

## COUNTERMAJORITARIAN LEGISLATURES

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*State and federal courts routinely cast state legislatures in the role of democratic hero. Recent events illustrate: Some states have embraced the nondelegation doctrine, striking down governors' pandemic responses based on the theory that those weighty choices belong to the legislature. During the 2020 election, federal judges invoked an "independent state legislature" doctrine to question voting rights measures from state executive actors and courts. Democratic romanticism regarding state legislatures permeates public dialogue too. The legislature is often described as the true majoritarian branch, unlike "unelected bureaucrats," courts, local governments, and governors.*

*But this rhetoric is not reality. As this Article explains, state legislatures are almost always a state's least majoritarian branch. The combination of our districting scheme, geographic clustering, and extreme gerrymandering means that state legislatures are recurrently controlled by the state's minority party. Indeed, this Article finds that minority-party rule has afflicted state legislative chambers hundreds of times in the modern era. In contrast, state governors and state courts are overwhelmingly chosen via simple statewide elections, with no electoral college or lifetime appointment.*

*This reframing destabilizes conventional narratives about state government. It opens a host of broader inquiries about the extent to which state and federal courts should and do rely on majoritarian analysis, the appropriate relationships between the state branches, and the vertical distribution of power between states and local governments. Most immediately, this Article offers a series of course corrections that can bring prominent doctrines in line with state legislative reality.*

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#### INTRODUCTION

Recent judicial opinions and popular discourse have cast state legislatures in the hero's role. In several high-profile rulings leading up to the 2020 election, the U.S. Supreme Court depicted state legislatures as the heart of American democracy.<sup>1</sup> In striking down governors' pandemic-related actions, state courts have insisted that to protect the will of the people, they must protect legislative power.<sup>2</sup> Entire doctrines hinge on this

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1. See *infra* section I.B.

2. See *infra* section I.B.

democratic romanticism: Based on the understanding that state legislatures are “the people’s representatives,”<sup>3</sup> courts go on to mandate that only state legislatures handle the most important questions facing the polity.<sup>4</sup> State legislatures and their allies echo these sentiments in public dialogue, touting their status as the true voice of the people.<sup>5</sup>

But this rhetoric is not reality. As this Article explains, state legislatures are typically a state’s least majoritarian branch. Often they are outright countermajoritarian institutions. Across the nation, the vast majority of states in recent memory have had legislatures controlled by either a clear or probable minority party.<sup>6</sup> Even where state legislatures do cross the majority threshold, they are beset by the distortions and accountability drawbacks of winner-take-all, single-member districts, including a “winner’s bonus” that can turn a majority into a supermajority and the potential for incumbent entrenchment.<sup>7</sup> Meanwhile, the other branches of state government, now overwhelmingly selected via statewide elections, do not face any of these problems.<sup>8</sup>

Political scientists and scholars of political geography appreciate these dynamics. They have documented how developments in geographic and partisan sorting, as well as strategic gerrymandering, have created a disconnect between popular support and electoral victories in state legislatures.<sup>9</sup> This Article bolsters their findings with original analysis underscoring that state legislative minority rule is commonplace in the modern era.<sup>10</sup> Yet doctrines of administrative, constitutional, and local government law have not caught up. State courts routinely wax poetic about legislative majoritarianism and accountability while casting a comparatively skeptical eye at governors, state agencies, and local governments—ignoring that those entities may be far more responsive than legislatures

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3. *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring).

4. See *infra* Parts I, III (describing the nondelegation doctrine, major questions doctrine, intrastate preemption, and independent state legislature doctrine).

5. See *infra* Part III.

6. See *infra* section II.C; Miriam Seifter, *Countermajoritarian Legislatures: Appendix*, <https://ssrn.com/abstract=3934016> (describing methodology) [*hereinafter* Appendix].

7. See, e.g., Douglas J. Amy, *Real Choices/New Voices: How Proportional Representation Elections Could Revitalize American Democracy* 49–50 (2d ed. 2002); Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes & Nathaniel Persily, *The Law of Democracy: Legal Structure of the Political Process* 1267 (5th ed. 2016).

8. See *infra* section II.D. On the need for comparative institutional analysis, see generally Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 4–7 (1994) (explaining comparative institutional analysis).

9. See, e.g., Jonathan Rodden, *Why Cities Lose: The Deep Roots of the Urban-Rural Political Divide* 175–96 (2019); *infra* section II.B.

10. See *infra* section II.C; Appendix.

to the people of the state. Federal courts engage in these paeans to state legislatures too.<sup>11</sup>

To be clear, this Article does not argue, as others have, that we should jettison a discourse centered on democracy.<sup>12</sup> Building on prior work,<sup>13</sup> I argue that democracy, with majoritarianism as one pillar alongside political equality and popular sovereignty, *is* a commitment of state constitutions. In certain circumstances, state constitutional interpreters *should* use it when deciding how to allocate power between branches. Neither majoritarianism nor democracy itself will always be dispositive, of course. Crucially, majority rule is only valuable in conjunction with political equality, and majority preferences must sometimes yield to the protections for individual rights inscribed in the state and federal constitutions. Reasonable minds may also differ on precise definitions of democracy, an “exemplary ‘essentially contested concept.’”<sup>14</sup> But the minority-party rule afoot in state legislatures today does not implicate these important cautions or raise boundary questions regarding the meaning of democracy.<sup>15</sup>

This Article’s argument that state legislatures can rarely claim majoritarian primacy requires a working definition of majoritarianism and majority rule. To be sure, theoretical and practical complications, from Arrow’s theorem<sup>16</sup> to lack of voter information,<sup>17</sup> pose conceptual challenges. But a productive measure of majority rule might include several dimensions. Most ambitiously, it might seek government whose policy decisions track public preferences—at least to some reasonable degree<sup>18</sup>—

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11. See, e.g., *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring) (positing that state “[l]egislators can be held accountable . . . for the rules they write or fail to write; typically, judges cannot”); *id.* at 30 (describing the state legislature as “the people’s representatives”).

12. See Edward L. Rubin, *Getting Past Democracy*, 149 U. Pa. L. Rev. 711, 714 (2001).

13. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021).

14. *Id.* at 864 (quoting W.B. Gallie, *Essentially Contested Concepts*, 56 Proc. Aristotelian Soc’y 167, 183–87 (1956)).

15. See *id.* at 862.

16. Arrow’s Nobel Prize winning work indicated that a system of aggregating preferences could not simultaneously satisfy basic conditions of both fairness and accuracy. See generally Kenneth J. Arrow, *Social Choice and Individual Values* (2d. ed. 1963) (detailing Arrow’s theorem); Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. Pol. Econ. 328 (1950). For an exploration of why Arrow’s work and the broader body of social choice theory “pose no significant challenges to the general legitimacy and meaningfulness of democratic decision making,” see Richard H. Pildes & Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum. L. Rev. 2121, 2127 (1990).

17. See, e.g., Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. Ill. L. Rev. 363, 370–84 (reviewing the extensive literature on voter ignorance).

18. Nicholas Stephanopoulos, for example, advocates an “alignment approach to election law,” in which voter and official preferences are “congruent” as to both partisan affiliation and policy. On policy, alignment occurs where “if most voters hold a certain ideology or issue position, their representative tends to do so as well (or at least to vote

and not, as many studies show, the preferences of big donors or the most affluent.<sup>19</sup> It might also seek government officials whose policies or partisan affiliation match the will of all those who wish to vote—and work to dismantle the obstacles that still impede people from voting.<sup>20</sup> But most minimally under majority rule, the candidate or party that receives the most votes should win.<sup>21</sup> That is the threshold that this Article adopts.<sup>22</sup> The fact that there is continued work to do to improve American democracy and the need to temper “fairy tales” about it<sup>23</sup> are not excuses for minority rule.<sup>24</sup>

Shining a spotlight on the comparative democratic character of the state branches, including how they differ from their national counterparts, is deeply destabilizing to conventional narratives about state government. It highlights that state legislatures may not be the “voice of the people” in a meaningful sense, while other parts of state government might come closer. Governors are elected without anything like the “outmoded,” “antimajoritarian” electoral college.<sup>25</sup> Other state executives, often elected themselves or directed by the governor,<sup>26</sup> may be far from the “unaccountable bureaucrat” label they often receive. Elected state judges may be more

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accordingly).” Nicholas O. Stephanopoulos, Elections and Alignment, 114 Colum. L. Rev. 283, 287 (2014).

19. See Kate Andrias, Separations of Wealth: Inequality and the Erosion of Checks and Balances, 18 U. Pa. J. Const. L. 419, 424 (2015) (“[P]artisanship is an incomplete explanation for government’s function. The concentration of economic and political power in the hands of the wealthy elite is also a critical factor.”); Martin Gilens & Benjamin I. Page, Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens, 12 Persps. on Pol. 564, 572–73 (2014) (explaining that the legislature is more likely to adopt policy changes that are favored by the wealthiest Americans). On the relative affluence of elected officials, see generally Nicholas Carnes, White-Collar Government: The Hidden Role of Class in Economic Policy Making (2013); Ganesh Sitaraman, The Puzzling Absence of Economic Power in Constitutional Theory, 101 Cornell L. Rev. 1445, 1460 (2016) (“Less than 2% of members of Congress themselves had working-class jobs before entering public life, and only 20% were raised in working-class households.”).

20. See generally Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (rev. ed. 2009) (documenting the many obstacles to suffrage that marginalized groups have experienced in the United States).

21. See, e.g., Stephanopoulos, *supra* note 18, at 287 (advocating partisan alignment, under which “if a majority of voters wish to be represented by a candidate from a certain party, this in fact is who represents them”).

22. For further discussion of this definition, see *infra* section II.A.

23. See Christopher H. Achen & Larry M. Bartels, Democracy for Realists: Why Elections Do Not Produce Responsive Government 7 (rev. ed. 2017).

24. Cf. Steven Levitsky & Daniel Ziblatt, Opinion, End Minority Rule, N.Y. Times (Oct. 23, 2020), <https://www.nytimes.com/2020/10/23/opinion/sunday/disenfranchisement-democracy-minority-rule.html> (on file with the *Columbia Law Review*) (“Democracy requires more than majority rule. But without majority rule, there is no democracy.”).

25. E.g., Michael J. Klarman, Foreword: The Degradation of American Democracy—and the Court, 134 Harv. L. Rev. 1, 240 (2020).

26. See Miriam Seifter, Gubernatorial Administration, 131 Harv. L. Rev. 483, 499–512 (2017) [hereinafter Seifter, Gubernatorial Administration] (explaining the modern-day capabilities of governors to remake and direct the state executive branch).

prone to the “majoritarian difficulty” than its opposite,<sup>27</sup> and even local governments may correspond better than legislatures to statewide majorities.<sup>28</sup>

All of this raises difficult questions about the democratic legitimacy of many state legislatures; increases the urgency of considering alternatives to our current system of winner-take-all, single-member districts; and raises serious constitutional questions about an array of current practices. In a longer-term research agenda, I hope to open a more far-reaching conversation about these foundational issues. But the heavy lift of structural change does not mean we should do nothing. A number of prominent state judicial doctrines provide a useful place to begin.

