FOREWORD

DEMOCRACY AND THE STATE DISTRIBUTION OF POWERS

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Year in and year out, states redistribute power among officials and branches. Some redistributions, reflecting an era of polarization and hardball, are efforts by one party to entrench its power and disadvantage its rivals. Other structural changes are more ordinary efforts to advance a policy vision or retool decision-making. Either way, conflicts over power redistributions often land in state court—and are unlikely to go away. State courts regularly view these structural conflicts through a federally resonant lens, patrolling the three state branches' supposed institutional boundaries at a high level of abstraction.

This Essay seeks to reorient state structural adjudication. Analysis that classifies power as executive, legislative, or judicial is an important starting point. But as at the federal level, horizontal classification alone—whether in service of formalism or functionalism—can produce illogical decisions and fall short in hard cases. Suffused with democratic commitments, state constitutions offer other options. State courts are well-suited to consider not just horizontal. but also vertical effects on the state's democracy and the people that state distributions of power are intended to serve. Many state courts already acknowledge both the limits of horizontal classification alone and the relationship

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between power distributions and democracy, though they have yet to fully develop an alternative approach.

The Essay proposes a framework for adjudicating state structural conflicts that incorporates a limited but crucial set of democratic considerations. As prior work has shown, state constitutions embrace core democratic pillars of popular sovereignty, majority rule, and political equality. A democratic inquiry in structural cases need not replicate the indeterminacy of horizontal classifications. Instead, it should focus on whether a law impairs all three pillars and thus the basic operation of democracy—often by entrenching government power. Folding this democratic review into structural analysis will sometimes support redistributions of power by well-functioning institutions. As importantly, it stands ready to limit redistributions that would thwart popular self-rule. Review along these lines will not bring magical certainty to the distribution of powers conflicts, but it will better align structural jurisprudence with both state constitutional commitments and the real world of state democracy.

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INTRODUCTION

State government structure is often in flux. Over both the long haul and in recent years, change has been the constant.[1] Whether or not one agrees that federal constitutional structure is defined by its durability,[2] state institutions are not. Both the big picture and subtler features of state institutions have shapeshifted over time, routinely revisited to meet the moment. At the constitutional level, big-picture change has included the rise of gubernatorial vetoes (and line-item vetoes); the establishment of direct democracy; the widespread election of judges; and limits on legislative power.[3] And smaller-bore reshuffling is commonplace. Consider the following recent examples, covering a wide range of situations and motivations:

- State legislatures have proposed or enacted incremental changes to how state judges are selected[4] and what powers courts have.[5]

1. On the volatility of state constitutions themselves, see, for example, Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AMER. POL. SCI. REV. 657, 665–66 (2016); ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 91–117 (2nd ed. 2023) (discussing state constitutional evolution); JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES (2018). On the activity of state legislatures in revisiting structural arrangements, see, for example, Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537 (2019) (describing the rise and fluidity of state government offices and their powers).

2. *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 716–33 (2011) (describing the "conventional wisdom that constitutional structure—the set of institutions and political decisionmaking processes that create our basic framework of government—is durable and constraining"); *id.* at 719 ("Many of the most important structural features of the U.S. government have remained mostly noncontroversial and more or less intact since the Founding[.]").

3. For accounts of these shifts and others, see, for example, WILLIAMS & FRIEDMAN, *supra* note 1; ALAN G. TARR, UNDERSTANDING STATE CONSTITUTIONS (1998); JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021).

4. *See, e.g.*, Michael Milov-Cordoba et al., *Legislative Assaults on State Courts in 2023*, BRENNAN CTR. FOR JUST. (Jan. 9, 2024), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2023; Marin Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121 (2020).

5. *See, e.g.*, John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 985–86 (2007) (describing amendments in North Dakota and Nebraska that require a supermajority vote to declare a statute unconstitutional).

- After the height of the COVID-19 pandemic, many states changed which institutions have authority over emergency power (often by limiting the governor's power),[6] or created new government entities to do so.[7]

- Many state legislatures have proposed, and some have enacted, changes to how elections are administered; some of these shift power to partisan actors or have patent partisan intent.[8]

- State courts, legislatures, and constitutional drafters have taken new positions on deference to administrative agencies, with some rejecting the practice under separation of powers concepts (sometimes echoing federal fashions)[9] and others embracing it.[10]

- State courts have revitalized or considered revitalizing their nondelegation doctrines.[11]

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6. *See* Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275 (2022); Richard Briffault, *States of Emergency: Covid-19 and Separation of Powers in the States*, 2023 WIS. L. REV. 1633; James G. Hodge & Jennifer L. Piatt, *COVID's Counterpunch: State Legislative Assaults on Public Health Emergency Powers*, 36 BYU J. PUB. L. 31, 31 (2022); Michelle Mello et al., *Legal Infrastructure for Pandemic Response: Lessons Not Learnt in the US*, BMJ, Feb. 12, 2024, at 2, available at: https://www.bmj.com/content/384/bmj-2023-076269 (tallying "65 laws adopted in 24 states . . . with restrictions that extend beyond the pandemic period").

7. *See, e.g.*, OHIO REV. CODE ANN. § 101.36 (West 2021).

8. *See, e.g.*, S.B. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); *see also* Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1349-51; STATES UNITED DEMOCRACY CTR., A DEMOCRACY CRISIS IN THE MAKING: DECEMBER 2023 YEAR-END UPDATE (Dec. 7, 2023), https://statesuniteddemocracy.org/resources/dcim-2023-year-end/#section-3.

9. *See* Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 734 (2020) (collecting state judicial opinions that echo federal reasoning about deference).

10. *See* Aaron Saiger, *Derailing the Deference Lockstep*, 102 BOSTON U. L. REV. 1879 (2022); Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines* (Ctr. for Study Adm. State, Working Paper No. 21-23, 2020), https://ssrn.com/abstract=3552321. For examples, see Cent. Ga. Elec. Membership Corp. v. Pub. Serv. Comm'n, 830 S.E.2d 459, 461 (Ga. App. 2019); Mueller Indus. v. South, No. 2022-WC-01178-COA, 2023 WL 6985896, at *2 (Miss. Ct. App. Oct. 24, 2023) (quoting Clear River Const. Co. v. Chandler *ex rel.* Chandler, 926 So. 2d 273, 275 (¶¶ 9–10) (Miss. Ct. App. 2006)); FLA. CONST. art. V, § 21.

11. *See, e.g.*, Becker v. Dane Cnty., 977 N.W.2d 390 (Wis. 2022); *In re* Certified Questions, 958 N.W.2d 1 (Mich. 2020); *cf.* Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 264 (2022); Daniel E. Walters,

- State legislatures have engaged in "power plays" of stripping authority from just-elected executive branch officials.[12]
- State legislatures have otherwise created, eliminated, or changed the powers of various executive branch officials, some of which are established in the states' constitutions.[13]
- State legislatures have proposed, and some have enacted, new burdens on direct democracy.[14]
- States have modified, expanded, or adopted new forms of legislative veto.[15]

These redistributions of power often land in court. When they do, state courts typically proceed through a conventional, federally inflected separation-of-powers analysis.[16] They undertake the murky inquiry of what powers or functions correspond to each branch, and then ask whether one branch has encroached (or encroached too much) upon the powers of another.[17] As a shorthand, I will refer to this family of approaches as "horizontal classification": Whether formalist or functionalist, its shared premise is that "there is a way to classify

Decoding Nondelegation After Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417 (2022).

12. *See* Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1219 (2019).

13. *See* Katarina Sostaric, *Reynolds Signs Law to Limit Iowa State Auditor's Powers*, IPR (June 1, 2023, 7:59 PM), https://www.iowapublicradio.org/state-government-news/2023-06-01/reynolds-signs-law-to-limit-iowa-state-auditors-powers; Chris Lisinski, *Mass. Auditor Moves to Sue the Legislature into Complying with Her Review*, WBUR (July 27, 2023), https://www.wbur.org/news/2023/07/27/dizoglio-appeals-campbell-audit-mass-legislature.

14. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J. F. 191, 207–16 (2023) (providing examples of methods state legislatures have used to attack direct democracy).

15. *See* Derek Clinger & Miriam Seifter, *Unpacking State Legislative Vetoes*, U. WIS. L. SCH., https://uwmadison.app.box.com/s/hl6eyasw6yrc5i4k9futlzi09pk9ofau (Mar. 19, 2024).

16. *See infra* Part II.

17. *See infra* Part II.

government authority into three categories,"[18] and that cases can be decided based on the extent of horizontal breach of those classifications.[19]

Even at the federal level, the literature critiquing these approaches is voluminous and hard-hitting. Most relevant here, scholars have stressed that government authority does not divide neatly into three categories; many exercises of power could plausibly fit in any category.[20] Nor is it clear how a court can determine that one branch has intruded too far into another's powers. At the bottom, horizontal classification is "hopelessly abstract," [21] if not altogether "incoherent."[22] If there is a saving grace of the prevailing approach, it is that competing approaches raise concerns about judicial competence,[23] at least for counter-majoritarian federal courts whose expertise lies chiefly in law books.

