe the Court’s political question doctrine as “somewhat capricious.” WRIGHT, KOCH, JR. & MURPHY, *supra* note 37, § 8348.

49. 369 U.S. 186 (1962).

50. *Id.* at 217. For a general discussion of the political question doctrine, see Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031 (2023).

51. *Carr*, 369 U.S. at 217.

52. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

the Texas Constitution.⁵³ Nebraska has done the same.⁵⁴ State courts have applied the political question doctrine to prevent state court review of partisan gerrymanders,⁵⁵ even though the Supreme Court, in *Rucho v. Common Clause*,⁵⁶ specifically left open the potential for state court litigation.⁵⁷

North Carolina's recent decision about partisan gerrymandering is notable. In February 2022, the state supreme court had held that, notwithstanding *Rucho*, partisan gerrymandering claims were justiciable.⁵⁸ The majority in *Harper v. Hall (Harper I)*⁵⁹ grounded its opinion in the unique features of the North Carolina State Constitution: North Carolina's "constitution 'is more detailed and specific than the federal Constitution'" about the rights of its citizens, the state's constitution provides specific criteria for evaluating excessive partisan gerrymanders, and the judicial federalism concerns are not as acute when state judicial officers interpret state constitutional provisions.⁶⁰

After the state supreme court swung from a Democratic-leaning majority to a Republican-leaning majority in the 2022 general election

53. *Am. K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 253 (Tex. 2018) ("We have assumed that the *Baker* factors that 'define nonjusticiable political questions for purposes of demarcating the separation of powers in the federal government under the United States Constitution . . . serve equally well in defining the separation of powers in the state government under the Texas Constitution.'" (quoting *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005))); *see also Perdue v. Baker*, 586 S.E.2d 606, 615 (Ga. 2003) ("Because the Supreme Court's exposition of separation of powers is consistent with this Court's prior rulings on the issue, we find federal precedent persuasive in considering the question before us.").

54. *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 176 (Neb. 2007) ("Although we have implicitly recognized the political question doctrine, we have not previously adopted the U.S. Supreme Court's justiciability tests under that doctrine, which we do now." (footnote omitted)).

55. *See Harper v. Hall (Harper III)*, 886 S.E.2d 393, 400–01 (N.C. 2023) (following *Rucho*); *Brown v. Sec'y of State*, 313 A.3d 760, 774 (N.H. 2023) ("The reasoning employed by the majority of the *Rucho* Court . . . is directly on point with respect to the plaintiffs' claims under the New Hampshire Constitution."). *But see Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 21, 539 P.3d 272, 281 (N.M. 2023) (refusing to follow *Rucho* on state constitutional grounds).

56. 139 S. Ct. 2484 (2019).

57. *Id.* at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.").

58. *Harper v. Hall (Harper I)*, 868 S.E.2d 499, 533 (N.C. 2022).

59. 868 S.E.2d 499 (N.C. 2022), *overruled by, Harper III*, 886 S.E.2d 393, and *aff'd sub nom.*, *Moore v. Harper*, 143 S. Ct. 2065 (2023).

60. *Id.* at 533 (quoting *Corum v. Univ. of N.C.*, 413 S.E.2d 276, 290 (N.C. 1992)).

cycle,⁶¹ the court in *Harper v. Hall* (*Harper III*)⁶² decided to rehear whether partisan gerrymandering was a non-justiciable claim.⁶³ In a 5–2 decision, the North Carolina court overturned its holding from the previous year, ruling that judicial review of partisan gerrymanders violates North Carolina’s separation of powers.⁶⁴ “We begin our analysis with the Supreme Court of the United States’ insightful and persuasive opinion in *Rucho v. Common Cause*,” wrote the majority.⁶⁵

II. CONSTITUTIONAL THEORY AND STRUCTURAL LOCKSTEPPING

The persistence of state supreme court citation to Supreme Court authority on state separation-of-powers issues is puzzling. This is puzzling because states are distinct sovereigns, and state constitutions are supposed to be, well, constitutions.⁶⁶ Under most theories of constitutional interpretation, federal constitutional law on separation of powers should be as relevant to a state constitutional dispute as the constitution of Brazil.⁶⁷

Moreover, as numerous scholars have observed, the institutional arrangements, substantive guarantees, and basic structure of state constitutions differ significantly from those of the federal government. This Essay focuses on three differences—administrative institutional entrenchment, the presence of positive rights, and the phenomenon of state constitutional length—although these features obviously do not exhaust all the ways in which state constitutions are unique.

61. See Dallas Woodhouse, *New State Supreme Court Justices Take Oaths, Flip Control to Republicans*, CAROLINA J. (Jan. 1, 2023), <https://www.carolinajournal.com/opinion/new-state-supreme-court-justices-take-oaths-flip-control-to-republicans/> [<https://perma.cc/YWM4-STDX>] (noting how North Carolina’s Supreme Court would hold a 5–2 Republican majority starting in January 2023).

62. 886 S.E.2d 393 (N.C. 2023).

63. *Id.* at 409.