Consider, for example, the nondelegation doctrine, lately on the rise in state supreme courts.<sup>29</sup> The doctrine prohibits state legislatures from delegating too much policymaking authority to state agencies or localities. State courts invoking the doctrine have leaned heavily on the state legislature’s democratic character, contrasting it with the questionable democratic legitimacy of “unelected bureaucrats.” Insert a minority-rule legislature into that equation, though, and an agency official responsible to an elected governor, and the analysis falls apart. One might seek to ground a nondelegation doctrine in other reasoning—for example, in originalism or a libertarian theory of lawmaking—but those alternatives are weaker and hard to square with the democratic commitments of state constitutions. Indeed, when state legislatures are minoritarian, a robust version of a legislature-preferring doctrine like the nondelegation doctrine is difficult to defend at all. A similar critique applies to several other doctrines that leverage supposed legislative majoritarianism, including the “major questions doctrine,” the intrastate preemption doctrine, and the “independent state legislature doctrine” in election law.

The problem of mischaracterizing legislatures runs beyond individual doctrines and cases. The discourse surrounding legislative majoritarianism can have harmful effects. Democracy myths, whether perpetuated in good faith or not, sell well.<sup>30</sup> They often end arguments.<sup>31</sup> In a democracy, who really wants to argue that we should not choose the democratic branch

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27. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 693 (1995).

28. See *infra* section III.C.

29. For discussion of the nondelegation doctrine, see *infra* sections I.B.1, III.B.

30. Cf. Jamal Greene, *Selling Originalism*, 97 *Geo. L.J.* 657, 708–14 (2009) (claiming that originalism’s simplistic, populist, and nativist features “place it at a competitive advantage in the methodologies market”); Ken I. Kersch, *The Talking Cure: How Constitutional Argument Drives Constitutional Development*, 94 *B.U. L. Rev.* 1083, 1088 (2014) (“Political entrepreneurs and leaders, moreover, can use political and constitutional ideas discursively in popular, movement, group, and party politics as a vehicle for constitutional renovation and transformation.”).

31. See, e.g., Rubin, *supra* note 12, at 715 (stating that democracy “is the temple at which all modern political leaders worship”).

over maligned alternatives? It's hard to defend even sensible public health measures when they are framed as a choice between legislative democracy and the tyranny of unelected bureaucrats. It's hard to argue that localities should make decisions for themselves when those choices are framed as harming the interests of "the people" statewide. It's hard to criticize state legislatures for making voting harder if questioning the legislature means you are against democracy. These compelling democracy narratives can also mask other agendas. They divert the terms of debate, inside courts and outside of them, from the values that are really at issue.

Rethinking legislative majoritarianism is fruitful even in states (like California or Alabama) with a solid statewide partisan majority, where all three branches are controlled by the same party.<sup>32</sup> There, legislatures are majoritarian in the sense that they are led by the majority party; all of the branches are. But the distinctive value legislatures offer to state governance in those states is not the popular voice with which they are typically associated. Rather, in these "trifecta" states, it is state legislatures' inclusion of partisan-minority voices,<sup>33</sup> and the possibilities they create for at least some interparty deliberation, that set them apart.<sup>34</sup> In this sense, prevalent doctrines seem to get the value of state legislative branches backwards.

As this last insight reinforces, majoritarianism is not the only value that matters in state government. Far from it. When state legislatures are simply less majoritarian than their sibling branches or prone to greater mediation of the popular will, this Article does not suggest they are normatively problematic. It does argue, however, that a number of prominent doctrines need substantial retooling. By clearing away the rhetoric of legislative majoritarianism, it is easier to see the values that state legislative bodies do and do not offer. Scholarship and doctrine should focus on those values, not democracy myths.<sup>35</sup>

Grounding doctrines and discourse in reality is a worthwhile project for its own sake, but the stakes of state government are now particularly high. The pandemic has brought to light just how much of American governance, from public health to policing to election administration to the

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32. See Nat'l Conf. of State Legislatures, *State Partisan Composition* (Sept. 14, 2021), <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [<https://perma.cc/368D-LJSC>].

33. On the value of minority power within institutions, see Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 *Harv. L. Rev.* 1787, 1867–72 (2019); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 *Harv. L. Rev.* 4, 37–44 (2010).

34. On the extent of minority-party influence in state legislatures, see generally Jennifer Hayes Clark, *Minority Parties in U.S. Legislatures: Conditions of Influence* (2017).

35. This Article is therefore calling for greater "institutional realism," in Richard Pildes's terminology. See Richard Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 *Sup. Ct. Rev.* 1, 2. For further discussion of the normative desirability of such realism, see *infra* Part III.

social safety net, is either driven or delivered by states.<sup>36</sup> Even if future presidents take a more active leadership role in the next crisis, rather than asking states to do so, the capacity for functional and democratic state government will be vital to the nation. That will often involve the resolution of disputes between state legislatures and other actors. Anchoring the relevant doctrines in reality is an enduring, important task.

Finally, reconsidering legislative majoritarianism in the states is also useful for the light it refracts on the role of democracy in our federal system. Many of the arguments this Article makes about the limits of legislative representation can be (and have been) made about Congress, where minority rule is baked into the Senate and can seep in through the gerrymandering of the House.<sup>37</sup> At the national level, though, Congress is not anomalous; the Electoral College and the appointment and life tenure of judges limit majoritarianism across the board. A federal nondelegation doctrine that praises Congress as the voice of the people may be empirically questionable, but it is not absurd. That the national government has tripled down on minoritarianism, though, only underscores the importance of honoring majority rule where it exists—and of leveraging the majoritarian structure of state government to temper its absence at the national level.

Part I of this Article begins with a step back. It identifies *majoritarian analysis* as a staple of state and federal constitutional law and pauses to consider its key maneuvers. Courts and commentators conducting this form of analysis express majority rule as a constitutional value, assess the majoritarianism of the branches or institutions at issue, and then allocate authority accordingly. Part I then provides several examples of majoritarian analysis in practice, both old and new. Of particular concern, in a series of recent cases, state courts and other actors have submerged important policy debates beneath democratic rhetoric—sometimes while pursuing decidedly countermajoritarian ends.

Part II describes why legislatures have come to be many states' least majoritarian branch. It synthesizes literature from election law, political science, and political geography to describe obstacles to majority control in districted elections, and presents data revealing that minority-party rule and highly skewed election outcomes are common in modern state legislatures. It then underscores state legislatures' least-majoritarian status by comparisons to the statewide elections for state courts and state executive officials—selection methods that states chose partly as a response to the perceived representative deficiencies of state legislatures.

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36. See, e.g., Michael Wines, As Washington Stews, State Legislatures Increasingly Shape American Politics, N.Y. Times (Aug. 29, 2021), <https://www.nytimes.com/2021/08/29/us/state-legislatures-voting-gridlock.html> (on file with the *Columbia Law Review*).

37. See, e.g., Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) 25–79 (rev. ed. 2008) [hereinafter Levinson, *Undemocratic Constitution*].



Finally, Part III returns to the doctrines flagged in Part I and explains how recognition of countermajoritarian state legislatures should inform four doctrines: the nondelegation doctrine, the major questions doctrine, intrastate preemption, and the independent state legislature doctrine. Each of these doctrines is substantially weakened without the crutch of legislative majoritarianism. The doctrines must be reframed and modified accordingly. Reflecting on these doctrines also generates broader insights about the relationship between the entities they involve: state legislatures and governors, administrators, local governments, and the federal courts.

One further point before proceeding: This Article's claim is not that state legislative majoritarianism is impossible; rather, it is that it is contingent—on geographic, legal, and political variables. Those contingencies, while stable in recent decades, may eventually shift. Changes in geographic settlement, electoral or districting rules, or partisan alignments could push legislatures toward a different future. A reader in that future may find this Article's commentary no longer apt. The Article's contention is simply that, in the meantime, we can and should take account of legislative realities.

## I. MAJORITARIAN ANALYSIS IN STATE AND NATION

### A. *The Majoritarian Two-Step*

Theories and doctrines that allocate decisionmaking power based on a branch's majoritarian status—*majoritarian analysis*, as a shorthand—are a staple of constitutional law. To highlight how state courts do this, too, and how they often err in so doing, this Part first takes a step back. It briefly unpacks the assumptions of majoritarian analysis into its main components: that majorities should rule and that each branch or institution's majoritarian status can be assessed and applied in constitutional doctrine. The explicit and implicit acceptance of these steps is pervasive, but breaking them apart helps to show where state doctrines are going astray.

At the first step, there is wide agreement in democratic theory and in American constitutional law that majorities should rule.<sup>38</sup> Among democratic theorists, this is a minimum standard: “[V]irtually everyone assumes

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38. See Robert A. Dahl, A Preface to Democratic Theory 34–35 (1956) (explaining that democratic theories have always identified democracy with “political equality, popular sovereignty, and rule by majorities” and that democratic government is defined by the “absolute sovereignty of the majority”); Anthony Downs, An Economic Theory of Democracy 24 (1957) (linking democracy with the idea that offices go to those “receiving the support of a majority of those voting”); Jon Elster, Introduction, in *Constitutionalism and Democracy: Studies in Rationality and Social Change* 1, 1 (Jon Elster & Rune Slagstad eds., 1988) (“Democracy I shall understand as simple majority rule, based on the principle ‘One person one vote.’”); Guy-Uriel E. Charles, Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of *Baker v. Carr*, 80 N.C. L. Rev. 1103, 1146 (2002) (“By almost all conceptions of democracy, any polity that fancies itself democratic must at least be responsive to majoritarian interests, commonly referred to as majority rule.”);

that democracy requires majority rule in the weak sense that support by a majority ought to be *necessary* to passing a law.<sup>39</sup> Some scholars would go further, arguing for not mere majority rule but some form of consensus or broader buy-in.<sup>40</sup>

In constitutional law, too, decades of scholars have emphasized the necessity of majoritarianism to American democracy, even as their critics have questioned whether the American constitution embraces democracy and have complicated simple accounts of what majority rule entails.<sup>41</sup> Majoritarianism has become the “dominant paradigm” of constitutional law scholarship, “a paradigm that emphasizes the democratic roots of the American polity” and conceives of “democracy as majority rule.”<sup>42</sup> I cannot add quickly enough that critics of pure majoritarianism abound. But typically critiques are in the service of tempering majoritarian instincts with values of minority power<sup>43</sup> or rights protection,<sup>44</sup> or achieving it through more sophisticated or deliberative processes.<sup>45</sup> In other words, modern constitutional scholars may seek better majority rule or view majority rule as insufficient. But they are not advocating for rule by elite minorities.<sup>46</sup>

The second and more contested step involves attributing majoritarian status to branches and institutions. The most familiar example of this maneuver is in the so-called “central problem of constitutional law”:<sup>47</sup> the federal court’s “counter-majoritarian difficulty.”<sup>48</sup> This “obsession”<sup>49</sup> labels

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Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *Geo. L.J.* 491, 500 (1997) [hereinafter Klarman, *Judicial Review*] (identifying defenses of majoritarianism).

39. Robert A. Dahl, *Democracy and Its Critics* 135 (1989).

40. See Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* 2 (2d ed. 2012).

41. See Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 *Harv. L. Rev.* 43, 74 (1989) (criticizing the “majoritarian paradigm” in constitutional law, in part because the federal Constitution “does not support the priority of democracy”).

42. *Id.* at 61, 64.