This Essay, originally delivered as the Annual Robert F. Williams Lecture on State Constitutional Law, calls for a shift in emphasis in state structural adjudication. Starting with a traditional tripartite framework makes good sense, and sometimes there are easy cases. But states can do better than horizontal abstractions alone.

For one thing, the knocks against horizontal classification hit harder in the states. State constitutions have little independent attachment to abstract horizontal distributions of power; the contours of each branch's

18. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 625–26 (2001). As Thomas Merrill has written:

> [F]ormalists and functionalists start with the same premise: that the constitutional principle of separation of powers is concerned with the allocation of governmental functions among the different branches of government. Indeed, both groups generally agree with the traditional understanding that governmental activities can be classified under three functional headings—legislative, executive, or judicial—with each function associated with one of the three branches of government.

Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225 (1992) (citation omitted).

19. *See, e.g.*, Magill, *supra* note 18; Merrill, *supra* note 18; Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346 (2016).

20. *See, e.g.*, Magill, *supra* note 18, at 604 ("The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers.").

21. Cristina M. Rodríguez, *Complexity As Constraint*, 115 COLUM. L. REV. SIDEBAR 179, 184 (2015).

22. Magill, *supra* note 18, at 605; *see also* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991).

23. *See, e.g.*, Edward H. Stiglitz, *Constitutional Folk Theories As a Guide to Constitutional Values? The Case of the Legislative Veto*, 48 J. LEGAL STUD. 45, 48 (2019) (finding, based on an empirical study of the relationship between state legislative vetoes and gubernatorial accountability for rising energy prices, that "tinkering with institutions to promote functionalist values is often a fraught business, and that courts may not be competent in it").

powers can be nebulous at any given time, and the roles of the branches change over time. "Separation of powers is thus not a stable concept, even within a single state."[24] Moreover, state "distribution of powers" clauses[25]—as they are often called, and as I will call them to shed some

24. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1884 (2001).

25. *See* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 72 DUKE L.J. 545 (2023). The clauses, including article and section titles, are as follows: ALA. CONST. art. III, § 42 (distribution of powers; legislative, executive, and judicial branches of government; separation of powers); ARIZ. CONST. art. III (distribution of powers); ARK. CONST. art. IV, §§ 1–2 (departments; division of governmental authority; separation of powers); CAL. CONST. art. III, § 3 (state of California; enumeration; exercise); COLO. CONST. art. III (distribution of powers); CONN. CONST. art. II (distribution of powers; delegation of regulatory authority; disapproval of administrative regulations); FLA. CONST. art. II, § 3 (general provisions; branches of government); GA. CONST. art. I, § 2, para. 3 (bill of rights; origin and structure of government; separation of legislative, judicial, and executive powers); IDAHO CONST. art. II, § 1 (distribution of powers; departments of government); ILL. CONST. art. II, § 1 (powers of the state; separation of powers); IND. CONST. art. III, § 1 (distribution of powers; three separate departments); IOWA CONST. art. III, § 1 (distribution of powers; departments of government); KY. CONST. §§ 27–28 (distribution of powers; powers of government divided among legislative, executive, and judicial departments; one department not to exercise power belonging to another); LA. CONST. art. II, §§ 1–2 (distribution of powers; three branches; limitations on each branch); ME. CONST. art. III, §§ 1–2 (distribution of powers; powers distributed; to be kept separate); MD. CONST. art. VIII (declaration of rights; separation of powers); MASS. CONST. Pt. 1, art. XXX (declaration of the rights of the inhabitants of the Commonwealth of Massachusetts; separation of legislative, executive, and judicial departments); MICH. CONST. art. III, § 2 (general government; separation of powers); MINN. CONST. art. III, § 1 (distribution of the powers of government; division of powers); MISS. CONST. art. I, §§ 1–2 (distribution of powers; powers of government; encroachment of power); MO. CONST. art. II, § 1 (distribution of powers; three departments of government; separation of powers); MONT. CONST. art. III, § 1 (general government; separation of powers); NEB. CONST. art. II, § 1 (distribution of powers; legislative, executive, and judicial); NEV. CONST. art. III, § 1 (distribution of powers; three separate departments; separation of powers; legislative review of administrative regulations); N.H. CONST. pt. I, art. 37th (bill of rights; separation of powers); N.J. CONST. art. III, para. 1 (distribution of powers; branches of government); N.M. CONST. art. III, § 1 (distribution of powers; separation of powers); N.C. CONST. art. I, § 6 (declaration of rights; separation of powers); N.D. CONST. art. XI, § 26 (general provisions); OKLA. CONST. art. IV, § 1 (distribution of powers; departments of government); OR. CONST. art. III, § 1 (distribution of powers; division of government powers); R.I. CONST. art. V (distribution of powers); S.C. CONST. art. I, § 8 (declaration of rights; separation of powers); S.D. CONST. art. II (division of the powers of government); TENN. CONST. art. II, §§ 1–2 (distribution of powers; separation of powers; branches of government; persons belonging to different branches); TEX. CONST. art. II, § 1 (powers of government; separation of powers); UTAH CONST. art. V, § 1 (distribution of powers; three departments of government); VT. CONST. ch. II, § 5 (delegation and distribution of powers; departments to be distinct); VA. CONST. art. I, § 5 (bill of rights; separation of legislative, executive, and judicial departments; periodical elections); *id.* art. III, § 1 (departments to be distinct); W. VA. CONST. art. V, § 1 (division of powers); WYO. CONST. art. II, § 1 (distribution of powers; powers of government divided into three departments).

federal separation of powers baggage—were adopted in significant part to promote majoritarian accountability.[26] And state courts, which are more majoritarian decision-makers and sources of the common law, have competence that extends well beyond branch-essentializing and dictionary-sparring.

In place of horizontal abstractions alone, the Essay argues, states should resolve distribution of power conflicts with attention to the preservation of democracy, understood as rule by popular majorities on equal terms. As Jessica Bulman-Pozen and I have detailed at length elsewhere, democracy is a deep commitment of state constitutions, borne out in text, structure, and history.[27] Appraising a law's effects on the relationship between a state's people and their government, rather than only analyzing institutional abstractions, aligns with fundamental state constitutional precepts and the aims of state power allocations.

To be sure, a proposal to review laws with democracy in mind raises immediate questions: Would such an approach simply replicate, under new language, the indeterminacy of horizontal classification? And why doesn't democracy require deferring to legislative allocations of power, rather than questioning them? A framework of democratic review can attend to both concerns. An appropriate framework can be narrow enough to be determinate, but also robust enough to check legislative redistributions of power when they subvert democracy.

To see how, it helps to begin with a definition of the democracy that state constitutions embrace. Although the concept of democracy is famously contested,[28] its meaning at the state level features legible pillars of political equality, majority rule, and popular sovereignty.[29] Democratic review should be most concerned with manipulations that seriously distort all of these pillars in a way that reveals democratic dysfunction—or, as John Hart Ely put it, with laws or practices that cause "blockages in the democratic process."[30] Most such blockages or distortions can be understood as forms of entrenchment,[31] and it is

26. *See* Marshfield, *supra* note 25.

27. *See generally* Bulman-Pozen & Seifter, *supra* note 8.

28. *See* W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 169 (1956) (identifying democracy as an "essentially contested concept").

29. *See* Bulman-Pozen & Seifter, *supra* note 8, at 865 n.25 (collecting sources); *see also* Marshfield, *supra* note 25; Alan G. Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, *in* DEMOCRACY: HOW DIRECT? VIEWS FROM THE FOUNDING ERA AND THE POLLING ERA (Elliott Abrams ed., 2002).

30. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

31. *Id.* at 103; *see also* Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329 (2005); Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). State case law has sometimes recognized entrenchment as at odds

entrenchment that will be my focus here.[32] Anti-entrenchment in the name of democracy is one of the few principles that state constitutions entrench.

Confining the inquiry in this way takes us from the world of abstractions to the facts of power grabs and partisan lockups. It finds common ground with federally focused scholarship that calls for more nuanced understanding of the branches,[33] as well as proposals for "vertical"[34] analysis, or for "passing through" power analysis to the people and groups who wield it.[35] It is also consonant with the building blocks of state case law. Although democratic review lacks a developed framework in state court doctrine, it leverages state courts' existing instincts for pragmatic, consequentialist review and institutional realism.[36]

Again, my claim is not that traditional notions of the branches and their powers are irrelevant, or that courts should dispense with them. Instead, the argument is that democracy should be part of the analysis. The presence or absence of serious democratic deficits can make easy

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with constitutional principle: "If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to 'derive[]' its power from the people or to be "founded upon their will only." Harper v. Hall, 868 S.E.2d 499, 539 (N.C. 2022), *cert. sub nom.* Moore v. Harper, 142 S. Ct. 2901 (2022), *overruled in later appeal*, 886 S.E.2d 393 (N.C. 2023), *and aff'd sub nom.* Moore v. Harper, 600 U.S. 1729 (2023). The tortured citation for *Harper v. Hall* reflects the complex battle for democracy in which state courts are situated, a phenomenon discussed in Part II.