64. *Id.* at 448–49.

65. *Id.* at 409.

66. See *VanHorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795) (“Every State in the Union has its constitution . . . What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established.”).

67. On the other hand, the constitution of Brazil could be even *more* persuasive than the Federal Constitution, because, unlike the Federal Constitution, Brazil has an express separation-of-powers provision, as do many state constitutions. Keith S. Rosenn, *Separation of Powers in Brazil*, 47 DUQ. L. REV. 839, 850 (2009) (“The principle of the separation of powers is explicitly enshrined in Article 2 of the 1988 Constitution [of Brazil], which provides: ‘The Powers of the Union are the Legislative, Executive, and Judicial, which are independent and harmonious with each other.’”).

A. Administrative Institutional Entrenchment

Almost every state has an express, and occasionally emphatic, separation-of-powers provision in their constitution. Georgia's Constitution is illustrative: "The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided."⁶⁸

Nevertheless, several states also have entrenched administrative institutions into their state constitutions. Georgia and Nebraska, for example, have a constitutionally designated public service commission.⁶⁹ Colorado has constitutionalized a Commission on Mines.⁷⁰ The Fish and Wildlife Conservation Commission is a constitutionally designated office in the Florida Constitution.⁷¹ The Louisiana Department of Insurance is headed by an elected constitutional officer, as is the department of insurance in other states.⁷²

Another fourteen states have delegated authority over higher education to a board of regents or similar body through their constitutions.⁷³ Montana's constitution, for example, states that "government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise

68. GA. CONST. art. I, § 2, para. 3; *see also* COLO. CONST. art. III ("The powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.").

69. GA. CONST. art. IV, § 1, para. 1; NEB. CONST. art. IV, § 20.

70. COLO. CONST. art. XVI, § 1 ("There shall be established and maintained the office of commissioner of mines, the duties and salaries of which shall be prescribed by law. When said office shall be established, the governor shall, with the advice and consent of the senate, appoint thereto a person known to be competent, whose term of office shall be four years.").

71. FLA. CONST. art. IV, § 9.

72. In addition to Louisiana, other states include California, Delaware, Georgia, Kansas, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, and Washington. *See Insurance Commissioner (State Executive Office)*, BALLOTPEdia, [https://ballotpedia.org/Insurance_Commissioner_\(state_executive_office\)](https://ballotpedia.org/Insurance_Commissioner_(state_executive_office)) [<https://perma.cc/WJ83-9EMM>] (last visited Sep. 28, 2025).

73. Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J.L. & EDUC. 177, 180 (1978) ("[T]he constitutions of fourteen states appear to grant substantial independent power to the state higher education governing board or boards."); *see, e.g.*, COLO. CONST. art. IX, § 12; MICH. CONST. art. VIII, §§ 4–7.

and coordinate other public educational institutions assigned by law.”⁷⁴ In some of these states, the officers of the board are separately popularly elected officials.⁷⁵

B. Positive Rights

A number of states expressly provide for positive rights. Public education is one of the clearest examples. The State of Washington’s constitution states: “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”⁷⁶ Maine’s constitution contains a provision guaranteeing “a natural, inherent and unalienable right to food.”⁷⁷ Elsewhere, some state constitutions also provide for rights to a clean environment.⁷⁸

Even where there is no express positive right, some rights in state constitutions—like a right to vote—implicate a host of ancillary positive obligations on state governments to make that right meaningful.⁷⁹ For a right to vote to be more than a paper guarantee, a government must provide an infrastructure for elections, including a machinery to cast ballots, tabulate them, and certify results. Arguably, it must also provide sufficient security and independence of the electoral apparatus to hold a free and fair election. Similarly, a right to hunt and fish, as is guaranteed in largely rural states or by conservative constituencies in more urban states, would seem to require maintenance of natural resources to give that right substantive meaning.⁸⁰

74. MONT. CONST. art. X, § 9(2)(a); *see also* David E. Shipley, *The Status of Administrative Agencies Under the Georgia Constitution*, 40 GA. L. REV. 1109, 1166 (2006) (“The [Georgia] Board of Regents was given . . . constitutional status in 1943 in response to the Governor’s attempt to control it.”).

75. *See, e.g.*, NEB. CONST. art. VII, § 10; NEV. CONST. art. 11, § 7.

76. WASH. CONST. art. IX, § 1; *see also* *McCleary v. State*, 269 P.3d 227, 247 (Wash. 2012) (describing this section as imposing on the State an “obligation to provide an education and the corresponding *right* of Washington children to receive an education”).

77. ME. CONST. art. I, § 25.

78. *See* EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 3, 35, 147–48, 150 (2013).

79. *See* Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 ALASKA L. REV. 29, 34–35 (2011) (“Without positive state action, there is no voting. . . . Not only would there be no way to vote in the absence of government, there would also be no point.”).

80. *See* Jacob D. Charles, *Ancillary Rights*, 173 U. PA. L. REV. 1269, 1271 (2025) (“[F]or constitutional rights to work . . . the Constitution must sometimes be construed to extend to conduct that is not itself constitutionally-specified.”).