43. See, e.g., Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 4–6 (1994) (identifying the importance of “a majority that rules but does not dominate” and of representation that promotes minority influence).

44. See, e.g., Chemerinsky, *supra* note 41, at 48–51 (criticizing the Rehnquist Court’s deference to majoritarian decisionmaking as failing to protect civil rights).

45. See, e.g., James S. Fishkin, *Democracy When the People Are Thinking: Revitalizing Our Politics Through Public Deliberation* 1 (2018) (advocating practical reforms to make democracies more deliberative and more discerning of the “will of the people”).

46. See, e.g., Blackhawk, *supra* note 33, at 1864 (“It is uncontroversial to say that democracies lack legitimacy if ruled solely by elite minorities . . . . Yet, however necessary majority rule might be, it is insufficient to support democratic legitimacy in large and plural societies.”).

47. Laurence H. Tribe, *American Constitutional Law* 302 (3d ed. 2000).

48. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (2d ed. 1986) (introducing the term “counter-majoritarian difficulty”).

49. Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty*, Part Five, 112 *Yale L.J.* 153, 155 (2002) [hereinafter

the court as a nonmajoritarian institution and then “attempt[s] to reconcile judicial independence with democratic premises.”<sup>50</sup> Scholars and courts alike have joined in the effort, developing ways to make judicial review more majoritarian,<sup>51</sup> representation reinforcing,<sup>52</sup> or minimal,<sup>53</sup> and devising doctrines of justiciability and constitutional review accordingly.

Majoritarian analysis is not restricted to questioning courts, however. Courts and scholars undertake this type of analysis in separation of powers analysis more broadly, when allocating power among all three branches.<sup>54</sup> A prominent strand of the analysis sets its focus on legislatures. This next section highlights examples of how scholars and courts heap majoritarian praise on Congress and state legislatures, even as those branches seldom warrant that label.

### B. *Loving Legislatures*

Whereas scholarship two decades ago noticed a trend of “[d]issing Congress,”<sup>55</sup> the judiciary, scholarship, and public discourse in recent years have taken a noticeably pro-legislative turn. To be sure, courts are not entirely consistent in this posture, and they have not stopped striking down statutes. Furthermore, as the composition of courts and legislatures changes, we may expect discourse and doctrines to flip-flop in the future.<sup>56</sup>

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Friedman, Countermajoritarian Difficulty] (describing the inconsistency between judicial review and democracy as the “central obsession of constitutional theory”).

50. Louis Michael Seidman, Ambivalence and Accountability, 61 S. Cal. L. Rev. 1571, 1573 (1988).

51. See Klarman, Judicial Review, *supra* note 38, at 496–98 (positing three possible majoritarian conceptions of judicial review).

52. See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 101–02 (1980) (explaining that a representation-based approach to judicial review is consistent with the principle of representative democracy).

53. See Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 8 (1996) (arguing that “minimalism can be democracy-forcing” in part because “it ensures that certain important decisions are made by democratically accountable actors”).

54. As the discussion below indicates, sometimes the majoritarian status of a branch is a passing reference, and sometimes it anchors the doctrine or theory. For an illuminating example of the latter, Victoria Nourse has advanced a separation of powers theory that would evaluate each branch’s “vertical power,” meaning “those relationships between government and constituency,” and then assess how shifting power from one official to another might advance majoritarian or minoritarian bias. See Victoria Nourse, The Vertical Separation of Powers, 49 Duke L.J. 749, 752 (1999); Victoria Nourse, Toward a New Constitutional Anatomy, 56 Stan. L. Rev. 835, 840 (2004).

55. Ruth Colker & James J. Brudney, Dissing Congress, 100 Mich. L. Rev. 80, 85 (2001) (noticing a “growing disrespect for Congress” by the U.S. Supreme Court).

56. See Daryl J. Levinson, Foreword: Looking for Power in Public Law, 130 Harv. L. Rev. 31, 83 (2016) [hereinafter Levinson, Power in Public Law] (observing that one of the “familiar features of political behavior” is “institutional-level judgments” that “shift with the political winds”); Eric A. Posner & Cass R. Sunstein, Institutional Flip-Flops, 94 Tex. L. Rev. 485, 486 (2016) (noting that people’s views about institutional questions often “shift

But in a number of doctrinal areas, a strong practice has emerged, both in rhetoric and decisions, of preferring legislatures over other branches that are alleged to be less majoritarian. These expressions of preference, in turn, have filtered into legal and popular discourse.

The focus of this Article is state legislatures. Here it is common for courts to refer to the legislature as “the branch closest to the people”<sup>57</sup> or “the branch of our Government most responsive to the popular will.”<sup>58</sup> Some of these formulations may trace to a time when only the legislature was directly selected—in the early days of state government, it would have been accurate to deem the legislature “the representative of the popular will”<sup>59</sup> or “the direct representatives of the people.”<sup>60</sup> Others borrow from federal precedent. Whatever the source, the anachronism runs throughout state decisions.<sup>61</sup>

Built atop this premise, the doctrinal tendency is to require that certain types of decisions, especially policy-laden ones, be restricted to the

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dramatically with changes in the political affiliations and substantive views of those who occupy the offices in question”).

57. *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 627 (Minn. 2017) (Anderson, J., dissenting) (“Our framers plainly vested the powers to tax and spend in the branch closest to the people, the Legislature.”); *Hall v. State*, 539 So. 2d 1338, 1346 n.20 (Miss. 1989) (“Deference ought to be given such legislative expressions, not out of obligation but comity, not out of accession to authority, but in respect for the legislature as that branch of government closest to the people whom all branches have been created to serve.”); *State ex rel. Dean v. Brandjord*, 92 P.2d 273, 280 (Mont. 1939) (Johnson, C.J., concurring) (“In the Constitution the people of Montana, wisely or not, entrusted the appropriation power to the legislature, since it is the branch closest to the people.”); *Jayne v. State Tax Comm’n*, 2 Or. Tax 65, 72 (Or. T.C. 1965) (“The power to introduce tax legislation is recognized as the peculiar prerogative of the legislative branch closest to the people, the House of Representatives.”); *Leyen v. Dunn*, 461 S.W.2d 41, 44 (Tenn. Ct. App. 1970) (“The legislature constitutes the branch of government closest to the people, most cognizant of their needs, and more responsive to their demands.”); see also *Alexander v. Jackson*, No. 1:05-CV-1339-T/An, 2006 WL 8435049, at \*7 (W.D. Tenn. June 27, 2006) (“In Tennessee, as in most democratic societies, the declaration of proper public policy is ‘primarily’ a task for that branch of government that is (we hope) the closest to the people’s collective contemporary will—i.e., the legislative.”).

58. *Haole v. State*, 140 P.3d 377, 387 (Haw. 2006) (internal quotation marks omitted) (quoting *Hyatt Corp. v. Honolulu Liquor Comm’n*, 738 P.2d 1205, 1208 (Haw. 1987) (quoting *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst. (Benzene)*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment))).

59. *Carr v. Coke*, 22 S.E. 16, 23 (N.C. 1895).

60. *Lipscomb v. Nuckols*, 172 S.E. 886, 887 (Va. 1934).

61. For example, concurring in the prominent case of *State v. Berger*, Justice Paul Newby wrote: “Since its inception, the judicial branch has exercised its implied constitutional power of judicial review with ‘great reluctance,’ recognizing that when it strikes down an act of the General Assembly, the Court is preventing an act of the people themselves . . . .” *State v. Berger*, 781 S.E.2d 248, 259 (N.C. 2016).

legislature out of respect for “democracy”<sup>62</sup> or “the democratic process.”<sup>63</sup> Federal courts enter praise in the same register. From Chief Justice Earl Warren’s optimistic reflection in *Reynolds v. Sims* that “[s]tate legislatures are, historically, the fountainhead of representative government in this country”<sup>64</sup> to Justice Neil Gorsuch’s recent emphasis that states are “the people’s representatives,”<sup>65</sup> regard for state legislatures forms a salient narrative.

Importantly, all of this also feeds a discourse outside of the courts. As I have emphasized in other work, it is “constitutional communities” within *and* outside of courts, rather than courts alone, that generate constitutional meaning.<sup>66</sup> It is highly significant, then, that the simple story of legislatures as synonymous with the popular will, and even as democratic heroes, has gotten so much play in public and professional discourse. Legislators themselves, advocacy groups, think tanks, and attorneys routinely associate the legislature with “the people”<sup>67</sup> while deriding agency appointees as “unelected bureaucrats” and governors as would-be “kings.”<sup>68</sup>

Before turning to illustrative doctrines, a word about good faith is in order. Opportunism and insincerity could explain the legislative love in some of the examples in this Article. Faux fealty to legislative majoritarianism, in this view, provides cover to reach desired ends. If that is what is

62. See, e.g., *Cato v. Craighead Cnty. Cir. Ct.*, 322 S.W.3d 484, 490 (Ark. 2009) (“The resolution of questions of policy ‘is addressed in a democracy to the policy-making branch of government, the General Assembly, and it is not for the courts to make a statute say something that it clearly does not.’” (quoting *King v. Ochoa*, 285 S.W.3d 602, 604 (Ark. 2008))).

63. E.g., *Lugano v. Dir., Div. of Tax’n*, 28 N.J. Tax 49, 57 (N.J. Tax Ct. 2014), *aff’d per curiam*, 28 N.J. Tax 562 (N.J. Super. Ct. App. Div. 2015) (“Out of respect for the democratic process and in recognition of the Legislature’s status as a coequal branch, statutes under attack are ‘entitled to great weight by the courts.’” (quoting *N.J. Sports & Exposition Auth. v. McCrane*, 292 A.2d 580, 590 (N.J. Super. Ct. Law Div. 1971), *aff’d*, 292 A.2d 545 (N.J. 1972))).

64. 377 U.S. 533, 564 (1964); see also *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736 (1964) (rejecting a Colorado constitutional amendment that would have adopted a nonmajoritarian state senate, even when approved by a majority of voters in the state).

65. *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring).

66. Miriam Seifter, *Extra-Judicial Capacity*, 2020 Wis. L. Rev. 385, 387.

67. See, e.g., Sam Dunklau, *Group of Pa. GOP Lawmakers Seek “Suspension” of State Emergency Management Law, WLVR* (Aug. 25, 2020), <https://www.wlvr.org/2020/08/group-of-pa-gop-lawmakers-seek-suspension-of-state-emergency-management-law/> [<https://perma.cc/336R-PRTZ>] (quoting a spokesperson for a Pennsylvania legislative body describing a plan to “hold Gov. Wolf accountable and return power to the people by attempting to override the governor’s veto of House Resolution 836”).

68. E.g., Saja Hindi, *GOP Leader Asks Colorado Supreme Court to Overturn Polis’ Mask Mandate, Other Orders*, *Denver Post* (Aug. 27, 2020), <https://www.denverpost.com/2020/08/27/coronavirus-neville-lawsuit-polis-mask-order-colorado/> [<https://perma.cc/9HEB-GK5F>] (quoting a Colorado legislator that criticized the governor as “King Polis” and added that his constituents are without a voice when unelected health officials are making decisions).

afoot, it might undermine this Article's intervention: Arguments showing the absence of legislative majoritarianism are unlikely to persuade those who peddle it for convenience. I think, however, that identifying and critiquing the practice is still worthwhile. For one thing, judicial decisions have a tendency to spread—through precedent, obviously, but also through practices of mimicry, diffusion, and borrowing. So too does rhetoric. Simple slogans regarding legislatures being “the voice of the people,” for example, tend to get picked up by civil society, the academy, and the popular dialogue. Challenging the prevailing notion of state legislatures as majoritarian can limit the spread of these ideas or at least temper it with relevant counterarguments. Moreover, once the prop of legislative majoritarianism is removed, a number of prominent doctrines become highly unstable. They require a new mooring that in some cases does not exist.