32. Entrenchment is not a bright-line category. *See, e.g.*, Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015). Still, sometimes it is unmistakable.

33. *See, e.g.*, Huq & Michaels, *supra* note 19, at 352 (describing a "thick political surround" of the three branches of the federal government, "enveloped and infused by a teeming ecosystem of institutional, organizational, and individual actors within as well as outside of government"); Magill, *supra* note 18.

34. *See, e.g.*, V. F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 840 (2004) (articulating a "constitutive view" of the separation of powers based on "an economy of vertical relations between the governed and the governing"); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999). For harmonious approaches, see Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 22 (2015) (developing a "constituency-relations model" of federalism); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994) (taking a "participation-centered" or "bottom-up" approach to understanding institutions).

35. Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 83 (2016) ("Locating policymaking power therefore requires not only identifying the relevant institutional decisionmakers but also 'passing through' the power of each institution to the underlying interests that control its decisionmaking.").

36. *Cf.* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 5 (2013) ("Institutional realism might seem terrifying to contemplate, but public law cannot and does not live by institutional formalism alone." (citation omitted)).

cases easier and tip the balance in hard cases. Democratic review can thus provide better purchase on structural conflicts in the states, helping state courts and commentators reason through both existing conflicts and those on the horizon.

Under democratic review, some categories of redistribution are likely to pass constitutional muster. For example, despite generating separation of powers controversy,[37] changes in state judicial deference to administrative agencies will typically not pose a constitutional problem, whether a state is allowing or banning such deference. And many shifts in authority between the branches or to new entities likewise register as ordinary politics or governance, not constitutional error.

On the other hand, actions that seek to lock in state officials' power do raise constitutional concerns. These actions—like giving unreviewable power to subsets of the legislature, stripping power from just-elected officials, or attempting to change the rules of elections themselves—should require meaningful justifications to survive review. State legislatures will often be the ones initiating these actions, though forms of unaccountable self-dealing by executives or courts should receive equal scrutiny when they occur.[38]

The remainder of the Essay unfolds as follows. Part I begins by taking stock of current state distribution-of-powers doctrine and highlighting its limitations. Part II then makes the case for democratic review, showing how adding democratic considerations to a distribution-of-powers framework aligns with the core commitments of state constitutions, the purposes of distribution-of-powers clauses, and the role of state courts. Part III outlines how democratic review would work and sketches contemporary applications involving redistributions of the power to regulate elections, changes in deference to administrative agencies, and the supercharging of state legislative vetoes.

37. *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475 (2022); Saiger, *supra* note 10.

38. One example is the recent phenomenon of state attorneys general arrogating power to review and reject popular ballot initiatives. *See, e.g.*, Montanans Securing Reprod. Rts. v. Knudsen, 546 P.3d 183 (Mont. 2024); Letter from Dave Yost, Ohio Att'y Gen., to Donald McTigue (Jan. 25, 2024), https://www.ohioattorneygeneral.gov/getattachment/1023abe6-8759-4d27-9198-1a9e0d3c591a/Ohio-Voters-Bill-of-Rights-(Second-Submission).aspx (stating that the attorney general has the constitutional duty to review the accuracy of titles of ballot initiatives, and rejecting the title "Ohio Voters Bill of Rights" on the ground that to be a bill of rights, "the amendment would need to 'create a legitimate claim of entitlement' to a benefit" under *Board of Regents v. Roth*).

I. HORIZONTAL CLASSIFICATION AND ITS LIMITATIONS

A. The State of State Case Law

State case law in distribution of powers cases—encompassing multiple doctrines in fifty states over centuries—of course defies easy summary. Yet in its modern form across the country, this set of doctrines nonetheless displays a pattern that calls out for revision. Under the operative tests in many states (as at the federal level), horizontal classification is the cornerstone of decision-making. State decisions are horizontal in the sense that they consider only the effect of one branch's actions on other branches, without attention to their effects on individuals or groups. And they are classification-based in the sense that they ascribe to each branch a set of powers, and then define constitutional violations based on whether branches intrude on each other's turf.

By way of simplified overview, the vast majority of state courts have overarching distribution of powers tests,[39] rather than a series of clause-

39. For just a sampling from across the country, see *Ex parte* Jenkins, 723 So. 2d 649, 654 (Ala. 1998) (explaining that separation of powers prohibits mixing of "core powers" of the branches, and that these powers have "specific boundaries"); Alaska Pub. Int. Rsch. Grp. v. State, 167 P.3d 27, 35 (Alaska 2007) (classifying powers with branches and assessing whether a branch has encroached on the powers of another branch); J.W. Hancock Enter. v. Arizona State Registrar Contractors, 690 P.2d 119, 125 (Ariz. Ct. App. 1984) (providing a four-part test considering both the nature of the power and practical consequences); Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 644 (Cal. 2001) (finding generally no separation of powers violation where one branch has not taken over the core functions of another); State v. Gracia, 719 A.2d 1196 (Conn. App. Ct. 1998) (inquiring whether one branch has been given duties that belong exclusively to another branch, or that significantly interfere with another branch's essential functions); Op. Justs., 380 A.2d 109 (Del. 1977) (adopting Kansas's test of examining the "essential nature" of the power being exercised, the degree of control by one branch over another, and the legislature's intent); Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004) (upholding a "strict" separation of powers doctrine prohibiting encroachment on or delegation of each branch's assigned powers); Perdue v. Baker, 586 S.E.2d 606, 615 (Ga. 2003) (relying upon federal tests to classify legislative and executive functions); Tucker v. State, 394 P.3d 54, 72 (Idaho 2017) (holding that separation of powers doctrine is implicated by textual commitment of a power to one branch, or a matter that "implicates another branch's discretionary authority"); Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 905 (Ill. 2010) (writing that the purpose of separation of powers is "to ensure that the whole power of two or more branches of government shall not reside in the same hands" (quoting People v. Walker, 519 N.E.2d 890, 892 (Ill. 1988)); State v. Monfort, 723 N.E.2d 407, 411 (Ind. 2000) (stating that each branch has "specific duties and powers that may not be usurped or infringed upon by the other branches of government"); State v. Thompson, 954 N.W.2d 402, 410 (Iowa 2021) (barring any branch from exercising powers forbidden to it, exercising power assigned to another branch, or impairing another branch's performance of constitutional duties); State v. Beard, 49 P.3d 492, 496 (Kan. 2002) (assessing usurpations of power through a multi-factor test); Fletcher v. Commonwealth, 163 S.W.3d 852, 863 (Ky. 2005) (precluding exercise by one department of powers vested solely in any of the others); New England Outdoor Ctr. v. Comm'r Inland

bound or doctrine-specific inquiries.[40] In at least forty-five states, this inquiry begins with horizontal classification. That is, states ask whether