C. State Constitutional Length and Age

Chief Justice Marshall famously enjoined that “we must never forget, that it is *a constitution* we are expounding.”⁸¹ Constitutions must not “partake of the prolixity of a legal code,” lest they become incomprehensible to judges and the public alike.⁸² Instead, constitutions only require that “its great outlines should be marked [and] its important objects designated.”⁸³ For decades, state supreme court justices have cited the Chief Justice’s “we must never forget” line when interpreting their own constitutions.⁸⁴

But in 1819, when Chief Justice Marshall wrote these words, he was expounding on a document of a little over 4,500 words.⁸⁵ The present Constitution of the State of Alabama is roughly 370,000 words (even after a streamlining effort in 2020)⁸⁶—over eighty times as long. Even one of the shortest state constitutions, the Constitution of the State of Vermont, is almost twice the length of the Federal Constitution.⁸⁷ As Judge Sutton has written, “[i]n contrast to the sparing elegance of the United States Constitution, . . . state constitutions look like yard sales, filled with items that never should have been included in the first place and that obscure the basics of governing.”⁸⁸

The prodigious length of many state constitutions—resembling, in fact, a legal code—counsels for a far more nuanced and state-specific approach to judicial interpretation than simply matching the steps set out

81. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

82. *Id.*

83. *Id.*

84. *See, e.g., Snell v. Walz*, 6 N.W.3d 458, 469 (Minn. 2024); *Peck v. Douglas*, 530 A.2d 551, 554 (Vt. 1987); *Lockwood v. Nims*, 98 N.W.2d 753, 763 & n.5 (Mich. 1959); *Morley v. Remmel*, 221 S.W.2d 51, 60 (Ark. 1949) (Smith, J., dissenting); *People v. Sischo*, 144 P.2d 785, 792 (Cal. 1943).

85. *See United States Constitution*, BALLOTPEDIA, https://ballotpedia.org/United_States_Constitution [<https://perma.cc/9TRP-BJZW>] (last visited Sep. 30, 2025) (noting that the Federal Constitution contains 4,543 words).

86. Thomas Spencer, *The Alabama Constitution Reformed: Is There Still Work to Do?*, PUB. AFFS. RSCH. COUNCIL OF ALA. (Feb. 19, 2024), <https://parcalabama.org/introduction-to-parcas-series-on-the-constitution-of-2022/> [<https://perma.cc/8T84-NBSJ>]; WHNT Staff, *Alabama’s Constitutional Amendments 2020: Amendment Four, Cleaning up the Constitution*, CBS 42 (Nov. 3, 2020, at 10:50 CT), <https://www.cbs42.com/news/politics/your-local-election-hq/alabamas-constitution-al-amendments-2020-amendment-four-cleaning-up-the-constitution/> [<https://perma.cc/W5TK-M85M>].

87. *See Vermont Constitution*, USLEGAL, <https://system.uslegal.com/state-constitutions/vermont-constitution/> [<https://perma.cc/6H5G-3VH9>] (last visited Oct. 23, 2025).

88. Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 KAN. L. REV. 687, 690 (2011).

by federal courts in federal constitutional matters.⁸⁹ And that move implicates the role that state judicial officers have in construing state constitutions.

Finally, compared to the Federal Constitution, state constitutions are remarkably young. Rhode Island's present constitution (its second) was adopted in 1986.⁹⁰ Georgia's present constitution (its tenth) was adopted in 1983.⁹¹ This does not include those constitutions that have been "re-codified" or "re-styled" but purport to make no substantive change to the law.⁹² If one takes the interpretative challenges of these constitutions seriously, Alabama's current constitution is only three years old.

D. Implications for State Constitutional Interpretive Methodology

Despite the significant differences between the Federal Constitution and state constitutions, state constitutional interpretive debates tend to fall along the same tracks as federal disputes. Professor Abbe Gluck has documented how state courts tend to "import without distinction federal-textualist institutional and constitutional arguments and expressly assume that the same justifications hold for the states as well."⁹³ Professors Helen Hershkoff and Stephen Loffredo observe how state judicial officers interpret their power in light of "[n]otions of institutional capacity, rooted in the formal and functional aspects of federal separation of powers" even

89. Some of the techniques necessary to adjudicate the breadth of the United States Code come to mind. See JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 324–81 (4th ed. 2021) (discussing canons of construction in statutory interpretation); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 70 (1988) (discussing the possibility of courts presuming legislative intent from congressional inaction in response to foundational interpretive decisions); see also Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1194 (asking rhetorically whether it is better to approach state constitutions as constitutions or as statutes).

90. *Constitution of the State of Rhode Island: Introduction*, STATE OF RI: GEN. ASSEMBLY, <https://www.rilegislature.gov/riconstitution/Constitution/ConstitutionIntro.aspx> [https://perma.cc/Q53J-2QY9] (last visited Oct. 23, 2025).