The paragraphs that follow briefly describe how four prominent doctrines invoke ideals of legislative majoritarianism. Part III returns in more detail to updating the doctrines in light of legislative and inter-branch realities.

1. *Nondelegation*. — It is no secret that after its famed dormancy, the federal nondelegation doctrine, which governs the scope of delegations that Congress makes outside the legislative branch, is poised for a comeback.<sup>69</sup> The doctrine has famously had “only [one] good year”<sup>70</sup> in which the Supreme Court used it to invalidate a statute.<sup>71</sup> Yet after ninety years of the Supreme Court “embracing the principle in theory but policing it with a mellow touch,”<sup>72</sup> a majority of Justices has expressed interest in reinvigorating it. Four Justices explained this interest in *Gundy v. United States*.<sup>73</sup> Justice Brett Kavanaugh then conveyed his interest in a separate statement in *Paul v. United States*.<sup>74</sup> To many observers, it seems only a matter of time before the federal courts once again begin striking down statutes on the ground that Congress gave away too much of its constitutional authority.

Although the new Supreme Court majority might chart a different course,<sup>75</sup> the doctrine's most prominent and longstanding rationale has been democratic and majoritarian.<sup>76</sup> John Hart Ely, for example, argued

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69. See, e.g., Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 Wis. L. Rev. 141, 141 (describing the “palpable sense of anticipation” regarding the doctrine's resurgence and predicting the Supreme Court's possible approaches to it).

70. Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 332 (1999).

71. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 527 (1935); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 448 (1935).

72. Lisa Heinzerling, *Nondelegation on Stilts*, 29 N.Y.U. Env't L.J. (forthcoming 2021) (manuscript at 2), <https://ssrn.com/abstract=3706964> [<https://perma.cc/J32A-8F27>].

73. 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment); *id.* (Gorsuch, J., dissenting, joined by Roberts, C.J. & Thomas, J.).

74. 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari).

75. See *infra* section III.B.

76. See, e.g., Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2141 (2004) (“The most prominent

that a nondelegation doctrine was necessary because broad delegations are “undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic” and that legislators ought not be leaving lawmaking to “unelected administrators.”<sup>77</sup> Jurists across the ideological spectrum have embraced this view. Justice William J. Brennan Jr. echoed the fear that delegation led to policymaking by agencies “often not answerable or responsive in the same degree to the people,”<sup>78</sup> as did Judge Henry Friendly.<sup>79</sup> Echoing similar concerns, Justice John Marshall Harlan II wrote in 1963 that the doctrine “insures 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.”<sup>80</sup> Justice William Rehnquist’s opinion in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (the *Benzene* case) repeated that majoritarian logic, stating that nondelegation “ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.”<sup>81</sup>

State courts, too, apply a version of the nondelegation doctrine and have echoed this majoritarian, democratic reasoning. Many states have enforced the nondelegation doctrine more actively than the U.S. Supreme Court.<sup>82</sup> As Jason Iuliano and Keith Whittington concluded in a two-article study spanning two centuries of case law, even as the doctrine waned in the

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argument advanced by the proponents of strict nondelegation is the desirability of having public policy made by actors who are accountable to the people. Indeed, this is typically offered as the trump card in the case for strict nondelegation.”); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733, 807 (1980) (noting that other than relying on the Article I vesting clause, “opponents of delegation . . . nearly always base their argument on majoritarian principles”).

77. Ely, *supra* note 52, at 131–32. Ely argued that “there can be little point in worrying about the distribution of the franchise and other personal political rights unless the important policy choices are being made by elected officials.” *Id.* at 133.

78. *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in the judgment).

79. Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 75 Harv. L. Rev. 863, 882 (1962) (advocating for clear definitions of standards that agencies must follow).

80. *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., concurring in part and dissenting in part).

81. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment).

82. See, e.g., Joseph Postell, *The Nondelegation Doctrine After Gundy*, 13 NYU. J.L. & Liberty 280, 307–24 (2020) (explaining that the nondelegation doctrine is applied far more frequently at the state level than at the federal level); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1180–81 (1999) (explaining that “in the federal system, limits on delegation are either nonexistent or underenforced”).

U.S. Supreme Court, it remained “alive and well” in the states.<sup>83</sup> Although courts across the states have not applied the doctrine with equal vigor,<sup>84</sup> and although the state courts’ approaches are generally best described as “pragmatic” rather than dogmatically opposed to delegations to any particular actor,<sup>85</sup> Iuliano and Whittington conclude that it “has become an increasingly important part of state constitutional law.”<sup>86</sup>

Like their federal counterparts, state courts often invoke majoritarian tropes in nondelegation cases. Sounding democratic notes, the Oregon courts have stated that “[a]ccountability of government is the central principle running through the delegation cases.”<sup>87</sup> The Supreme Court of Kansas has stated that the nondelegation doctrine flows from the Kansas Constitution’s legislative vesting clause,<sup>88</sup> which “expresses the fundamental concept that we are to be governed by our duly elected representatives” and “is the foundation upon which our democratic form of government is built.”<sup>89</sup> The Kentucky Supreme Court, mentioning its more restrictive nondelegation doctrine, has argued that it frees Kentucky from John Hart Ely’s worry about a lack of the legislative accountability “that is crucial to the intelligible functioning of a democratic republic.”<sup>90</sup> Rhode Island and Pennsylvania describe the doctrine as serving the purpose of “assur[ing] that duly authorized, politically accountable officials make fundamental policy decisions.”<sup>91</sup> Louisiana courts have devised a nondelegation test to ensure that legislators “make the difficult policy choices for which they are accountable to the public through the democratic process.”<sup>92</sup> The Supreme Court of New Jersey has said that the nondelegation doctrine “prevents the Legislature from abdicating its political responsibility and

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83. Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 *Notre Dame L. Rev.* 619, 620 (2017).

84. See Rossi, *supra* note 82, at 1191.

85. Iuliano & Whittington, *supra* note 83, at 621, 645; see also Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 *Colum. L. Rev.* 561, 582 (1947) (discussing pragmatism and the doctrine’s “wavering course”).

86. Iuliano & Whittington, *supra* note 83, at 620.

87. *City of Damascus v. Brown*, 337 P.3d 1019, 1032 (Or. Ct. App. 2014) (quoting *Corvallis Lodge No. 1411 v. Or. Liquor Control Comm’n*, 677 P.2d 76, 79 (Or. Ct. App. 1984)).

88. Kan. Const. art. II, § 1 (“The legislative power of this state shall be vested in a house of representatives and senate.”).

89. *Sedlak v. Dick*, 887 P.2d 1119, 1135 (Kan. 1995).

90. *Bd. of Trs. of Jud. Form Ret. Sys. v. Att’y Gen.*, 132 S.W.3d 770, 782, 784 (Ky. 2003) (quoting Ely, *supra* note 52, at 132).

91. *Marran v. Baird*, 635 A.2d 1174, 1179 (R.I. 1994); see also *Protz v. Workers’ Comp. Appeal Bd.*, 161 A.3d 827, 833 (Pa. 2017) (“First, it ensures that duly authorized and politically responsible officials make all of the necessary policy decisions, as is their mandate per the electorate.”).

92. *State v. All Pro Paint & Body Shop, Inc.*, 639 So. 2d 707, 712 (La. 1994).



prevents undemocratic, bureaucratic institutions from wielding all-encompassing, uncontrollable government power.”<sup>93</sup>

2. *The Major Questions Doctrine.* — Like the nondelegation doctrine, variants of the “major questions doctrine” center legislatures as the most desirable policymakers. At the federal level, the major questions concept has found life as an off-ramp from the *Chevron* framework,<sup>94</sup> as a canon of statutory construction,<sup>95</sup> and as a possible new take on the nondelegation doctrine.<sup>96</sup> In all of these contexts, the main underlying idea is, again, that Congress is the most democratically legitimate policymaker.

The major questions concept has seeped into the states. In one prominent ruling echoing a line of New York cases, the Court of Appeals of New York rejected the New York City Board of Health’s portion limit on sugary drinks. The court reasoned that, unlike other straightforward matters that a health board can legitimately regulate, the soda limits “entailed difficult and complex choices between broad policy goals—choices reserved to the legislative branch.”<sup>97</sup> After all, the court reasoned, “it is the province of the people’s elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends.”<sup>98</sup> Several other states have embraced similar reasoning.<sup>99</sup>

A few states go further. Rather than assuming that legislatures would not want *major* questions decided by other officials, some states apply the presumption against administrative authority across the board. These states, in other words, construe all grants of authority narrowly. Florida, Iowa, and Wisconsin have adopted this stance by statute.<sup>100</sup>

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93. *Twp. of Mount Laurel v. Dep’t of Pub. Advoc.*, 416 A.2d 886, 891 (N.J. 1980).

94. See *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (holding that the *Chevron* framework was not appropriate because the issue involved a question of deep “economic and political significance”).

95. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (“[O]ur inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented . . . . In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”).

96. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari) (observing that the Court has applied a doctrine of statutory interpretation “closely related” to “a nondelegation principle for major questions”).

97. *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).

98. *Id.* at 546 (quoting *Boreali v. Axelrod*, 517 N.E.2d 1350, 1356 (N.Y. 1987)).

99. See, e.g., *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.”); *Postell*, *supra* note 82, at 308–10; see also *State Dep’t of Highways, Div. of Highways v. Denver & Rio Grande W. R.R. Co.*, 789 P.2d 1088, 1093 (Colo. 1990).

100. See Fla. Stat. § 120.52(8) (2013); Iowa Code § 17A.23 (2018); 2011 Wis. Act 21; *Wis. Legislature v. Palm*, 942 N.W.2d 900, 917 (Wis. 2020) (explaining that “[t]he explicit authority requirement is, in effect, a legislatively-imposed canon of construction that requires us to narrowly construe imprecise delegations of power to administrative agencies”);

3. *Intrastate Preemption*. — We are in an era of aggressive state preemption of local decisions. Call it “hyper-preemption,”<sup>101</sup> “the new preemption,”<sup>102</sup> or “nuclear preemption”;<sup>103</sup> today’s intrastate preemption is “the leading challenge in today’s state and local government law.”<sup>104</sup> The practice is strikingly far-reaching in its frequency and scope. States have barred local governments from regulating on a wide range of issues, from environmental initiatives (fracking, plastic bag bans, etc.) to immigration<sup>105</sup> to gun control<sup>106</sup>—and more recently, pandemic-related protocols.<sup>107</sup> States have also become more punitive in their preemption, attaching fines, liability, or removal from office for local government officials who attempt to regulate preempted matters, or terminating state aid to localities that do so.<sup>108</sup> This phenomenon “has reached nearly epidemic proportions,”<sup>109</sup> becoming far more frequent in the last decade than in prior history. Its rise is closely linked with the rise of American political polarization and the urban–rural divide; it typically involves red state legislatures preempting blue cities.<sup>110</sup>

And state legislatures typically win. Here, the legislative love is baked into the doctrine. Local power receives few protections in state or federal constitutional law<sup>111</sup> because local governments are viewed largely as “creatures of the state” legislature.<sup>112</sup> Even in states that offer local governments some degree of “home rule” authority, state legislatures have the upper

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see also Nev. Rev. Stat. § 233B.040 (2013) (“[T]he power to adopt regulations . . . is limited by the terms of the grant of authority pursuant to which the function was assigned.”).

101. Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 *Geo. L.J.* 1469, 1473 (2018).

102. Richard Briffault, *The Challenge of the New Preemption*, 70 *Stan. L. Rev.* 1995, 1997 (2018) [hereinafter Briffault, *New Preemption*].

103. E.g., *id.* at 2007–08.

104. Richard Briffault, Nestor Davidson & Laurie Reynolds, *The New Preemption Reader: Legislation, Cases, and Commentary on the Leading Challenge in Today’s State and Local Government Law* (2019).

105. See Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 *Colum. L. Rev.* 837, 848–49 (2019).

106. See Joseph Blocher, *Firearm Localism*, 123 *Yale L.J.* 82, 85 (2013).

107. See Spencer Wagner, Brooks Rainwater & Katherine Carter, *Preemption and the COVID-19 Pandemic: Exploring State Interference Before, During, & After the Crisis* 3 (2020), [https://www.nlc.org/wp-content/uploads/2020/11/COVID-19\\_Preemption\\_Report.pdf](https://www.nlc.org/wp-content/uploads/2020/11/COVID-19_Preemption_Report.pdf) [https://perma.cc/5WGY-UAA6].

108. See Briffault et al., *supra* note 104, at 14; Scharff, *supra* note 101, at 1507–15.

109. Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 *Fordham Urb. L.J.* 133, 134 (2017).

110. Briffault, *New Preemption*, *supra* note 102, at 1997–98.

111. See Gerald E. Frug, *The City as a Legal Concept*, 93 *Harv. L. Rev.* 1057, 1062–67 (1980).

112. Frug, *supra* note 111, at 1063; see also *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) (“Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them.”).

hand. Home rule authority often does not extend to matters with “extra-territorial impact,”<sup>113</sup> and even when those are arguably absent, intrastate preemption doctrines typically allow states to trump local decisions on questions of “statewide concern.”<sup>114</sup> These labels easily attach to most topics.<sup>115</sup> Moreover, some state courts give state legislatures deference on whether an issue is of statewide concern or not.<sup>116</sup>

This legal architecture is justified—implicitly or explicitly—on the assumption that the legislature represents the state as a whole. In other words, one rationale for limiting local authority is that when matters affect the entire state, officials who can speak for the state as a whole should decide.<sup>117</sup> And state courts typically assume that state legislatures, not local governments, speak for the people of the state.<sup>118</sup> State legislatures today take this even further, sometimes insinuating or asserting that they speak for the “real” state, not urban areas like Milwaukee or Detroit.<sup>119</sup>

4. *The Independent State Legislature Doctrine.* — The independent state legislature doctrine, rooted in two clauses of the federal Constitution, purportedly leaves certain election-related decisions to the state legislature alone. The doctrine is based on the text of the Elections Clause and the Presidential Electors Clause. The Elections Clause states that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,”<sup>120</sup> and the Presidential Electors Clause states that “Each State shall appoint, in such Manner as the Legislature thereof may direct,” its presidential electors.<sup>121</sup>

Although the independent state legislature doctrine was “largely overlooked” in the nineteenth century, it was largely rejected in the twentieth

113. See Laurie Reynolds, Home Rule, Extraterritorial Impact, and the Region, 86 *Denv. U. L. Rev.* 1271, 1274 (2020).

114. See Richard Briffault & Laurie Reynolds, *Cases and Materials on State and Local Government Law* 432–91 (8th ed. 2016).

115. See Reynolds, *supra* note 113, at 1274–75.

116. See, e.g., *Black v. City of Milwaukee*, 882 N.W.2d 333, 346 (Wis. 2016) (“[L]egislative determinations regarding whether a policy matter constitutes a ‘statewide concern’ . . . are ‘entitled to great weight’” (quoting *Madison Tchrs. v. Walker*, 851 N.W.2d 337 (Wis. 2014))).

117. See, e.g., *Black*, 882 N.W.2d at 343 (noting that the state legislature, unlike local governments, acts “in the name of the people of the State of Wisconsin” (quoting *Van Gilder v. City of Madison*, 267 N.W. 25 (Wis. 1936))).

118. See Paul A. Diller, The Political Process of Preemption, 54 *U. Rich. L. Rev.* 343, 346 (2020) [hereinafter Diller, The Political Process of Preemption]. Reading *Hunter v. Pittsburgh* alongside *Reynolds v. Sims*, Diller articulates the idea—submerged but necessary in the doctrine—that “[o]nly a democratically legitimate state government—that is, one which purported to represent credibly a majority of the state’s population—could justifiably exercise its plenary powers over the democratic subunits within it.” *Id.*

119. See, e.g., Emily Badger, Are Rural Voters the ‘Real’ Voters? Wisconsin Republicans Seem to Think So, *N.Y. Times* (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/upshot/wisconsin-republicans-rural-urban-voters.html> (on file with the *Columbia Law Review*).

120. U.S. Const. art. I, § 4, cl. 1.

121. *Id.* art. II, § 1, cl. 3.

and basically latent until *Bush v. Gore*.<sup>122</sup> In that case, Justice Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, wrote that the Presidential Electors Clause confers the power to appoint presidential electors upon state legislatures specifically. As a result, they wrote, the Clause prevented the Florida Supreme Court from “infring[ing] upon the legislature’s authority.”<sup>123</sup> In other words, the doctrine conceives of the state legislature as standing apart from (and superior to) its sibling branches and free of state constitutional constraints when addressing federal elections.

Scholars after *Bush v. Gore* were generally critical of the idea of an independent state legislature doctrine.<sup>124</sup> Fifteen years later, a majority of the Supreme Court rejected the doctrine in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, noting that the Court had never held that the elections clauses required states to act “in defiance of” the states’ own constitutions, and that “it is characteristic of our federal system that States retain autonomy to establish their own governmental processes.”<sup>125</sup> Accordingly, the majority cast aside the idea that Arizona voters could not entrust federal districting to an independent commission.<sup>126</sup> One might have assumed the doctrine was gone for good.

Yet the independent state legislature argument returned with a bang in the final weeks of the 2020 election.<sup>127</sup> In several states, judicial and executive branch actors sought to adjust voting policies in light of the pandemic. In a series of cases arising out of events in Minnesota,<sup>128</sup> North

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122. See Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 9–10 (2020).

123. *Bush v. Gore*, 531 U.S. 98, 112–14 (2000) (Rehnquist, C.J., concurring). This followed an allusion to the idea in the per curiam opinion in *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76–77 (2000) (per curiam) (holding that the Florida Supreme Court erred to the extent it failed to consider that the Presidential Electors Clause guarantees state legislatures’ authority against interference by other branches of state government).

124. See, e.g., Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037, 1045 (2000); Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in Bush v. Gore*, 29 Fla. St. U. L. Rev. 661, 672 (2001). But see Richard Epstein, “In Such Manner as the Legislature Thereof May Direct”: The Outcome in *Bush v. Gore* Defended, 68 U. Chi. L. Rev. 613, 620 (2001).

125. 576 U.S. 787, 816–18 (2015).

126. See Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill of Rights J. (forthcoming) (manuscript at 14–20), <https://ssrn.com/abstract=3720065> [<https://perma.cc/B964-HPU6>].

127. For a rundown of these cases and an argument that the revival of the independent state legislature doctrine gives undue deference to state legislatures and harms voters, see *id.* (manuscript at 15–19).

128. *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020).

Carolina,<sup>129</sup> Pennsylvania,<sup>130</sup> Texas,<sup>131</sup> and Wisconsin,<sup>132</sup> litigants argued that the adjustments must be rejected; in light of the independent state legislature doctrine, they argued, the legislature alone could make such changes. Jurists, in turn, resurrected the doctrine from its rest—and heaped on majoritarian reasoning in the process.

On the Supreme Court, Justice Gorsuch has emerged as the most vocal exponent of the link between the independent state legislature doctrine and majoritarian rule. In the Wisconsin case, he concurred (joined by Justice Kavanaugh) in the Court’s decision to leave in place the Seventh Circuit’s rejection of a district court’s extension of the date by which timely mailed ballots could be received and counted. Embracing the independent state legislature doctrine, Justice Gorsuch described its foundations as a wise, even inevitable choice between branches of government: “Legislators can be held accountable by the people for the rules they write or fail to write; typically, judges cannot.”<sup>133</sup> And while these “democratic processes can prove frustrating,” entrusting important decisions to state legislators was “a feature to the framers, a means of ensuring that any changes to the status quo will not be made hastily, without careful deliberation, extensive consultation, and social consensus.”<sup>134</sup> Federal court intervention would “damage . . . the power of the people to oversee their own government, and . . . the authority of legislatures, for the more we assume their duties the less incentive they have to discharge them.”<sup>135</sup>

Justice Gorsuch hit similar notes in a case arising out of North Carolina, where he argued (this time dissenting from the Court’s refusal to intervene) that last-minute changes by the state’s elections board not only violated the text of the federal Constitution but also threatened “the power of the people to oversee their own government” in favor of “largely unaccountable bodies.”<sup>136</sup>

Lower courts echoed similar reasoning in the run-up to the 2020 election.<sup>137</sup> The Eighth Circuit, for example, rejected the Minnesota Secretary of State’s attempt to alter the deadline for mail-in ballots, reasoning that

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129. *Moore v. Circosta*, 141 S. Ct. 46 (2020).

130. *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1 (2020).

131. See Complaint for Emergency Injunctive Relief, *Hotze v. Hollins*, No. 4:20-cv-03709 (S.D. Tex. filed Oct. 28, 2020), 2020 WL 6373661.

132. *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020).

133. *Id.* at 29 (Gorsuch, J., concurring).

134. *Id.* at 29–30.

135. *Id.* at 30.

136. *Moore v. Circosta*, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., dissenting).

137. In addition to *Carson*, see *Wise v. Circosta*, 978 F.3d 93, 104 (4th Cir. 2020) (Wilkinson, J. & Agee, J., dissenting) (stating that “nonrepresentative entities” had “undone the work of the elected state legislatures”); *Middleton v. Andino*, 976 F.3d 403, 404–05 (4th Cir. 2020) (Wilkinson, J. & Agee, J., dissenting) (“The Constitution makes it clear that the principal responsibility for setting the ground rules for elections lies with the state legislatures.”).

in light of the Constitution, “it is not the province of a state executive official to re-write the state’s election code” regarding presidential electors and that “[t]he democratically-enacted election rules in Minnesota” must stand.<sup>138</sup>

Some commentators have also endorsed the majoritarian reasoning underlying the independent state legislature doctrine. Michael Morley argues that the doctrine flows from “a fundamental structural decision” in the federal Constitution to place elections “under the ultimate control of the political—and politically accountable—entities.”<sup>139</sup> In his view, the doctrine is defensible precisely because it “bolsters the Constitution’s structural allocation” of election-regulating authority “to representative legislative assemblies.”<sup>140</sup>

### C. *Appraising Majoritarian Analysis*

The majoritarian analysis that courts practice is flawed. The sources of these flaws differ at the state and national levels.