Fisheries & Wildlife, 748 A.2d 1009, 1013 (Me. 2000) (employing a "rigorous" separation requirement that depends on whether a power has been granted to one branch only); Murphy v. Liberty Mut. Ins., 274 A.3d 412, 435 (Md. 2022) (asking in various ways if one branch has usurped or encroached on the powers of another); Chief Admin. Just. Trial Ct. v. Lab. Rels. Comm'n, 533 N.E.2d 1313, 1316 (Mass. 1989) (focusing on whether one branch has interfered with the powers or functions of another); Makowski v. Governor, 852 N.W.2d 61, 71 (Mich. 2014), *as amended on reh'g* (Sept. 17, 2014) (noting that the "true meaning" of separation of powers is that no branch can exercise the "whole power" of another); Moore v. Bd. Supervisors Hinds Cnty., 658 So. 2d 883, 887 (Miss. 1995) (asking whether one branch is exercising power at the core of another branch's power); State Auditor v. Joint Comm. on Legis. Rsch., 956 S.W.2d 228, 231 (Mo. 1997) (calling for analysis of whether one branch interferes with or assumes another branch's power); Powder River Cnty. V. State, 60 P.3d 357, 380 (Mont. 2002) ("[P]owers properly belonging to one department shall not be exercised by either of the others." (quoting Coate v. Omholt, 662 P.2d 591, 594 (Mont. 1983)); State *ex rel* Spire v. Conway, 472 N.W.2d 403, 408 (Neb. 1991) (holding that branches cannot encroach on duties and prerogatives of other branches or delegate their own duties and prerogatives); Comm'n on Ethics v. Hardy, 212 P.3d 1098, 1103–04 (Nev. 2009) (per curiam) (explaining that branches are prohibited from "impinging on the functions of another"); State v. Merrill, 999 A.2d 221, 225 (N.H. 2010) (asking whether one branch usurps an "essential power" of another); Brown v. Heymann, 297 A.2d 572, 578 (N.J. 1972) (holding that branches may not claim or receive "inordinate power"); State *ex rel.* Candelaria v. Grisham, 539 P.3d 690 (N.M. 2023) (holding that branches cannot "unduly interfere with or encroach on" the authority of another); Cooper v. Berger, 822 S.E.2d 286, 292–93 (N.C. 2018) (analysis based on each branch's "exclusive" powers and unreasonable disruption of other powers); State *ex rel.* Bray v. Russell, 729 N.E.2d 359 (Ohio 2000) (barring exercise of powers belonging to one branch by another branch, as well as "overruling influence" by one branch over others); *In re* Oklahoma Dep't Transp., 64 P.3d 546 (Okla. 2002) (barring "coercive influences" between branches); Rooney v. Kulongoski, 902 P.2d 1143 (Or. 1995) (barring performance of or burdens upon functions of one branch by another branch); Jefferson Cnty. Ct. Appointed Emps. Ass'n v. Pennsylvania Lab. Rels. Bd., 985 A.2d 697, 706 (Pa. 2009) (holding that the branches cannot usurp functions belonging to other branches); Quattrucci v. Lombardi, 232 A.3d 1062, 1066 (R.I. 2020) (finding that violations occur when a branch disruptively and unnecessarily assumes powers central or essential to another); State v. Langford, 735 S.E.2d 471, 478 (S.C. 2012) (barring usurpations of power between branches); State v. Moschell, 677 N.W.2d 551 (S.D. 2004) (barring encroachment by one branch on another branch's powers); Vandyke v. State, 538 S.W.3d 561, 571 (Tex. Crim. App. 2017) (barring usurpations and interference by one branch with another branch's powers); *In re* Young, 976 P.2d 581, 590 (Utah 1999) (barring an "attempt by one branch to dominate another in the other's proper sphere of action"); Hunter v. State, 865 A.2d 381, 391 (Vt. 2004) (barring encroachment on constitutionally defined functions); *In re* Phillips, 574 S.E.2d 270, 273 (Va. 2003) (finding no violation unless one branch exercises the "whole power" of another); Carrick v. Locke, 882 P.2d 173, 177 (Wash. 1994) (holding that the "fundamental functions of each branch" must "remain inviolate"); State *ex rel.* McGraw v. Burton, 569 S.E.2d 99, 107 (W. Va. 2002) (prohibiting fundamental encroachment on core powers of each branch); Serv. Emps. Int'l Union, Loc. 1 v. Vos, 946 N.W.2d 35, 47 (Wis. 2020) (analysis based on "core" and "shared" powers of the branches).

40. For an example of a case advocating a more case-by-case approach, see Anderson v. Lamm, 579 P.2d 620, 623 (Colo. 1978) ("The dividing lines between the respective powers

a power "belongs" to a branch,[41] or is "core"[42] or "essential"[43] to that branch.

What states do with these classifications varies across and within states. Prior scholarship has noted both formalism and functionalism in state structural decisions,[44] as well as other approaches.[45] Case law continues to bear this out: Some cases attempt to draw firm lines around each branch's power in a formalist fashion, such that any exercise of the power by another branch violates the state constitution.[46] More of the case law embraces a functionalist approach, asking about the degree of intrusion by one branch into another's prerogatives or the extent of resulting disruption to that branch.[47] Some states emphasize the importance of pragmatism[48] or flexibility.[49] There is sufficient variation between cases in any given state to defeat a strict taxonomy of methodologies[50]—but some effort at horizontal classification is a mainstay.

As I will explain below, these efforts at horizontal classification are often wanting on their own.

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are often in crepuscular zones, and, therefore, delineation thereof usually should be on a case-by-case basis." (quoting MacManus v. Love, 499 P.2d 609, 610 (Colo. 1972)). Even so, Colorado courts' case-by-case approach depends on horizontal classification.

41. *See e.g.*, *Powder River Cnty.*, 60 P.3d at 380.

42. *See, e.g.*, *Moore*, 658 So. 2d at 887.

43. *See, e.g.*, *Merrill*, 999 A.2d at 225.

44. *See* Adrian Vermeule, *The Judical Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 360 (2000) (summarizing state separation of powers cases regarding judicial power as "largely functionalist: most commonly, they enquire whether the challenged statute encroaches upon or unduly interferes with core judicial functions"); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1217 (1999) (finding formalism in state approaches to nondelegation and legislative vetoes).

45. *See* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993) (surveying formalist, functionalist, and other approaches to legislative appointment questions).

46. *See, e.g.*, State v. Stephens, 663 S.W.3d 45 (Tex. Crim. App. 2021), *reh'g denied*, 664 S.W.3d 293 (Tex. Crim. App. 2022).

47. *See, e.g.*, Quattrucci v. Lombardi, 232 A.3d 1062 (R.I. 2020).

48. *See, e.g.*, State *ex rel.* Schneider v. Bennett, 547 P.2d 786 (Kan. 1976); Elizabeth River Crossings OpCo, LLC v. Meeks, 749 S.E.2d 176 (Va. 2013); Clark v. Cuomo, 486 N.E.2d 794 (N.Y. 1985) (noting the importance of "common sense" in the separation of powers analysis).

49. *See, e.g.*, Billis v. State, 800 P.2d 401, 415 (Wyo. 1990) ("[W]e are convinced that the state's framers had in mind a pragmatic, flexible view of differentiated governmental power.").

50. *See* Chad M. Oldfather, *Some Observations on Separation of Powers and the Wisconsin Constitution*, 105 MARQ. L. REV. 845 (2022).

B. The Unworkability of the Status Quo

Commentators have already piled on against horizontal classification at the federal level. The cuts are deep: The classification effort is "tired, . . . unhelpful and in some ways incoherent,"[51] both because powers do not convincingly fall into these categories, and because there is no agreed upon metric for interbranch overreaches.[52] The case law recognizes that the separation of powers is not an end in itself, but the purposes that courts identify seldom go beyond "platitudes."[53] And even if all could agree with a Madisonian aim of preventing excessive accumulations of power,[54] the courts' doctrines bear little relationship to actual power or constraint in society.[55]

For several reasons, horizontal classification fares no better at the state level, and likely worse. To begin, the state case law is subject to the same incoherent critiques as the federal case law. Horizontal classifications produce logically unsatisfying results; there is often no clear reason for a court to classify a power as belonging to one branch or to reach one outcome rather than its opposite.

For example, in the absence of a federal-style appointments clause, may a state legislature appoint members of administrative agencies, or is appointment an executive function that the legislature cannot possess? Some courts have reasoned that appointment is exclusively executive,[56] while others have stated that at least some appointments are not an executive power at all.[57] More states seem to envision some degree of sharing of appointment powers[58]—but even then, deciding when legislative appointment is permissible has involved asking how "executive" the appointed body is. For example, the California Supreme Court prominently upheld legislative appointments to the California

51. Magill, *supra* note 18, at 605.

52. Brown, *supra* note 22. For a more recent critique of formalism and functionalism in hard cases, see Shalev Gad Roisman, *Balancing Interests in the Separation of Powers*, 91 CHI. L. REV. (forthcoming 2024).

53. Rodríguez, *supra* note 21, at 184.

54. THE FEDERALIST No. 47 (James Madison).

55. Levinson, *supra* note 35.

56. *See, e.g.*, Op. Justs., 309 N.E.2d 476, 479 (Mass. 1974) ("The creation of a public office is a legislative function, but the appointment of a particular person to an office is the function of the executive department." (quoting Comm'r Admn. v. Kelley, 215 N.E.2d 653, 657 (Mass. 1964)); Devlin, *supra* note 45, at 1246–48 (discussing this and other cases).

57. State *ex rel.* Martin v. Melott, 359 S.E.2d 783, 787 (N.C. 1987) ("We hold that the appointment of a Director of the Office of Administrative Hearings is not an exercise of executive power.").

58. *See* Marine Forests Soc'y v. California Coastal Comm'n, 113 P.3d 1062, 1089 (Cal. 2005) (collecting cases).

Coastal Commission,[59] "the most powerful land use authority in the nation."[60] In doing so, it reasoned that legislative appointments to an "independent administrative agency" like the commission were more likely to be constitutional, and distinguished agencies or officials that would involve more "core" or "traditional" executive powers.[61] That analysis, of course, replicates the puzzles of horizontal classification in ways that will yield no easy answers.[62]

Even on issues where state courts have reached a clear majority position, they often disagree about the underlying horizontal classifications. For example, states have overwhelmingly rejected legislative vetoes, striking down laws permitting legislative chambers or committees to reject agency rules or executive spending decisions.[63] But state courts have advanced divergent accounts of the precise constitutional problem. It could be that the legislature is exercising legislative power without bicameralism and presentment, as the United States Supreme Court held in *INS v. Chadha*.[64] Some state courts have reasoned instead that the problem is legislative actors exercising executive or judicial power.[65] And some opinions argue that more than one of these problems is present,[66] underscoring the limitations of horizontal classification.

These limitations are arguably more significant at the state level due to the fluidity of the branches' roles. Even more so than at the federal level, there is no fixed category of what legislatures, executives, and courts do.[67] In part, this is because state constitutions have always

59. *See id.*

60. Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1080 (2004).