91. LaVerne W. Hill & Melvin B. Hill, *Georgia Constitution*, NEW GA. ENCYCLOPEDIA (Sep. 29, 2020), <https://www.georgiaencyclopedia.org/articles/government-politics/georgia-constitution> [https://perma.cc/Q494-433Y].

92. See H.R.J. Res. 52, 2022 Leg., Reg. Sess. (Ala. 2022) ("The proposed Constitution of Alabama of 2022 . . . complies with Amendment 951 to the Constitution of Alabama of 1901, and only arranges the Constitution of Alabama of 1901 into proper articles, parts, and sections, removes racist language, deletes duplicative and repealed provisions, consolidates provisions regarding economic development, arranges all local amendments to the constitution by county of application, and makes no other changes.").

93. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1858 (2010).

in those cases where institutional arrangements differ significantly from the federal model.⁹⁴

To their credit, some state judicial personnel have attempted to articulate a theory of constitutional interpretation suitable to their own state constitutions. Justice Patrick DeWine of Ohio recently penned an article articulating a theory of constitutional interpretation for the Ohio Constitution.⁹⁵ In it, he advances an “original public meaning” approach to the Ohio Constitution.⁹⁶ Tracking familiar debates about the Federal Constitution, Justice DeWine argues that locating the original public meaning is a form of judicial constraint, preventing the will of the people from being replaced with that of the judges.⁹⁷

Even then, Justice DeWine recognizes potential complications in applying original public meaning to the Ohio Constitution. The Ohio Constitution is much more easily amended than the Federal Constitution; this justifies judicial minimalism, in his opinion.⁹⁸ But the Ohio Constitution is also far longer, far newer, and contains far more positive rights, which would seem to point in the opposite direction.⁹⁹ Justice DeWine expresses hostility to lockstepping, especially in terms of constitutional rights,¹⁰⁰ but elsewhere seems less certain when it comes to structure.¹⁰¹

Justice DeWine also counsels for a presumption that provisions enacted in Ohio’s 1802 constitution retain their meaning if replicated in the 1851 constitution.¹⁰² But that presumption sits uneasily with the notion that it is the meaning of the words *as understood by the generation that enacted it* that controls. The understandings of 1802 cannot control the meaning of the terms because it is the act of sovereignty in forming the

94. Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 970 (2011).

95. R. Patrick DeWine, *Ohio Constitutional Interpretation*, 86 OHIO ST. L.J. (forthcoming 2025) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4986929 [<http://dx.doi.org/10.2139/ssrn.4986929>].

96. *Id.*

97. *Id.* (manuscript at 9).

98. *See id.* (manuscript at 10–11).

99. *See supra* Sections II.B–C.

100. DeWine, *supra* note 95 (manuscript at 24–25).

101. Justice DeWine articulates a theory of standing under the Ohio Constitution that looks exactly like that of the federal courts. *See State ex rel. Martens v. Findlay Mun. Ct.*, 2024-Ohio-5667, 262 N.E.3d 304, at ¶ 12 (DeWine, J.). While Justice DeWine is careful to source this standing doctrine in the Ohio Constitution of 1851, the case he cites for the proposition links back to the Ohio Supreme Court’s endorsement of *Lujan* for Ohio standing analysis. *See id.* (citing *ProgressOhio.org, Inc. v. JobsOhio*, 2014-Ohio-2382, N.E.3d 1101, at ¶ 7 (citing *Moore v. Middletown*, 2012-Ohio-3897, 975 N.E.2d 977, at ¶ 22 (citing and quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)))).

102. DeWine, *supra* note 95 (manuscript at 13–14).

constitution that made the words law in 1851—a point he acknowledges elsewhere in the article.¹⁰³ There is as much an originalist case to presume the language does *not* mean the same in 1851 (with all the attendant changes in the society, law, and culture) and to review the linguistic evidence *de novo*, as there is to presume consistency.

Further, the presumption of consistency is itself a form of constitutional implementation.¹⁰⁴ Nothing about the Ohio Constitution commands such a presumption. It is more likely judge-created doctrine designed to conserve judicial resources and to make a lengthy, multi-generational document administrable as law—not to advance a project of recovering the linguistic or legal meaning of a particular provision at a certain point in time.

Judge Lisa Lorish of the Virginia Court of Appeals and Elizabeth Putfark have contributed to this debate by recognizing the challenges of interpreting constitutions when they are revised over multiple generations—not just amended, but revised wholesale and re-ratified. They identify tools to evaluate how to interpret constitutional provisions across time, like “interconstitutionalism,”¹⁰⁵ as well as the questions that arise when adopting an originalist-textualist approach to these intergenerational constitutions, including “choosing between the moment of ratification and the moment of drafting, between the intent of the ratifiers and the intent of the drafters, and between the accumulated versus the ‘original’ meaning of text.”¹⁰⁶

These efforts to articulate a unique state constitutional interpretive methodology are laudable, but they still labor under the long shadow of methodological disputes pertaining to the Federal Constitution.¹⁰⁷ For example, a clause-bound, original public meaning approach to separation-of-powers jurisprudence—which often presumes a clear and

103. See *id.* at 16 (“[T]he relevant inquiry is not what the provision meant at the time it was first promulgated in its original source, but what Ohioans understood it to mean at the time of its incorporation into the Ohio Constitution.”).