At the national level, the first problem is well-told: Majoritarian democracy was widely rejected in the Founding Era<sup>141</sup> and is challenging to square with the Constitution’s text and structure.<sup>142</sup> Yet the precariousness of this analytic enterprise at the federal level goes further. The problem is that none of the federal branches are majoritarian. Indeed, one leading retort to the countermajoritarian difficulty is to show (really, to remind) of this fact.<sup>143</sup> Separation of powers doctrines that sweep in both the executive and legislative branches are illustrative. One common intuition is that Congress (particularly the House of Representatives) is “the most majoritarian branch”<sup>144</sup> or at least “the seemingly most representative.”<sup>145</sup> Yet

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138. *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020).

139. Morley, *supra* note 122, at 33.

140. *Id.* at 34.

141. Michael J. Klarman, *The Framers’ Coup: The Making of the United States Constitution* (2016); Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 142, 168, 220 (1913).

142. Levinson, *Undemocratic Constitution*, *supra* note 37, at 9; Klarman, *Judicial Review*, *supra* note 38, at 494.

143. See Friedman, *Countermajoritarian Difficulty*, *supra* note 49, at 172–76; Klarman, *Judicial Review*, *supra* note 38, at 492–93. Another response has been to show that the U.S. Supreme Court has tended to follow the popular will. See, e.g., Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 14–18 (2009) (describing how the Court is sensitive to changes in popular opinion across a spectrum of legal issues).

144. Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 *Tex. L. Rev.* 469, 472, 483 (1985) (referring to Congress as “the branch of government most accountable to the people” and “the most majoritarian branch of government”); see also Klarman, *Judicial Review*, *supra* note 38, at 495 n.19 (stating that policymaking by Congress “generally will be more majoritarian than” policymaking by the federal judiciary).

145. Friedman, *Countermajoritarian Difficulty*, *supra* note 49, at 158.

other doctrines, including the *Chevron* doctrine<sup>146</sup> and doctrines of presidential removal power,<sup>147</sup> prominently praise the President as the most accountable, implicating age-old debates about the democratic chops of the chief executive versus the national legislature.<sup>148</sup> Thus, despite its prevalence, majoritarian analysis in federal constitutional law seldom sheds much light and is vulnerable to critiques of flip-flopping,<sup>149</sup> incoherence,<sup>150</sup> and empty rhetoric.<sup>151</sup>

Majoritarian analysis at the state level starts with significant advantages at each step. First, as Jessica Bulman-Pozen and I have recently shown, state constitutions express a commitment to democracy, including the principle of majority rule, and do so much more clearly than the federal constitution. Thus, at the first step, state courts avoid the battle of trying to anchor democratic priorities in a document that does not embrace them. That does not mean that doctrines should always prioritize majoritarianism; sometimes other values prevail. For present purposes, the point is that *some* consideration of majority rule is well supported in state founding documents.

Second, the majoritarian status of the branches is much clearer in the states. Whereas majoritarian comparisons among the national branches may be hazy, the states have three branches with distinct democratic pedigrees. As Part II discusses, two state branches today are elected in almost all states via statewide elections—no districts, no electoral college, just a pure, statewide referendum. Only the legislative branch mediates voter preferences through more intricate institutional structure.

The problem is that many state doctrines and much state discourse seem to get the step two assessment exactly backwards. As the next Part explains, state legislatures, as a matter of historical and empirical fact, are the states' least majoritarian branches. Indeed, one of their central values, or at least possibilities, lies in providing an important platform for *minority* voices. When state courts, commentators, and officials praise legislative majoritarianism, they are often hewing to a legal fiction.

## II. STATE LEGISLATURES: THE LEAST MAJORITARIAN BRANCH

This Part describes the relationship between state legislatures and majoritarianism. It begins in section II.A by reflecting on and defending the

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146. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

147. See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92 (2020).

148. See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 *UCLA L. Rev.* 1217, 1227 (2006).

149. See Posner & Sunstein, *supra* note 56, at 486.

150. See Levinson, *Power in Public Law*, *supra* note 56, at 97.

151. Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 *Hastings L.J.* (forthcoming 2022) (manuscript at 7, 53) (on file with the *Columbia Law Review*).

minimal conception of majoritarianism that this Article adopts. In section II.B, it discusses how representational distortions, rooted in state legislatures' near-exclusive use of winner-take-all elections in single-member districts, operate to undermine majority rule.<sup>152</sup> The result, relayed in section II.C, is that many state legislatures either are under minority party control or afford bare majority parties significant (even supermajority) cushions. Both of these distortions are on prominent display in many states today, where patterns of geographic settlement and deliberate gerrymandering exacerbate the inherent skews of districted elections.

Of course, these criticisms of districted elections also apply to the U.S. House of Representatives. But as section II.D explains, in the states, unlike at the national level, there are majoritarian alternatives. Unlike at the national level, states pair their legislatures with two branches that are majoritarian simpliciter: selected by statewide votes, unmediated by districts or other intermediate steps. Indeed, states turned to at-large election of governors and judges in part *because* of the perceived majoritarian failings of state legislatures.

State legislatures are thus the states' least majoritarian branch. That fact is not always a normative indictment—as this Article discusses in Part III. But it is a trait that we must reckon with.

#### A. *Unpacking the Criteria*

Before assessing state legislative majoritarianism, let me restate this Article's minimal understanding of the term: An elected body is not majoritarian unless the candidate or party receiving the most votes wins. When the candidate or party that prevails received fewer votes than another candidate or party, the body is minoritarian, a term this Article uses synonymously with countermajoritarian.<sup>153</sup> As noted, one could layer on many more features of a (small-d) democratic wish list, but this definition is a prerequisite to most additions.

Still, this conception warrants reflection. For one, what if majoritarianism is not really what the doctrines in Part I seek? Is it possible that state

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152. Four states use multimember districts to elect all members of their house or assembly chamber: Arizona, New Jersey, South Dakota, and Washington. Several additional states use multimember districts for at least one seat within the legislature. The use of multimember districts has declined in state legislatures since the 1960s. See Annual Reports, Nat'l Conf. of State Legislatures (Sept. 16, 2020), <https://www.ncsl.org/aboutus/ncsl-foundation-for-state-legislatures/annual-report.aspx> [<https://perma.cc/2U7S-TJ7U>] [hereinafter Nat'l Conf. of State Legislatures, Annual Reports]; State Legislative Chambers That Use Multi-Member Districts, Ballotpedia, [https://ballotpedia.org/State\\_legislative\\_chambers\\_that\\_use\\_multi-member\\_districts](https://ballotpedia.org/State_legislative_chambers_that_use_multi-member_districts) [<https://perma.cc/38HD-E24J>] (last visited Aug. 12, 2021).

153. An elected body can be *nonmajoritarian* without being countermajoritarian or countermajoritarian. That common result, which is not the focus here, occurs when a candidate or party prevails with the most votes, but those votes are only a plurality of the votes cast (due to votes for third parties).



courts are not actually defending legislatures because they speak for a popular majority, but because they foster decisionmaking rooted in productive *deliberation*? Even if not, could the doctrines be defended on that alternative ground? After all, compared to the other branches, legislatures differ in their “sheer numbers,” which builds in the possibility of pluralism and deliberation.<sup>154</sup> And “[t]he legislative arena, at least in theory, is the clearest institutionalized setting for democratic deliberation . . . . [I]t is the arena in which ‘participants of deliberation, before counting votes, are open to transform their preferences in the light of well-articulated and persuasive arguments.’”<sup>155</sup>

Still, most deliberation advocates are presumably seeking to use it to improve majority rule, not substitute for it.<sup>156</sup> Thus, the most precise objection to this Article’s definition of majoritarianism would seem to be this: Through deliberation, state legislatures might approximate some form of majoritarianism regardless of partisan seat share. If a party controls the legislature despite receiving a minority of votes, but there is ample compromise and cross-party voting, the *practice* of legislation may make up for problems with the *selection* of legislators.

But it is far from clear that this objection is borne out in practice. Although a study of state legislative practice is well beyond the scope of this Article, the signs regarding meaningful cross-party policymaking are not encouraging. Political scientists find that state legislatures are increasingly polarized.<sup>157</sup> An interview-based study by the National Conference of State Legislatures (NCSL) found that “there is increasing pressure to conform to party orthodoxy” and that the parties are “increasingly ideologically distant from each other.”<sup>158</sup> In some states, caucus rules or an absence of strong deliberation norms mean the minority party is shut out altogether. Regarding Wisconsin, the NCSL wrote: “Both Democrats and Republicans reported that Democrats have no influence on state fiscal policy or major legislation. The majority never negotiates with the minority.”<sup>159</sup> Institutional factors further undermine deliberation as the defining virtue of state legislatures: Most are still part-time, and staffing

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154. Jeremy Waldron, *Political Theory: Essays on Institutions* 130–34, 157 (2016).

155. Samuel Issacharoff, *Democracy’s Deficits*, 85 *U. Chi. L. Rev.* 485, 498 (2018) (quoting Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy* 14 (2013)).

156. Cf. Hélène Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* 145–47 (2012) (arguing that inclusive majority rule tends to produce higher quality decisions).

157. See, e.g., Boris Shor, *Polarization in American State Legislatures*, in *American Gridlock* 203, 203–04 (James A. Thurber & Antoine Yoshinaka ed., 2015).

158. Nat’l Conf. of State Legislatures, *State Legislative Policymaking in an Age of Political Polarization* 1, 6 (2018), [https://www.ncsl.org/Portals/1/Documents/About\\_State\\_Legislatures/Partisanship\\_030818.pdf](https://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Partisanship_030818.pdf) [<https://perma.cc/U2KB-9DU3>] [hereinafter Nat’l Conf. of State Legislatures, *State Legislative Policymaking*].

159. *Id.* at 10.

and resources are limited.<sup>160</sup> In turn, state legislators may also be more susceptible to interest group pressure once in office than are members of Congress.<sup>161</sup>

None of this is to say that state legislatures are never deliberative or that minority-party views never work their way into legislation. Surely, they sometimes are and sometimes do—and perhaps they can be encouraged to do even more.<sup>162</sup> But it seems far-fetched, in today’s political world, to expect that deliberation will recreate majoritarian decisionmaking in a minoritarian body. Aspirations for deliberation are thus not an argument against awarding majority status to majority vote-getters.<sup>163</sup> It still makes sense to expect that minimal standard of democracy from state legislatures.

A related objection might ask whether it’s appropriate to measure majoritarianism in election results by relying on party affiliation, as this Article does below, and to assume that someone who votes for their party at the district level also hopes their party will control the legislature. While granting that partisanship will not translate perfectly in these ways,<sup>164</sup> the answer is probably yes. Because Americans have increasingly “sorted” themselves into two parties,<sup>165</sup> with little overlap<sup>166</sup> and much animosity<sup>167</sup> between them, it is indeed reasonable to posit that voters want their party to govern. Thus, if majoritarianism matters, then it is reasonable to insist, as Nicholas Stephanopolous has, that “if a majority of voters wish to be

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160. See Nat’l Conf. of State Legislatures, Full- and Part-time Legislatures (2017), <https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx> [<https://perma.cc/N8T5-R7XC>] [hereinafter Nat’l Conf. of State Legislatures, Full- and Part-Time Legislatures].