61. *Marine Forests*, 113 P.3d at 1088–89.

62. *See* Devlin, *supra* note 45, at 1246 ("One problem with such a conceptual approach, as with similar federal analyses, is that it is often very difficult to classify the functions of the appointee so neatly.").

63. For a roundup, see Clinger & Seifter, *supra* note 15. For additional analysis, see Miriam Seifter, *State Legislative Vetoes and State Constitutionalism*, N.Y.U. L. Rev. (forthcoming Dec. 2024) (manuscript on file with author).

64. 462 U.S. 919, 951 (1983).

65. *See* Seifter, *supra* note 63.

66. *See id.*

67. *See generally* TARR, *supra* note 3 (periodizing state constitutional change by century and describing significant change in state institutions in each period).

accepted forms of blended power—between legislative and executive,[68] between legislative and judicial,[69] and between executive and judicial.[70] Moreover, these arrangements have changed substantially over time.[71]

The earliest state constitutions poured powers that we might now view as executive into the legislature, wary of gubernatorial excess.[72] Later periods of constitutional revision substantially increased and centralized executive power.[73] Likewise, states shifted some authority (like the power to grant divorces) from the legislature to the courts,[74] and also bestowed upon courts a range of other "legislative and policymaking functions."[75] The state branches have never had a fixed portfolio.

And as Alan Tarr has observed, "[e]ven the very nature of those branches has also changed."[76] State courts have gone from appointed entities to mostly elected bodies.[77] State executive branches have likewise changed in structure, with the plural executive allowing voters to select more officials.[78] State legislatures, for their part, have become subject to procedural and substantive limits with no federal analogs.[79] These changes have altered the differences between the branches; among other things, they allow all three branches to position themselves as the

68. *See, e.g.*, Marine Forests Soc'y v. California Coastal Comm'n, 113 P.3d 1062, 1089 (Cal. 2005) (collecting cases).

69. *See, e.g.*, Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 717 (2018) ("This Article concerns the first three decades of the nineteenth century and shows state judges in power-sharing arrangements with their legislatures.").

70. *See, e.g.*, Michael C. Pollack, *Courts Beyond Judging*, 46 B.Y.U. L. REV. 719, 746 (2021) (describing how state courts "exercise enforcement discretion in precisely the area which the popular conception perhaps most associates with the executive: the choice whether to prosecute an individual").

71. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 340 (2003) ("[S]tate provisions dealing with the distribution of power and the responsibilities of various branches have changed considerably over time.").

72. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980).

73. *See* Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 532 (2017).

74. Tarr, *supra* note 71, at 335.

75. Pollack, *supra* note 70, at 719.

76. Tarr, *supra* note 71.

77. *See, e.g.*, JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 57–83 (2012).

78. *See* Seifter, *supra* note 1.

79. *See generally* Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797 (1987).

people's representatives.[80] These shifts in institutional character also undermine arguments rooted in comparative institutional competence that are based on federal assumptions.[81]

Finally, the hard-to-define role of the people further complicates any attempt to find a tidy tripartite division of powers in the states.[82] The federal constitutional design relies so heavily on representative intermediaries rather than direct popular input that we speak of "the people" largely as a fictional (or sleeping) sovereign.[83] But at the state level, "[t]he popular sovereign has remained, by design and practice alike, at least intermittently awake."[84] This is particularly true in the roughly half of states that use ballot initiatives or other forms of direct democracy, through which the people participate directly in lawmaking.[85] How does this affect horizontal classification efforts? It might mean, as now-Judge Anthony Johnstone has argued, that there is a "divided legislative branch," in which the people share in the legislative power.[86] Or the people might be their own separate branch, superior to and less constrained than the others in their power to reconstitute government at will.[87] In all events, the significant role of the people themselves further undercuts horizontal classification as a standalone adjudicative framework.

As the next Part will describe, there is a better way. State constitutions do not distribute power to perfect an abstract tripartite division. Rather, they distribute power as a means to other constitutional ends—centrally, the constitutional commitment to democracy.

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80. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735 (2021); Tarr, *supra* note 71, at 335 ("Whereas initially only the legislature could claim to speak for the people, the election of executive officials and judges gave those branches equal claim to represent the people . . . .").

81. *See generally* Hershkoff, *supra* note 24.

82. *See, e.g.*, Anthony Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 NEB. L. REV. 125, 162 (2022) (exploring the initiative through a separation of powers framework, in which "[s]tate constitutions vest the legislative power in the people as well as the legislature, and the initiative power is both independent of and equal to the legislature's own power"); *see also* Zasloff, *supra* note 60.

83. *See* Bulman-Pozen & Seifter, *supra* note 8, at 895.

84. *Id.* at 896–97.

85. For a recent overview, see ALLIE BOLDT, DIRECT DEMOCRACY IN THE STATES: A 50-STATE SURVEY OF THE JOURNEY TO THE BALLOT (Nov. 2023), https://statedemocracy.law.wisc.edu/wp-content/uploads/sites/1683/2023/11/Direct-Democracy-In-the-States-Full-Report.pdf.

86. *See* Johnstone, *supra* note 82.

87. *Cf.* Zasloff, *supra* note 60, at 1124 ("[T]he existence of the initiative directly gives power to the electorate, allowing it to operate without any check or balance."). For Professor Zasloff, the inconsistency between the aims of separating power (to impede majorities) and direct democracy (to empower them) counsels in favor of weak judicial enforcement of the separation of powers. *See id.*

II. DEMOCRACY AND THE STATE DISTRIBUTION OF POWERS

This Part lays the groundwork for an adjudicative framework that incorporates basic democratic inquiries in cases of structural conflict. Part III will elaborate on the mechanics; this Part begins with foundations.

Weaving democratic considerations into state distribution-of-powers analysis is well-founded for at least three overlapping reasons. First, democratic review follows from the text and deep structure of state constitutions, and therefore offers a way to interpret ambiguous provisions. Second, as Jonathan Marshfield has persuasively shown, the purpose behind states' adoption of a separation of powers scheme was at least partly an effort to achieve majoritarianism and accountability.[88] Third, democratic review, like other forms of vertical analysis, aligns well with state courts as institutions, and its constituent parts are already present in state case law.

Indeed, in proposing democracy as a consideration in structural adjudication, this Essay elevates a value already expressed in separation of powers case law, albeit often in passing. State courts and jurists have described the separation of powers as "the foundation on which our democracy rests,"[89] or "a constitutional cornerstone of our democracy,"[90] or "fundamental to democracy."[91] On this view (although seldom fully elaborated), distributing power among three branches is a way of ensuring that democracy continues to function, presumably because democracy (like rights and other values) is compromised if power is aggregated in a way that produces tyranny or despotism. A related point also holds: Because state constitutions require democracy, it can serve as a limiting principle and north star for state power distributions.

Again, I do not propose democratic review as a comprehensive framework for structural conflicts. Some attempted redistributions violate state constitutions for other reasons. For example, a legislature may flout constitutional specifications as to which officer will wield a power or how an officer will be selected. There are also cases involving

88. *See* Marshfield, *supra* note 25.

89. Markwell v. Cooke, 482 P.3d 422, 423 (Colo. 2021).

90. Smith v. Superior Ct. Sacramento Cnty., 265 Cal. Rptr. 3d 736, 745 (Cal. Ct. App. 2020), *as modified* (July 23, 2020); *see also* Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004) ("The cornerstone of American democracy known as separation of powers recognizes three separate branches of government—the executive, the legislative, and the judicial—each with its own powers and responsibilities.").

91. *In re* Certified Questions, 958 N.W.2d 1, 56–57 (Mich. 2020) (McCormack, C.J., concurring in part and dissenting in part); *see also* Baldwin v. Reagan, 715 N.E.2d 332, 338 (Ind. 1999) (referring to the state's government as a "separation of powers democracy").

patent interbranch encroachment, including when state courts (echoing James Madison) find that a branch has exercised the "whole power"[92] or "complete power"[93] of another (though such arrangements may well raise democracy problems too). And there may be cases where restructuring raises due process concerns.[94] But on the whole, asking whether a power redistribution impairs democracy, especially by entrenching power, will be a more productive exercise, and more faithful to state constitutions, than only asking whether one branch has veered outside of its lane.

A. Democracy and the Deep Structure of State Constitutions

In prior work, Jessica Bulman-Pozen and I have explained at length why and how democracy emerged as a core principle of state constitutions. I will only briefly review those observations here. Through text, structure, and history alike, state constitutions are built on a commitment to democracy, conceived of as encompassing pillars of popular sovereignty, majority rule, and political equality.[95]

Start with text. State constitutions across the country contain express commitments to the pillars of democracy, provisions with no federal analog. Forty-nine state constitutions prominently declare that it is the people who are sovereign, and do so in operative text rather than preambles.[96] All state constitutions expressly protect the right to vote, and roughly half include additional protections to ensure that elections remain "free" or "free and equal," or to guard against interference with the right to vote.[97] The design of state government institutions reinforces the people's control, because they are typically selected through a vote of the people as a whole, undistorted by intermediaries like the Senate or Electoral College.[98] So too do the machinery of direct democracy and the multiple and feasible avenues for constitutional amendment.[99]

These provisions were neither accidental nor throwaways. Much of the text of state constitutions is the product of extensive borrowing or

92. *In re* Phillips, 574 S.E.2d 270, 273 (Va. 2003).