104. See *infra* text accompanying note 117.

105. See Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 330 (2022) (“[I]nterconstitutionalism is the use of a polity’s antecedent constitution(s) to generate meaning for that same polity’s current constitution.”).

106. Lisa M. Lorish & Elizabeth Putfark, *The Emerging Virginia Constitution: Open Questions of Interpretation, and How Their Resolution May Impact Unenumerated Rights*, 59 U. RICH. L. REV. ONLINE 23, 41, 54 (2024), <https://lawreview.richmond.edu/files/2024/12/Lorish-Putfark.pdf> [<https://perma.cc/2RPN-RVH4>]; see also *id.* at 33 (noting the challenge of dealing with a state constitution that underwent “a comprehensive overhaul [in 1971]” but “retained much of the prior [1928] constitution” and “much of the Bill of Rights that [itself] had remained largely similar to the original Declaration of Rights authored by George Mason in 1776”).

107. See Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1636 (2010) (“[S]tate constitutionalism remains in the shadow of the U.S. Supreme Court and the Federal Constitution.”).

definitive tripartite division between the judicial, legislative, and executive branches—does not fully account for the constitutional entrenchment of administrative personnel, agencies, institutions, and duties. A thought experiment comes to mind: How might federal separation-of-powers jurisprudence look different if the Federal Reserve Act of 1913 were written into the Federal Constitution? In some ways, the entrenchment of administrative bodies with regard to health, safety, education, or other public services within state constitutions presents a similar issue. The people, through an act of popular sovereignty, have peeled off certain personnel, functions, and policies from other branches and placed them within a constitutionally-specified fourth branch—a branch that has no express textual equivalent in the Federal Constitution.¹⁰⁸

Nor can typical “passive virtues” of the judiciary, as expressed in Article III standing doctrine, serve adequately to enforce the express and implicit positive rights in state constitutions—assuming those positive rights constitute binding law as opposed to aspiration or a focal point for political activism.¹⁰⁹ As Professor Helen Hershkoff wrote, “because state constitutions often include positive rights and regulatory norms, their texts explicitly engage state courts in substantive areas that have historically been outside the Article III domain.”¹¹⁰

So too, it is inevitable that a state constitutional methodology must cope with the reality that state constitutions are long—some exceptionally so. It is simply impossible to read every line of a 370,000-word document without confronting the fact that some prioritization of values and some

108. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 309 (2009) [hereinafter WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS*] (“Many states have amended their constitutions . . . to create constitutional agencies or commissions, in addition to officers, with extensive regulatory and adjudicatory powers.”); David E. Shipley, *The Status of Administrative Agencies Under the Georgia Constitution*, 40 GA. L. REV. 1109, 1166 (2006) (“Thus, the status of a constitutional agency like the PSC [Public Service Commission] is more secure than that of an agency created solely by the General Assembly, but that a secure place under the Georgia Constitution does not insulate the specific actions of the PSC and other constitutional agencies from judicial review and other forms of judicial challenge.”).

109. See generally EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* (2013) (discussing how popular movements use state constitutions for political coordination).

110. Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1889–90 (2001); cf. Rebekah G. Strotman, Note, *No Harm, No Problem (in State Court): Why States Should Reject Injury in Fact*, 72 DUKE L.J. 1605, 1633 (2023) (“Along with broad state constitutional protections, states may have broad statutory rights, which less-restrictive standing rules would make easier to vindicate.”).

trade-offs will be inevitable.¹¹¹ The challenge is exacerbated by the uneasy synthesis of negative rights and positive rights in state constitutions. The Nevada Supreme Court confronted this tension when a constitutional right to public education funding and a structural requirement of a legislative supermajority led to a legislative impasse.¹¹² The Court, forced to make a choice, chose to suspend the “structural” supermajority requirement to advance the “individual right” to an effective public education.¹¹³

This is not to say that state supreme court decisions are illegitimate or suspect when they independently conclude that state constitutional structures bear a similarity to federal constitutional law. Reading a state’s grant of the “judicial power” to the judiciary to include judicial review,¹¹⁴ or understanding the meaning of “recess” in a state constitution to limit a state appointment power, is not invalid merely because it lands in the same place as the Federal Constitution. Such conclusions should be justified by reference to state constitutional history, culture, and values rather than by articulated or unarticulated deference to the wisdom, or the convenience, of federal precedent.

More generally, because of the unique features identified here, state constitutions push the courts to be more pragmatic in resolving constitutional tensions than the textualist and originalist approaches would seem to permit.¹¹⁵ They also highlight the essential role that state

111. Cf. John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 570 (1992) (“Sovereign legislatures produce commands which need not, and generally cannot, be completely coherent.”).