161. See Alexander Hertel-Fernandez, *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States—And the Nation 9–10* (2018).

162. Clark, *supra* note 34, at 12–32 (detailing circumstances under which minority-party members participate meaningfully).

163. See *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.”).

164. For an interesting exploration, see generally Seth E. Masket & Hans Noel, *Serving Two Masters: Using Referenda to Assess Partisan Versus Dyadic Legislative Representation*, 65 *Pol. Rsch. Q.* 104 (2012).

165. See, e.g., Alan I. Abramowitz, *The Great Alignment: Race, Party Transformation, and the Rise of Donald Trump* 15 (2018); Matthew Levendusky, *The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans* 4–5, 8 (2009); Gerald C. Wright & Nathaniel Birkhead, *The Macro Sort of the State Electorates*, 67 *Pol. Rsch. Q.* 426, 427 (2014).

166. E.g., Abramowitz, *supra* note 165, at 17 (“To a much greater extent than thirty or forty years ago, Democrats and Republicans today see those who support the other party as very different from themselves, not only in their social characteristics and policy preferences but in their fundamental values.”).

167. See *id.* at 17.

represented by a candidate from a certain party, this in fact is who represents them.”<sup>168</sup> Or, as Paul Diller has written, that “[i]f a political party wins a clear majority of the popular vote over time, such votes must translate into legislative majorities with regularity.”<sup>169</sup>

A third clarification distinguishes between actions a legislature takes unilaterally and those in which it acts in concert with another branch, most notably through bicameralism and presentment. In the latter context, a legislature’s minoritarian potential is blunted by the involvement of the governor, who is elected statewide. The legislative actions of greatest concern here are thus those in which the legislature acts alone: as a litigant, through committees with the power to revise or strike down executive action,<sup>170</sup> or as a veto point against new legislation. Part III further discusses these dynamics.

#### B. *Obstacles to Legislative Majority Rule*

The reasons state legislatures often fall short of majority rule are familiar to political scientists and election law scholars, even if they have not yet permeated the doctrines and discourse surrounding state legislatures. The causes are straightforward. The choice to use single-member-districted, winner-take-all elections has consequences for legislative representation. Under some conditions, present in the United States and elsewhere, the shifts that this electoral system creates can subvert majority rule.

Of course, in a winner-take-all system, *moderating* majority rule is part of the point of using districted elections over statewide elections. Districts avoid all-or-nothing clean sweeps by the majority party and create, instead, opportunities for minority parties and groups to attain representation. This potentially explains why the House of Representatives turned to districted elections in the first place: As Michael Kang points out, it was the desire to blunt the sweeping losses caused by shifting statewide majorities that led to the adoption of the Apportionment Act of 1842, which required states to elect members of the House of Representatives via single-member districts.<sup>171</sup> At some level of generality, opportunities for minority-party

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168. Stephanopoulos, *supra* note 18, at 287.

169. Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 *La. L. Rev.* 287, 291 (2016).

170. See generally, e.g., Nat’l Conf. of State Legislatures, *Separation of Powers: Legislative Oversight*, <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-legislative-oversight.aspx> [<https://perma.cc/TQ9A-YVS5>] (last visited Sept. 9, 2021) (“Forty-one states have some type of authority to review administrative rules, although not all of them have the power to veto rules.”). For an extensive study of state legislative oversight and review powers, see *Checks and Balances in Action: Legislative Oversight Across the States*, Wayne St. Univ., Ctr. for Urb. Stud. [stateoversightmap.org](http://stateoversightmap.org) [<https://perma.cc/EB7E-SUEP>] (last visited Aug. 12, 2021).

171. Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 *B.C. L. Rev.* 1379, 1389–90 (2020) (“Compared to districted elections, the general ticket election therefore favored the majority party.”); see also James Thomas Tucker, *Redefining American Democracy: Do*

voice, if not minority-party power, are a celebrated virtue of districted elections.<sup>172</sup> In the ideal vision, districted elections allow for something better than mere majority rule: They foster majority rule *plus* minority voice.

Yet in the absence of proportional representation,<sup>173</sup> the use of districts tends to skew the power of both the majority and minority parties. In the political science terminology, winner-take-all elections in single-member districts entail “electoral bias.” That is, they will not reliably come out with the same majorities or margins that a simple statewide election would generate.<sup>174</sup> “It is true by definition that in non-proportional-representation political systems, parties often do not win the same percentage of votes and seats.”<sup>175</sup> In the burgeoning literature on partisan gerrymandering, scholars have taken this insight and devised numerous ways to measure whether the ensuing deviations favor one party or the other<sup>176</sup> and when such bias should be legally actionable.<sup>177</sup>

But the recent literature on how to measure partisan gerrymandering and partisan bias might obscure a more fundamental point. Regardless of whether the electoral system consistently prefers one *party*, it affects the

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Alternative Voting Systems Capture the True Meaning of “Representation”?, 7 Mich. J. Race & L. 357, 375–76 (2002) (recounting this history).

172. See, e.g., Richard H. Pildes, Diffusion of Political Power and the Voting Rights Act, 24 Harv. J.L. & Pub. Pol’y 119, 124 (2000) (“Districted elections empower local minorities who would otherwise be swallowed up in a system not self-consciously designed to ensure some representation of their interests.”).

173. This Article describes the elections scheme we have. Other scholars and reformers have proposed a range of alternatives, including the use of multimember districts with proportional ranked choice voting, see The Fair Representation Act, H.R. 3863, 117th Cong. § 101 (2021), or a mixed-member proportional (MMP) system, see Benjamin Plener Cover, Two-Party Structural Countermandering, Iowa L. Rev. (forthcoming 2021) (manuscript at 10) (on file with the *Columbia Law Review*).

174. See, e.g., Graham Gudgin & Peter J. Taylor, Electoral Bias and the Distribution of Party Voters, 63 Transactions Inst. Brit. Geographers 53, 53 (1974) (“Electoral bias is defined as the difference between the proportion of votes a party receives in an election and the proportion of seats it obtains.”).

175. Richard G. Niemi & Patrick Fett, The Swing Ratio: An Explanation and an Assessment, 11 Legis. Stud. Q. 75, 75 (1986); see also Edward R. Tufte, The Relationship Between Seats and Votes in Two-Party Systems, 67 Am. Pol. Sci. Rev. 540, 540 (1973) (“[E]lectoral systems differ greatly in both their rate of translation of votes into seats (the ‘swing ratio’) and in their partisan bias.”).

176. See, e.g., Nicholas O. Stephanopoulos & Eric M. McGhee, Partisan Gerrymandering and the Efficiency Gap, 82 U. Chi. L. Rev. 831, 834 (2015) (introducing “a new measure of partisan symmetry”).

177. The U.S. Supreme Court prominently rejected the justiciability of partisan gerrymandering in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019), holding that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.” For a rundown of earlier judicial struggles to identify a manageable standard, see Daniel P. Tokaji, Gerrymandering and Association, 59 Wm. & Mary L. Rev. 2159, 2166–77 (2018). For an argument that state courts can adjudicate extreme partisan gerrymandering, see Bulman-Pozen & Seifter, *supra* note 13, at 910–16.

prospects for majority rule.<sup>178</sup> This is especially true in light of two factors: geographic clustering and the manipulation of district lines.

First, geography and residential patterns play an important role in this phenomenon. It is “[a] classic observation in the field of political geography” that, in districted elections, the distribution of groups across space can affect legislative outcomes—especially when “groups . . . are geographically clustered according to population density.”<sup>179</sup> This is the core insight of work by political scientists Jowei Chen and Jonathan Rodden. In Rodden’s popular book *Why Cities Lose*, he documents how geography has disadvantaged urban parties around the world when operating in winner-take-all districts.<sup>180</sup> Absent a system of proportional representation, as urban parties pack themselves into small numbers of districts while rural parties spread out, urban parties lose districts to an extent disproportionate to their actual numbers.<sup>181</sup> As Chen and Rodden write, “[p]erhaps no one is more acutely aware of this than the Democrats in the United States, who in recent years . . . frequently fall short of a legislative majority in the House of Representatives in spite of receiving more votes than the Republicans.”<sup>182</sup>

Second, the manipulation of district lines can make things much worse for either party, but especially for already disadvantaged urban parties. The large literature on partisan gerrymandering shows how the unusual American approach of putting political officials in charge of districting has the potential to substantially distort representation.<sup>183</sup> It leads to significant distortions in who wins elections. “By drawing districts to maximize the power of some voters and minimize the power of others,” Justice Elena Kagan wrote in her dissent in *Rucho v. Common Cause*, “a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer.”<sup>184</sup> And further, gerrymandering

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178. This point is often noted by comparative electoral scholars and theorists tracing back to John Stuart Mill, who decry the way that districting deviates from proportional representation. See, e.g., Amy, *supra* note 7, at 27.

179. Jowei Chen & Jonathan Rodden, *The Loser’s Bonus: Political Geography and Minority Party Representation I* (Apr. 9, 2016) (unpublished manuscript) (on file with the *Columbia Law Review*) [hereinafter Chen & Rodden, *The Loser’s Bonus*].

180. Rodden, *supra* note 9, at 23.

181. See Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 *Q.J. Pol. Sci.* 239, 239 (2013) (“[I]n many states, Democrats are inefficiently concentrated in large cities and smaller industrial agglomerations such that they can expect to win fewer than 50% of the seats when they win 50% of the votes.”).

182. Chen & Rodden, *The Loser’s Bonus*, *supra* note 179, at 1.

183. See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 *U. Chi. L. Rev.* 769, 780 (2013) (reviewing the differences between international and American electoral district design).

184. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2512 (2019) (Kagan, J., dissenting).

alters how those parties govern.<sup>185</sup> Among other things, it pushes each party further to their extremes.<sup>186</sup> Refusals to undertake regular redistricting in legislatures, which historically led to wildly malapportioned districts, can have similar effects.<sup>187</sup>

C. *State Legislatures' Countermajoritarian Tendencies*

All of this may sound a bit abstract, but it can yield minoritarian rule on the ground, resulting in two problematic phenomena. First, the combination of winner-take-all elections, single-member districts, and geographically clustered populations can lead to outright minority-party control of state legislatures—that is, the electoral design itself creates a skew that gives control to the minority party.<sup>188</sup> Second, this electoral system is well-known to exaggerate majority control, giving bare majorities an inflated margin. Legislators with such artificial cushions may be less responsive to the concerns of both the median voter and partisan minorities.

1. *Manufactured Majorities.* — The first pathology, outright nonmajoritarian control, is sometimes known in the election law literature as a “manufactured majority.”<sup>189</sup> It is a common feature in winner-take-all districted legislatures.<sup>190</sup> It may be, as commentators note, startling to foundational ideals of democracy. As Douglas Amy writes, it “violate[s] one of the most sacred tenets of democratic politics: majority rule.”<sup>191</sup>

But it’s not uncommon. The most obvious marker of a manufactured majority is when “a party with less than half of the statewide votes . . . receive[s] more than half of the seats”—a pattern that “happens routinely

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185. See, e.g., Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 *Wm. & Mary L. Rev.* 2115, 2118, 2120 (2018) (studying the effects of gerrymandering and concluding that its harm is not “limited to bloodless concepts like seat and votes shares,” but that it causes “the ideological skewing of representation—and, with it, the policies that shape people’s lives”).