93. Younger v. Superior Ct., 577 P.2d 1014, 1024 (Cal. 1978) (en banc).

94. *See* State *ex rel.* Bray v. Russell, 729 N.E.2d 359 (Ohio 2000) (concluding that the executive branch cannot add bad-time to a prisoner's sentence).

95. Bulman-Pozen & Seifter, *supra* note 8, at 879–80.

96. *See id.*

97. *See id.*

98. To be sure, state legislatures in particular are prone to fall short of their majoritarian potential. *See* Seifter, *supra* note 80. But those shortcomings are not hardwired into their design.

99. *Id.*; *see also* Bulman-Pozen & Seifter, *supra* note 14.

"imitative art."[100] That practice arose from the presence of shared problems, including "national historical developments" and social movements.[101] And a recurring reaction to state government corruption and underperformance was greater popular control—through direct democracy, substantive limitations on legislatures, judicial elections, and more.[102] In documents that have otherwise changed significantly, democracy has been a north star.

This defining commitment to democracy is relevant to courts' adjudication of structural disputes. In these disputes, state courts confront ambiguous text and cross-cutting signals. Almost all states include an express separation of powers clause, but they then proceed to blend powers with abandon.[103] In the face of such ambiguity, state courts regularly, and appropriately, decide conflicts with reference to the state constitution as a whole.[104] And the whole constitution indicates that self-rule by popular majorities on equal terms, rather than abstract divisions among branches, is the organizing principle of state constitutions.

B. The History and Purpose of State Distributions of Power

Second, the history and purpose of the forty-plus constitutions with an express provision regarding the distribution of powers underscores the propriety of a democratic inquiry.

At face value, the existence of provisions that explicitly rather than implicitly require separated power may seem to suggest a requirement of *stricter* separation—a reason to try for horizontal classification, even though it is difficult.[105] But as Jonathan Marshfield's valuable work shows, that idea is off the mark; a major thrust of state distribution of

100. *See* Bulman-Pozen & Seifter, *supra* note 14, at 866 (first citing Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199, 207–08 (2000); then citing John Walker Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 TEX. L. REV. 1615, 1617 (1990)).

101. *See* Bulman-Pozen & Seifter, *supra* note 8, at 866–67.

102. *See* Tarr, *supra* note 71.

103. *See id.*; Zasloff, *supra* note 60.

104. *See* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1860 (2023) (collecting sources for the proposition that "all fifty state high courts already profess to read their constitutions as a whole").

105. *See, e.g.*, State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000) (interpreting Florida's provision to require a "strict separation of powers doctrine") (citing FLA. CONST. art. II, § 3 ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.")).

powers clauses has been the aim of public accountability, rather than separation for its own sake. [106]

It is true that, in the early state constitutions, separated power was part of an Anti-Federalist logic that envisioned separation between the branches as a mechanism of accountability.[107] But of the two concepts, the focus on vertical accountability has persisted, while strict horizontal separation between branches never took off.

Consider first the many ways in which distributing power was understood as an accountability mechanism. As Marshfield documents, "[t]he earliest references to the separation of powers in state constitutions appeared in eighteenth-century state declarations of rights"[108]—declarations that were replete with statements about popular control and popular sovereignty.[109] Moreover, the language of some early distribution of powers provisions often included references to accountability or the importance of elections.[110] Many of the state provisions also included (and still include) bars on dual office-holding, a problem closely connected with government corruption and the need for greater public accountability.[111] And convention records, not just in the eighteenth century but in the nineteenth as well, reinforce that reining in wayward officials was a prime concern of constitution drafters.[112]

In contrast, state constitutions never operationalized their distribution of power clauses as strict barriers to overlapping horizontal functions. Nor, as Part I noted, did they develop a clear tripartite division of functions or keep those divisions stable over time. In the same documents that adopted these clauses, for example, the early state constitutions created nearly all-powerful legislatures that wielded many

106. *See* Marshfield, *supra* note 25, at 584 ("[T]he overlooked polestar in state constitutionalism is the idea that separating government power helps the public hold government accountable."); *id.* at 591 ("[W]hen early state constitutions spoke about the separation of powers, one idea that they were capturing was something analogous to auditing government.").

107. *See id.* at 598 ("By separating government into functional categories, early state constitutionalists hoped that the public would be better equipped to monitor and control officials who would otherwise tend to collude against the public good."); *see also* Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89, 120 (2022) (describing Antifederalist alignment with the strict separation in early state constitutions); Rossi, *supra* note 44, at 1172.

108. Marshfield, *supra* note 25, at 603; *see id.* at 612 n.377 (discerning that "roughly 40 percent of state constitutions with separation-of-powers provisions before 1800 included a reference in their bill of rights").

109. *Id.* at 603–04; *see also* Bulman-Pozen & Seifter, *supra* note 8 (gathering popular sovereignty provisions).

110. *See* Marshfield, *supra* note 25, at 607.

111. *See* LUTZ, *supra* note 72, at 96–97.

112. *See* Marshfield, *supra* note 25, at 616.

of the powers we now regard as executive.[113] In New Jersey, where this Lecture took place, the 1947 Convention retained the separation of powers clause from earlier constitutions while also concentrating on the governorship powers that appear legislative.[114] The addition of "escape clauses" to many distribution of powers clauses—providing that power must be separate, except as the Constitution prescribes[115]—reinforces that separation itself has never been the end game.[116]

As Marshfield explains, then, an underappreciated and enduring purpose of state distribution of power clauses is majoritarian public accountability.[117] Given that, analysis of statutory power redistributions should not be simply whether they breach blurry horizontal lines, but should ask whether they arrange power in ways that undermine democracy.

C. The Role of State Courts

A recurring justification for horizontal classification at the federal level—especially formalist versions—is that federal courts cannot or should not do anything more speculative. A simplified version of this view might begin with the argument that federal courts lack expertise in the day-to-day workings of government, as opposed to the meanings of legal texts.[118] And, understood as countermajoritarian institutions, they

113. *See, e.g.*, WILLIAMS & FRIEDMAN, *supra* note 1, at 267.

114. *See* Marshfield, *supra* note 25, at 602.

115. *See id.* at 606 (describing the "near universal" adoption of such clauses between 1800 and 1950); Tarr, *supra* note 71, at 340 (linking the significance of these clauses to self-rule, in the sense that underscore that people can, through their constitutions, allocate authority however they wish).

116. An alternative reading of the escape clauses is that the distribution of powers clauses do require strict tripartite separation, subject only to exceptions explicit in the Constitution. The problem with this reading, as noted above, is that it is unlikely that clear tripartite lines can be drawn, at least in hard cases.

117. Marshfield does not argue, of course, that every state constitutional power redistribution was motivated by august notions of democracy, nor would such a claim be plausible. *See* Rogan Kersh et al., *"More a Distinction of Words Than Things": The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U. L. REV. 5, 9 (1998) (noting that while structural arrangements have sometimes been changed to further "increased representation, access and popular rule," they have also been used to insulate government officials, or for more "prosaic political struggles").

118. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 887–88 (2003) (exploring the possibility that, "under certain assumptions, formalism might be seen not as embodying an embarrassingly crude understanding of communication, but as a sensible and highly pragmatic response to institutional limits of generalist judges and institutional capacities of Congress").

should avoid acting as policymakers.[119] There is much that has been disputed about these arguments at the federal level—including that horizontal classification is itself speculative, and that the adoption of clear structural rules is often intertwined with debatable empirical assumptions.[120] But even accepting the federal arguments regarding institutional competence, they find little application in state court.

As Helen Hershkoff's leading work pointed out decades ago, generalizations about the competence of federal courts are based on assumptions that tend not to apply in the states.[121] State courts face few institutional barriers in assessing how a law will affect the basic functioning of the state's democracy or in expressing state constitutional values.

For one, state courts are more majoritarian than federal courts. Most state high courts are elected, either initially or through retention elections, and even those that are not are appointed through more majoritarian mechanisms and typically serve for limited terms.[122] Their connection to the electorate and to the other branches of state government equips them to understand the impacts of state laws on the people of the state, at least as to limited questions like the basic functioning of the state's democracy.[123]

State courts' longstanding role as developers of the common law likewise positions them to perceive practical realities and to express overarching values.[124] This role is all the more appropriate because state courts seldom have the final word on contested questions. Instead, state courts are part of a political ecosystem in which the people may overrule them, through amendment or election.[125] As such, they are properly part of a dialogue in which they express constitutional values and await repudiation if they are wrong.[126]

119. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 28 (1962).

120. *See, e.g.*, Stiglitz, *supra* note 23; Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1 (2013).