112. See *Guinn v. Legislature of Nev. (Guinn II)*, 76 P.3d 22, 25 (Nev. 2003) (per curiam).

113. *Id.* at 32–33; see also *Guinn v. Legislature of Nev. (Guinn I)*, 71 P.3d 1269, 1276 (Nev. 2003) (“Public education is a right that the people, and the youth, of Nevada are entitled, through the Constitution, to access.”). But see *Nevadans for Nev. v. Beers*, 142 P.3d 339, 348 (2006) (overruling *Guinn I* in part).

114. See, e.g., *Rutherford v. M’Faddon* (Ohio 1807), in OHIO UNREPORTED JUDICIAL DECISIONS: PRIOR TO 1823, at 71, 72 (Ervin H. Pollack ed., 1952) (concluding that the judicial power includes judicial review); see also Devins, *supra* note 107, at 1637 (“[S]tate supreme court authority to independently interpret state constitutions is, in significant respects, moored to U.S. Supreme Court interpretations of the Federal Constitution.”).

115. See Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1881–82 (2023) [hereinafter Bulman-Pozen & Seifter, *State Constitutional Rights*]. In addition, there’s a significant resource challenge for state courts applying textualism and originalism. Depending on the jurisdiction and constitutional age, historical materials may be limited or nonexistent to understand state constitutions. See, e.g., Lorish & Putfark, *supra* note 106, at 28; Catherine R. Connors & Connor Finch, *Primacy in Theory and Application: Lessons from a Half-Century of New Judicial Federalism*, 75 ME. L. REV. 1, 17–18 (2023). But see Brady, *supra* note 89, at 1170 (“[T]he quantity of historical material pertaining to state constitutions is vast (though not for every state constitution).”); DeWine, *supra* note 95 (manuscript at 16–17) (suggesting that there are adequate resources to

courts must play in devising implementing doctrine to administer the provisions of state constitutions.¹¹⁶ This means developing tests, doctrines, presumptions, and other adjudicative tools that are not encoded in the written document.¹¹⁷ Moreover, these implementing doctrines should be the product of state constitutional text, structure, history, and traditions, not of the Federal Constitution.¹¹⁸

Although the broad strokes of formalism, textualism, and originalism may be useful to categorize different modalities of state constitutional argument, it seems unlikely that any one of these methods can be seen as *the* operative method of state constitutional interpretation. Instead, the mélange of different approaches forces state judicial officers into the kind of pragmatism that characterizes judicial interpretation of other nations' constitutions¹¹⁹—constitutions that, like state constitutions, are frequently marked by substantial length, frequent amendment, positive rights, youth, and distinctive political provenance.¹²⁰ Pluralist

conduct originalist historical investigation on the Ohio Constitution). Compared to the U.S. Supreme Court, state supreme courts may not have as luxurious a discretionary docket, access to quality amici briefing, or as many law clerks. Adam B. Sopko, *Catalyzing Judicial Federalism*, 109 VA. L. REV. ONLINE 144, 147 (2023), https://virginialawreview.org/wp-content/uploads/2023/07/Sopko_Book.pdf [<https://perma.cc/RS39-3BLY>]; Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1780 (2014) (“[I]t cannot be denied that state supreme courts do not receive the same number of amicus briefs as their brethren Justices on the U.S. Supreme Court.”).

116. See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 10–11 (2001).

117. See *id.* at 10–12 (describing this phenomenon).

118. See Bulman-Pozen & Seifter, *State Constitutional Rights*, *supra* note 115, at 1858 (“While scholars and jurists have debated substantive lockstepping, a subtler but more concerning practice of methodological lockstepping has begun to take hold [in state courts].”).

119. See Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1868 (2004) (finding that courts in fractured societies tend to “more closely approximate[] the ‘pragmatic’ values advocated by Richard Posner by asking what constitutional values best enhance the prospects for stable democratic governance” (footnote omitted)); Ran Hirschl, *The Continued Renaissance of Comparative Constitutional Law*, 45 TULSA L. REV. 771, 772 (2011) (describing the convergence of various nations’ approaches toward a common method as reflecting a “judicious, pragmatic balancing of competing claims, rights, and policy considerations, as opposed to various more principled . . . approaches to constitutional interpretation commonly used in the United States”); *cf.* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3121 (2015) (“[P]roportionality doctrine has shown itself capable of providing a stable framework across many controversial issues, in jurisdictions widely recognized as free and democratic constitutional states.”).

120. See Alex Reshanov, *Laws of the Lands: Exploring the World’s Constitutions*, LIFE & LETTERS (Mar. 22, 2023), <https://lifeandletters.la.utexas.edu/2023/03/laws-of-the-lands-exploring-the-worlds-constitutions/> [<https://perma.cc/TH2G-LKW9>].