121. Hershkoff, *supra* note 24.

122. *See, e.g.*, BRENNAN CTR. FOR JUST., SIGNIFICANT FIGURES IN JUDICIAL SELECTION, https://www.brennancenter.org/our-work/research-reports/significant-figures-judicial-selection (Apr. 14, 2023).

123. *Cf.* Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1253 (2012) (discussing arguments that elected judges can better understand both popular opinion and state legislatures).

124. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999); *see also* Bulman-Pozen & Seifter, *supra* note 104, at 1907.

125. *See* Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999).

126. *See* Bulman-Pozen & Seifter, *supra* note 104.

Given these institutional features, it is not surprising that at least some building blocks of democratic review already exist in state case law. As noted above, state courts profess to interpret their constitutions as a whole. In addition, many recognize the link between redistributions of power and democracy or reject entrenchment as a particular constitutional ill.[127] And when reviewing redistributions of power, some state courts already go beyond horizontal classification and examine the adequacy of the legislature's justification for a questionable arrangement. The next Part considers how these strands might form a workable framework that improves upon horizontal classification alone.

III. TOWARDS DEMOCRATIC REVIEW OF POWER DISTRIBUTIONS

The details of an adjudicative framework for distribution of powers disputes will necessarily vary across states, grounded in existing precedent and constitutional provisions. Still, it is possible to identify broad contours of a democracy-centered supplement to structural adjudication. This Part identifies two main components. State courts should first assess whether a redistribution of power has the likely purpose or effect of impairing the state's democratic operation. And where the answer to that question is yes, state courts should consider whether the legislature's reason for the enactment adequately justifies the impairment.

This two-step approach, rather than an all-or-nothing inquiry, shares common ground with proportionality or interest-balancing approaches used around the world in rights conflicts, which Jessica Bulman-Pozen and I have argued should inform the resolution of state constitutional rights.[128] The democratic review sketched here tailors those basic moves to the context of structural conflict.[129]

A. Identifying Democratic Impairment

First, the framework looks with suspicion at those rearrangements of power that have the likely purpose or effect of impairing the state's

127. *See infra* Part III.

128. Bulman-Pozen & Seifter, *supra* note 104. For a recent proposal to incorporate interest balancing in federal separation of powers disputes, see Roisman, *supra* note 52. For a discussion of how state courts should consider state legislative justifications for constraining majority rule, see Seifter, *supra* note 6.

129. The boundary between rights and structure is porous at the state level. *See* Bulman-Pozen & Seifter, *supra* note 14. Still, some degree of adaptation is necessary between frameworks; for example, the structural inquiry obviously need not begin with the question whether a constitutional right is at issue.

democratic operation. Obviously, a great deal turns on how we conceive of that category.

Virtually any shift in power could have some effect on one of the pillars of democracy. But chasing every such redistribution would replicate the indeterminacy of horizontal classification. It would also create tension with state constitutional democracy itself, which contemplates ongoing change by well-functioning institutions. Thus, democratic review should focus on democratic subversion—again, arrangements that create "blockages in the democratic process"[130] or where "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."[131]

Under this approach, heightened review is not warranted every time there is a change affecting any one of the pillars of democracy. For example, state constitutions surely don't require every individual policy choice to be made by a popular majority.[132] Nor does the premise of political equality preclude states from tailoring legislation to local communities.[133] Rather, the democratic review inquiry disfavors policies that subvert or "lock up" the democratic process.[134]

A recent decision from the New Mexico Supreme Court illustrates the definition of subversion that I have in mind. In holding that egregious partisan gerrymandering violates the state constitution—and that the state constitution contemplates a judicial check on such legislative overreach—the court reasoned that "entrenchment" by state officials undermines multiple guarantees of the state constitution.[135] It violates political equality via vote dilution, elevating some individuals over

130. ELY, *supra* note 30, at 117 (quoting *Kramer* for the idea that review is needed when there is a "challenge" to the "basic assumption" that "the institutions of state government are structured so as to represent fairly all the people").

131. *Id.* at 103; *see also id.* (additionally describing this problem as "clogging the channels of change").

132. While I believe that my account is generally complementary to Professor Marshfield's, the version of democratic review that I advance here does not prioritize public monitoring over other democratic pillars, and does not necessarily require that, "[i]n general, courts should favor the allocation of power that would keep the lines of accountability most clear." Marshfield, *supra* note 25, at 628. Rather, my approach would encourage courts to permit redistributions of power—sometimes even those that make lines of accountability less clear, as with the transfer of authority to an independent redistricting commission rather than elected officials or to an ethics board rather than a governor—so long as they do not entrench power or obstruct future democratic change.

133. State constitutional prohibitions of special legislation might independently impede such laws, but typically allow laws that make rational distinctions among communities. *See generally* Justin Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719 (2013).

134. *Cf.* Issacharoff & Pildes, *supra* note 31, at 648.

135. Grisham v. Van Soelen, 539 P.3d 272, 284 (N.M. 2023).

others. It violates popular sovereignty, because it would allow "an entrenched political party to supersede the will of New Mexicans," and it violates majority rule, because the system of majoritarian voting "would be transformed into meaningless exercise."[136]

Not every act of democratic subversion in distribution of powers cases will hew to these categories as neatly as partisan gerrymandering. But it is possible to identify some patterns of action that create lockups or obstructions in this way. These will tend to be decisions that shift power across institutions in ways meant to affect election outcomes, to ensure long-term partisan advantage in ways that voters cannot readily undo, or to shift decision-making to entities that are neither accountable to popular majorities nor answerable to any official who is. I expand on these examples more in Part III.C.

B. Requiring Meaningful Justifications

Second, democratic review does not automatically reject all actions that raise the risk of entrenchment—but it requires real reasons for them.

As Jessica Bulman-Pozen and I have argued in our work on state constitutional rights,[137] requiring state legislatures to give real reasons fits well with the state constitutional tradition. This sort of intermediate scrutiny accounts for the fact that in state constitutions, there are few absolutes. Courts should not strike down government actions on structural grounds without at least asking why the action occurred. But neither should they allow legislatures to impair democracy without giving a justification that is adequate and tailored to the incursion.

Requiring legislatures to provide adequate justifications for redistributions of power may be unfamiliar from a federal doctrine point of view, where courts hesitate to probe or second-guess legislative reasons. But a justification requirement fits well into the state constitutional tradition. After all, a defining idea in state constitutions is that the legislature is separate from the people.[138] "These constitutions task state courts with monitoring state legislatures on behalf of the people"[139]—and all the more so when legislatures act in ways that risk democratic impairment.

136. *Id.*

137. Bulman-Pozen & Seifter, *supra* note 14; Bulman-Pozen & Seifter, *supra* note 104.

138. Bulman-Pozen & Seifter, *supra* note 104, at 1903 ("[S]tate constitutions express skepticism of legislatures as representative institutions and recognize distinct channels for the expression of popular will, including through judicial elections").

139. *Id.*

Notably, some state courts already require state legislatures to justify their actions in distribution of powers cases. Courts in Kansas, Delaware, Rhode Island, Oregon, and New Jersey have asked in different fashions: Why is the legislature altering power distributions in an unusual way? In Kansas and Delaware, the state courts have asked about "the nature of the objective sought to be attained by the legislature."[140] Rhode Island's test, modeled after the Ninth Circuit's opinion in *INS v. Chadha*, asks whether a redistribution of power that disrupts another branch "is unnecessary to implement a legitimate policy of the Government."[141] Oregon's framework asks whether one branch's incursions "unduly burden" another branch, building in the potential for consideration of how much of a burden might reasonably be due.[142]

C. Applications

A few recent conflicts illustrate how democratic review might operate in practice.

1. Redistributions Around Elections

Elections create potent opportunities for redistributions of power aimed at entrenchment. For that reason, I begin by considering how democratic review could aid the adjudication of election-related disputes.

Consider first proposed laws that would transfer power to a legislature to decide who won an election.[143] One can readily imagine a challenge to such laws on the ground that they exceed the legislature's power. And they very likely do. The reason, however, is not that they breach a platonic ideal of the legislature's role or its relationship with, say, a traditional, executive-branch board of elections. Instead, they

140. Op. Justs., 380 A.2d 109, 115 (Del. 1977); State *ex rel.* Schneider v. Bennett, 547 P.2d 786, 792 (Kan. 1976).

141. Quattrucci v. Lombardi, 232 A.3d 1062, 1066 (R.I. 2020).

142. The court's analysis, however, seems to focus on the effects of a burden rather than the legislature's purpose or justification for it. *See* Rooney v. Kulongoski, 902 P.2d 1143, 1151 (Or. 1995) (stating that the undue burden "inquiry corresponds primarily to the underlying principle that separation of powers seeks to avoid the potential for coercive influence between governmental departments").

143. *See, e.g.*, Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1349 (2022) (collecting examples of proposed legislation); Bree Burkitt, *Proposed Resolution Would Give Arizona Legislature Authority to Override Popular Vote*, ARIZ. PUB. RADIO (Jan. 29, 2024), https://www.knau.org/knau-and-arizona-news/2024-01-29/proposed-bill-would-give-arizona-legislature-authority-to-override-popular-vote.

would violate state precepts of rule by the people.[144] Such laws raise a patent risk of entrenching power and choking off the channels of political change, and they do so without any strong or tailored non-entrenchment reason.

Other election-adjacent changes may present closer cases, but democratic review will still allow us to think about them in the right way. Take recent proposals to restructure election administration. In 2016, and again in 2023, the North Carolina Legislature passed laws increasing control of the state's Board of Elections by the legislature itself and its partisan allies.[145] The North Carolina Supreme Court rejected the 2016 effort on the ground that it unconstitutionally interfered with the governor's duty to faithfully execute the law.[146] A North Carolina trial court recently invalidated the 2023 law under that binding precedent.[147] But is the abstract institutional interest of the governor the heart of the matter? Isn't much of the real problem the legislature's effort to secure partisan control of election administration, especially (in 2016) immediately after a new governor was elected, or (in 2023) in the runup to an election?[148]

Democratic review could provide a useful supplement. Restructuring election administration to favors one's own political party should register as an indicator of an entrenchment risk, as should electoral restructuring at the hands of an already-gerrymandered legislature. Such shifts therefore require a meaningful explanation. To be sure, that explanation might sometimes exist. For example, a concrete (not merely abstract or hypothetical) problem with administration during the prior election may count as a sufficient explanation, lest democratic review itself become a source of entrenchment against well-intended change. But one can be optimistic that state courts have the tools to discern justifications that are empty in context from those that are real.

144. *See* Bulman-Pozen & Seifter, *supra* note 143, at 1359–61 (discussing how legislation that would empower legislatures to decide elections undermines state constitutional commitments).

145. *See* Cooper v. Berger, 809 S.E.2d 98, 100–03 (N.C. 2018) (describing legislation that limited the newly elected Democratic governor's control of the elections board in favor of legislative Republican appointees); 2023 N.C. Sess. Laws 1–17.

146. *See Cooper*, 809 S.E.2d at 114.

147. *See* Cooper v. Berger, Order Granting Plaintiff's Motion For Summary Judgment and Denying Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings, Wake Cnty. Superior Ct., at ¶ 14 (Mar. 11, 2024) ("*Cooper I* and *McCrory* control, and the Session Law must be permanently enjoined.").

148. *See* Bulman-Pozen & Seifter, *supra* note 8, at 918–19 (arguing that the democracy principle in state constitutions provides "a sounder basis for striking down the North Carolina lame duck laws" than the unitary executive theory the court seemed to endorse).

2. Examples Outside of Elections

Democratic review can also inform disputes outside the domain of elections. In some cases, it will reinforce that not all power redistributions are constitutionally problematic. Administrative deference doctrines, for example, do not raise serious risks of entrenchment, whether deference is being banned or adopted. Deferring or not deferring may have policy effects and normative implications. But a rule in favor or against administrative deference doesn't by itself choke the channels of political change. Courts overread the state distribution of powers requirements if they ban (or mandate) it as a constitutional matter, rather than treating it as a matter of shifting policy.

In contrast, some distributions of power outside the election context do warrant heightened democratic review. I will focus the rest of this Part on one of them: state legislative vetoes, in which legislators can reject executive-branch action without the full lawmaking process. These mechanisms are not monolithic, and democratic review can provide greater purchase on which variants are grounds for constitutional concern.

Legislative vetoes have been unconstitutional at the federal level since the Supreme Court's well-known decision in *INS v. Chadha*.[149] But states have continued to experiment with them.[150] Almost all state courts to consider the question have, like *Chadha*, deemed legislative vetoes unconstitutional.[151] Yet these mechanisms still exist in the states, due to a combination of "unlitigated arrangements, constitutional amendments, and occasional judicial evasion."[152]

Today's state legislative vetoes vary widely. Some are two-house mechanisms conferring power that is narrow or infrequently used.[153] In other states, legislative vetoes by stacked committees have become the preferred tool of gerrymandered legislatures seeking to wield outsized power.[154] In Wisconsin, dozens of legislative veto provisions authorize the legislature's Joint Committee on Finance to reject executive-branch spending of appropriated funds across various state programs—a practice just rejected by the state supreme court.[155]

149. 462 U.S. 919 (1983).

150. *See* Clinger & Seifter, *supra* note 15; *see also* Edward H. Stiglitz, *Unitary Innovations and Political Accountability*, 99 CORNELL L. REV. 1133, 1155 (2014) (describing the prevalence of the legislative veto in the states).

151. *See* Seifter, *supra* note 63.

152. *Id.*

153. *See* Clinger & Seifter, *supra* note 15.

154. *See id.*

155. *See* Evers v. Marklein, 2024 WI 31, 412 Wis.2d 525, 8 N.W.3d 395.

Horizontal classification may struggle to distinguish among these mechanisms. Indeed, to the frustration of its critics (and Justice White's dissent), the *Chadha* majority painted with a broad brush, rejecting all legislative veto arrangements for their failure to comply with bicameralism and presentment.[156] The opinion has also been criticized for its "wooden formalism,"[157] insisting on bicameralism and presentment without meaningful discussion of underlying values or concrete impacts.[158]

In contrast, democratic review could help distinguish among states' different approaches to legislative vetoes. It could take seriously the concern of Justice White—that some legislative vetoes might functionally satisfy constitutional requirements by requiring input from both chambers and the chief executive, and that such vetoes could further rather than undermine good government.[159] But at the same time, it could offer a coherent reason to oppose those legislative vetoes that undermine rather than advance democracy—in particular, legislative vetoes that confer substantial statewide power on unrepresentative legislative committees.

Viewed through democratic review's two steps, legislative committee vetoes have the purpose and effect of impairing democracy because they bestow statewide power upon small numbers of people who are not selected by a statewide majority or responsive to any state official who is. Considering this democratic deficit, rather than only observing that the legislature is executing the law or improperly legislating (or adjudicating), offers a clearer picture of the unconstitutionality of many states' mechanisms. It also provides a reason to be less concerned about forms of legislative oversight (like temporary pauses or interim decisions) that do not afford outsized power to unrepresentative individuals or institutions.

Some state case law already sounds in these themes, expressing concern that legislative power cannot be vested in small subsets of the

156. *See* Peter L. Strauss, *Was there a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789.

157. William N. Eskridge & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 527 (1992).

158. *Toward a New Constitutional Anatomy*, *supra* note 34, at 858.

159. *See* INS v. Chadha, 462 U.S. 919, 994 (1983) (White, J., dissenting). Justice White argued that the legislative veto at issue complied with bicameralism and presentment because "a change in the legal status quo" could be "consummated only with the approval of each of the three relevant actors." *Id.* at 994–95. He went on to write: "I fear it will now be more difficult 'to insure that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people.'" *Id.* at 1002–03 (quoting Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting)).

legislature.[160] In the context of rejecting a concurrent resolution scheme, the Alaska Supreme Court worried about a more concerning situation in which small numbers of legislators would wield power for the state.[161] The New Hampshire Supreme Court rejected an arrangement that gave legislative veto power to a quorum of members of state and house standing committees because, among other problems, shifting legislative power to such small groups does not represent the "legislative will."[162] The Kentucky Supreme Court also balked at a statute placing legislative veto power "into the hands" of a committee of only seven legislators or a subcommittee thereof.[163] And similarly, the West Virginia Supreme Court expressed concern about allocating veto power to "a small number of Committee members"[164] and the "political" decisionmaking that would ensue.[165]

Democratic review would use these concerns as a prompt to consider the legislature's reasons for creating the legislative veto of that type. Such a justification is possible; for example, the Vermont Supreme Court upheld a narrow legislative veto that would be exercised for fiscal emergencies when the legislature was out of session.[166] But broader vetoes, especially by committees that seem tailor-made to entrench partisan advantage, will be harder to justify.

CONCLUSION

Conflicts over state distributions of power are a mainstay, especially in polarized times. This Essay has argued that conventional frameworks of horizontal classification alone are insufficient in the states, and that state courts are well-suited to weaving in more meaningful, vertical inquiries that ask whether distributions of power impair the state constitutional commitment to democracy—that is, to popular self-rule on equal terms. This approach will not resolve all cases, and will often tolerate the dynamism of frequent state power shifts. But it can also stand as a bulwark against anti-democratic entrenchment, and thus can more effectively operationalize state constitutional boundaries.

160. For a more extended discussion, see Seifter, *supra* note 63.
161. State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).
162. Op. Justs., 431 A.2d 783, 788 (N.H. 1981).
163. Legis. Rsch. Comm. v. Brown, 664 S.W.2d 907, 918 (Ky. 1984).
164. State *ex rel.* Barker v. Manchin, 279 S.E.2d 622, 632 (W. Va. 1981).
165. *Id.* at 633, 636.
166. Hunter v. State, 865 A.2d 381, 396 (Vt. 2004).