methods seem the operative approach when it comes to state constitutions.¹²¹

But methodological pluralism to what end? What, normatively, should state judicial officers aim to optimize when they are working through the tangle of overlapping and conflicting rights, privileges, powers, and duties of state constitutions and their personnel? This Essay is not suitable for a full investigation of the normative goals of state constitutionalism, so it will rely on some potential directions supplied by others. One normative object of state constitutionalism is the “democracy principle,” as Professors Bulman-Pozen and Seifter have ably argued.¹²² This democracy principle means that state constitutions should be read in ways that advance the object of “popular sovereignty, majority rule, and political equality.”¹²³ When it comes to separation of powers, the democracy principle means reading the powers of branches both in light of the powers of other branches *and* the democracy principle of the state constitution as a whole.¹²⁴ So, for instance, executive nullification is not just about the sphere of legislative power versus the prerogatives of the executive, but whether failure to enforce amounts to a usurpation of the democracy principle of state constitutions.¹²⁵ A related view is that state constitutions should be read to expose, and thereby counter corruption and self-dealing—both within the state and in a federal system.¹²⁶ This “accountability principle” means specifically that, in state separation-of-powers cases, “courts should favor the allocation of power that would keep the lines of accountability most clear.”¹²⁷ Finally, state constitutions

121. See, e.g., JESSICA BULMAN-POZEN & MIRIAM SEIFTER, STATE CONSTITUTIONAL LAW: CASES AND PRINCIPLES 16 (2025) (“State constitutional interpretation has long been pluralist in nature.”); Chad M. Oldfather, *Some Observations on Separation of Powers and the Wisconsin Constitution*, 105 MARQ. L. REV. 845, 849 (2022) (“[T]he Wisconsin Supreme Court uses two, or perhaps three, interpretive frameworks when addressing questions about the meaning of the state’s constitution.”). See generally PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1984) (discussing different modalities of federal constitutional interpretation).

122. See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 862 (2021) [hereinafter Bulman-Pozen & Seifter, *The Democracy Principle*].

123. *Id.* at 864.

124. *Id.* at 919–23.

125. See *id.* at 928–29.

126. Jonathan L. Marshfield, *America’s Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 628 (2023). Professor Jonathan Marshfield offers this approach as a “second-order” decision-making device after the text has “run[] out.” *Id.* at 628 n.452 (citing James D. Nelson & Micah Schwartzman, *Second-Order Decisions in Rights Conflicts*, 109 VA. L. REV. 1095, 1096 (2023)). Given some of the broad challenges of interpreting state constitutional law already mentioned, I suspect that state courts may need to resort to these second-order decisional rules frequently.

127. *Id.* at 628.

are the masonry of federalism—they preserve intermediate and intermediating institutions, support cooperation with federal law in solving collective-action problems,¹²⁸ but also serve as a bulwark against centralization and tyranny.¹²⁹ These functions, too, can serve as a benchmark for judging the purpose and effectiveness of state constitutionalism.

III. FEDERAL CONSTITUTIONAL LIMITS ON STATE INSTITUTIONAL DESIGN

So far, this Essay has been critical of lockstepping state constitutional structure by reference to the Federal Constitution and optimistic about the ability of state judicial officers to craft unique methods and doctrines to administer the structural provisions of state constitutions. As a normative matter, and as a matter of constitutional theory, state courts should be less solicitous of Supreme Court decisions to decide matters of state constitutional law. State justices should aim to be independent innovators in this area and not simply reactive to federal law.¹³⁰ After all, it is a *state* constitution the justices are expounding.

That said, there are limits on state institutional experimentation. The Federal Constitution imposes a set of structural limits—sounding in due process—that are primarily concerned with protection of personal liberty. This due process feature of structure attempts to prevent tyranny by separating different governmental powers, separating personnel to exercise those powers, and/or requiring a set of procedural safeguards familiar to one branch to operate within another.¹³¹ Although it is true that “federal separation of powers doctrines have never been

128. Cf. Jim Rossi, *Assessing the State of State Constitutionalism*, 109 MICH. L. REV. 1145, 1157 (2011) (“Federalism is not only about states resisting federal power; it also envisions states acting as partners with a national government in pursuing national goals through decentralized government.”); Bulman-Pozen & Seifter, *The Democracy Principle*, *supra* note 122, at 923 (“To the extent executive federalism has emerged as a contemporary workaround for minoritarian, gridlocked federal government, state power grabs undermine national as well as state governance.”).

129. Marcus Gadson, *Why Study State Constitutional Law?*, 99 N.Y.U. L. REV. 1924, 1954–55 (2024) (Given the failures of federal institutions to meet the moment, “the state level [i]s the most promising arena in which to fight for our democracy.”); see also Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7 (2010) (discussing a federalism where “institutional arrangements promote voice, not exit; integration, not autonomy; interdependence, not independence”).

130. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS*, *supra* note 108, at 137 (noting that state decisions are often framed as reactions to federal cases “rather than a reasoned elaboration of state constitutional doctrine”).

131. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1717, 1727–29 (2012); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1519, 1534 (1991).

incorporated to apply to state governments,”¹³² federal courts do enforce a kind of crypto-incorporation of federal separation of powers through the Due Process Clause of the Fourteenth Amendment, notwithstanding early precedent to the contrary.¹³³

Most dramatically, this structural principle of due process regulates officials when they appear to blend executive with judicial or quasi-judicial functions. So, for example, in *Williams v. Pennsylvania*,¹³⁴ the Supreme Court held that it violated a defendant’s due process rights to have a former prosecutor who approved a death penalty charge to sit in on an appeal over that very decision, now that he was a sitting state supreme court justice.¹³⁵ The case was heard as a Fourteenth Amendment due process case, but is run through with separation-of-powers concerns.¹³⁶ Similarly, in *In re Murchison*,¹³⁷ the Court held that a judge acting pursuant to Michigan’s then peculiar “one-man grand jury” provision could not both charge and adjudicate any suspected perjury that resulted.¹³⁸ At the local level, in *Tumey v. Ohio*,¹³⁹ a law that allowed the city mayor to sit in a judicial capacity in criminal cases and receive money for himself and the city treasury only upon conviction was found to violate due process.¹⁴⁰ Although the Court explained that consolidation of executive and judicial functions in a city official alone did not violate

132. Williams, *The State of State Constitutional Law*, *supra* note 5, at 976; *see also Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (“[T]his Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.”).

133. *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (“Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State.”).

134. 579 U.S. 1 (2016).

135. *Id.* at 8 (“Chief Justice Castille, Williams argue[d], violated the Due Process Clause of the Fourteenth Amendment by acting as both accuser and judge in his case.”).

136. *Id.* at 12 (“Although not necessary to the disposition of this case, the [trial] court’s ruling underscores the risk of permitting a former prosecutor to be a judge in what had been his or her own case.”); *see also* Jacob Schuman, *Prosecutors in Robes*, 77 STAN. L. REV. 629, 681 (2025) (“Although *Williams* was decided based on the right to due process, the same principle of judicial impartiality sounds in the separation of powers.” (footnote omitted)).

137. 349 U.S. 133 (1955).

138. *Id.* at 137 (“Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.”).

139. 273 U.S. 510 (1927).

140. *Id.* at 523, 531–32.

the Constitution,¹⁴¹ the fact that the law gave the executive a pecuniary interest *as the executive* ran afoul of the Due Process Clause.¹⁴²

The Federal Constitution’s prohibition on bills of attainder also prevents legislatures from legislating sentences in criminal cases. A bill of attainder is a legislative enactment designed to “inflict punishment on [a] specified individual or group.”¹⁴³ In deciding whether a statute forms a forbidden bill of attainder, the Court looks to the historical meaning of legislative punishment, whether the legislation serves a nonpunitive legislative purpose, and whether the legislative record evinces some intent to punish.¹⁴⁴ As Chief Justice Earl Warren wrote, “the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.”¹⁴⁵

These cases do not stand for the proposition that states are forbidden from reposing certain adjudicative functions in what is nominally an “executive” or “legislative” branch. What they *do* suggest is that, to the extent one branch takes on something like an adjudicative role, it must ordinarily supply the kind of procedural process guarantees that are customary within a judicial forum.¹⁴⁶ This is the bargain that comes with institutional flexibility at the state level.¹⁴⁷

141. *Id.* at 534.

142. *Id.* (“A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.”); *see also id.* at 533 (“With his interest, as mayor, in the financial condition of the village, and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?”); *Ward v. Village of Monroeville*, 409 U.S. 57, 58–60 (1972) (noting that it violates due process to have a mayor with “wide executive powers” to also adjudicate fines in criminal cases that go to public fisc).

143. *Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp.*, 468 U.S. 841, 851 (1984). I leave it open here the extent to which Section Three of the Fourteenth Amendment amends the Attainder Clause. *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 666 (2024) (noting that the Supreme Court interpretation of the Bill of Attainder Clause does not “change or limit the meaning of Section Three [of the Fourteenth Amendment]”); *cf. Trump v. Anderson*, 144 S. Ct. 662 (2024) (construing Section Three of the Fourteenth Amendment).

144. *See Selective Serv. Sys.*, 468 U.S. at 582.

145. *United States v. Brown*, 381 U.S. 437, 442 (1965).

146. *Cf. Brown*, *supra* note 131, at 1556–57 (“Almost instinctively, [administrative] law now recognizes that when functions are not truly separate, individual rights need explicit procedural protections.”).

147. *Cf. id.* at 1557 (“Due-process principles . . . compensate for departures from the structural constitutional norms.”).

CONCLUSION

This Essay discussed how states continue to resort to federal law to administer their separation-of-powers provisions, and the error in doing so. The kind of scholarly attention and investigation that the “new judicial federalism” has generated in the area of individual rights and liberties has and should spark just as much thinking in the area of state constitutional structure.

This Essay also described what may be considered the federal constitutional limits on institutional design. I do not wish to overstate how much these federal constitutional provisions actually dictate state governmental structure. The Supreme Court is not in the business of specifying how many branches of government a state must have and what power each of those branches must exercise.

Nevertheless, federal guarantees do act as a limits—albeit generous ones—on how far states can go in shaping their governing institutions. And, once one surveys the boundaries set by these federal cases, they form regions that in their rough contours, if not in their scope or nomenclature, seem to resemble something like distinctive legislative, executive, and adjudicative powers and duties.