186. *Id.* at 2120. (“Pro-Democratic gerrymanders make House delegations substantially more liberal than their states’ electorates. Pro-Republican gerrymanders have an even larger effect in the opposite direction.”). In other work, Stephanopoulos and Warshaw show that partisan gerrymandering also damages democracy in the longer term, by influencing who bothers to contest elections, who donates, and who votes. See Nicholas Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 *Legis. Stud. Q.* 609, 612 (2020).

187. See *infra* section II.C.3.

188. For earlier recognition of this phenomenon as a possibility, see Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 *U. Pa. L. Rev.* 810, 810 (1974).

189. E.g., Issacharoff et al., *supra* note 7, at 1267 (“A manufactured majority is one in which the party that gets a majority of seats does not receive a majority of the actual votes, but becomes a governing majority because of the way majoritarian systems overreward the dominant parties.”).

190. See, e.g., *id.* (“Manufactured majorities occur often in majoritarian systems but rarely in [proportional representation] ones.”).

191. Amy, *supra* note 7, at 38; see also Issacharoff et al., *supra* note 7, at 1267.

in U.S. state legislatures.”<sup>192</sup> The vast majority of states have crossed this threshold in elections since 1960; some have done so in election after election. States in this group in recent memory include Florida,<sup>193</sup> Indiana,<sup>194</sup> Iowa,<sup>195</sup> Michigan,<sup>196</sup> Minnesota,<sup>197</sup> New Jersey,<sup>198</sup> North Carolina,<sup>199</sup> New Hampshire,<sup>200</sup> New York,<sup>201</sup> Ohio,<sup>202</sup> Pennsylvania,<sup>203</sup> Virginia,<sup>204</sup> and Wisconsin.<sup>205</sup>

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192. Daryl R. DeFord, Nicholas Eubank & Jonathan Rodden, *Partisan Dislocation: A Precinct-Level Measure of Representation and Gerrymandering*, *Pol. Analysis*, June 2021, at 1, 4.

193. J. Gerald Hebert & Ruth Greenwood, Campaign Legal Ctr., *Make Democracy Count: Ending Partisan Gerrymandering 6* (2016), [https://campaignlegal.org/sites/default/files/CLC\\_PartisanGerrymandering\\_Report\\_FINAL.pdf](https://campaignlegal.org/sites/default/files/CLC_PartisanGerrymandering_Report_FINAL.pdf) [<https://perma.cc/X7ND-DH3N>] (identifying Florida, Michigan, North Carolina, Ohio, Pennsylvania, and Wisconsin as states in which one party retained control of the legislature despite receiving a minority of the statewide vote).

194. See Rodden, *supra* note 9; see also *Bandemer v. Davis*, 603 F. Supp. 1479, 1486 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986) (detailing that Republican candidates won 57 of 100 seats with 48.1% of the vote).

195. Christian R. Grose, Jordan Carr Peterson, Matthew Nelson & Sara Sadhwani, *The Worst Partisan Gerrymanders in U.S. State Legislatures 12–13*, U.S.C. Schwarzenegger Inst. for State & Glob. Pol’y, <http://schwarzeneggerinstitute.com/theworstpartisangerrymanders/> [<https://perma.cc/5ENQ-ABWC>] (last visited Aug. 11, 2021) (identifying Michigan, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin as states that experienced “minority rule following the 2018 elections”).

196. *Id.*

197. See Gaby Goldstein & Mallory Roman, *State Legislatures in the 2020 Election: What Happened?*, Sister Dist. Project (Nov. 16, 2020), <https://sisterdistrict.com/state-legislature-chambers-2020-election-what-happened/> [<https://perma.cc/GEU9-PCGT>].

198. See Kevin Werner, *The Winner-Take-All Problem in Fort Lee, New Jersey*, FairVote (Jan. 21, 2014), <https://www.fairvote.org/the-winner-take-all-problem-in-fort-lee-new-jersey/> [<https://perma.cc/KRT5-A2QX>] (describing pro-Democratic skew of General Assembly); see also Steven J. Mulroy, *The Great Unskewing: Remediating Structural Bias in U.S. Elections*, 58 *U. Louisville L. Rev.* 101, 104 (2019).

199. See Grose et al., *supra* note 195; Hebert & Greenwood, *supra* note 193.

200. See Appendix.

201. See *id.*

202. See Liz Kennedy, Billy Corriher & Danielle Root, *Redistricting and Representation: Drawing Fair Election Districts Instead of Manipulated Maps*, Ctr. for Am. Progress (Dec. 5, 2016), <https://www.americanprogress.org/issues/democracy/reports/2016/12/05/294272/redistricting-and-representation/> [<https://perma.cc/7ZLA-QLXB>] (“[D]espite Democrats in Ohio winning more than 50 percent of the popular vote cast for the state legislature in 2012, Democratic members held just 39 of 99 seats in the wake of that election.”).

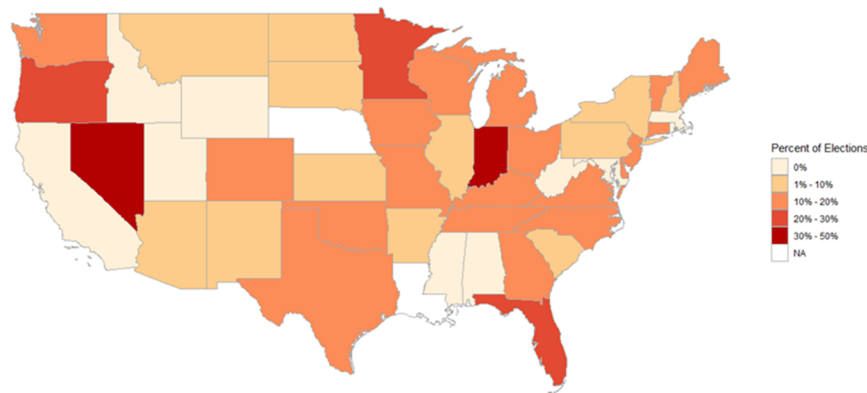
203. See Grose et al., *supra* note 195; Hebert & Greenwood, *supra* note 193.

204. *Id.*

205. Mitchell Schmidt, *2020 Election Again Shows Lopsided Republican Legislative Maps*, *Wis. State J.* (Nov. 12, 2020), [https://madison.com/wsj/news/local/govt-and-politics/2020-election-again-shows-lopsided-republican-legislative-maps/article\\_d0c11425-df16-5d0b-a3e8-4954e7897652.html](https://madison.com/wsj/news/local/govt-and-politics/2020-election-again-shows-lopsided-republican-legislative-maps/article_d0c11425-df16-5d0b-a3e8-4954e7897652.html) [<https://perma.cc/Q48R-BYA2>].

There is more. Publicly available data sets allow rough quantification of the phenomenon.<sup>206</sup> Between 1968 and 2016, thirty-eight states experienced at least one manufactured majority as a result of a general election in their state senate, while ten states did not. Similarly, forty states experienced at least one manufactured-majority election in their state house, while eight states did not. In total, there were 181 manufactured majorities resulting from general elections in state senates (93 won by Democrats, 88 won by Republicans) and 154 in state houses (100 won by Democrats, 54 won by Republicans). If we limit these to *minoritarian* outcomes—not just an election won with less than a majority, but one in which the party controlling the chamber did not receive the most votes—there have been 146 minoritarian outcomes in state senates (77 won by Democrats, 69 by Republicans) and 121 in state houses (79 won by Democrats, 42 by Republicans). The following maps show the relative frequency of these minoritarian results:

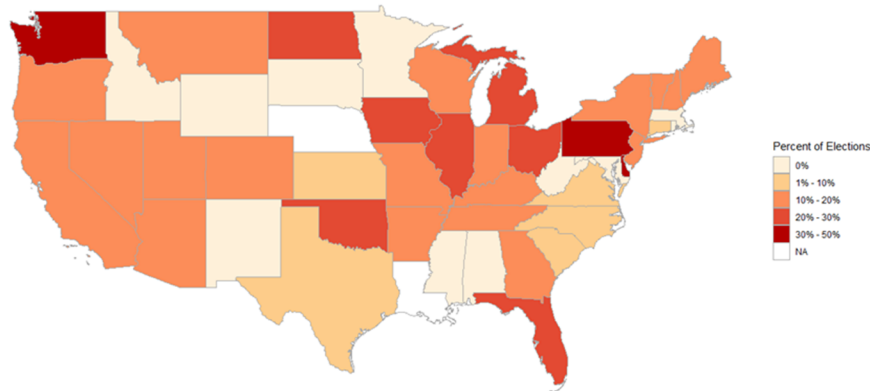
FIGURE 1: PERCENT OF STATE HOUSE ELECTIONS RESULTING IN MINORITARIAN CONTROL



206. This tally is based on two data sets: Carl Klarner's Restructured State Legislative Election Returns dataset, which provides information on the vote share of each party in each state-wide general election from 1968 to 2016, and Michigan State University's Correlates of State Policy dataset, which contains the Democratic seat share in each state legislative chamber from 1900 to 2018. The analysis excludes Nebraska and Louisiana, for which insufficient data was available. A more detailed methodology description, and full lists of manufactured majorities by state, chamber, margin, and year, is available in the Appendix.



FIGURE 2: PERCENT OF STATE SENATE ELECTIONS RESULTING IN MINORITARIAN CONTROL



With the rise of more sophisticated gerrymandering, more complete partisan sorting, and intense geographic clustering, manufactured majorities appear unlikely to go away.<sup>207</sup> Today, the phenomenon affects many people across the states. As a report from USC’s Schwarzenegger Institute observes, the election results after the 2018 election alone were such that “nearly 60 million Americans live under minority rule in their U.S. state legislatures.”<sup>208</sup> And in some states, it’s a repeated phenomenon, year after year. Republicans in Michigan, for example, have maintained a majority in the state’s House of Representatives since the most recent redistricting despite Democrats winning more total legislative votes in several elections and winning several statewide elections.<sup>209</sup>

To be sure, a tally of manufactured majorities cannot be free of doubt at the margins. Relying on statewide legislative vote shares to assess manufactured majorities may obscure nuances in measuring statewide partisan preferences. Not all state legislative seats are contested in every election. In recent work, Barry Burden and Rochelle Snyder find that the rate of uncontested elections in state legislatures has been rising, even as it has

207. See generally Rodden, *supra* note 9, at 1–3 (discussing how the underlying causes for manufactured majorities extend beyond gerrymandering). Indeed, the more complete partisan sorting described earlier has made manufactured majorities ever more consequential and problematic.

208. Grose et al., *supra* note 195, at 6.

209. See *id.* at 2–6; see also Paul Egan, Republicans Retain Control of Michigan State House After Both Parties Flip Seats, *Detroit Free Press* (Nov. 4, 2020), <https://www.freep.com/story/news/politics/elections/2020/11/04/michigan-state-house-election-results/6153955002/> [<https://perma.cc/3CW5-87Z2>] (reporting that Michigan Republicans retained control of the state House of Representatives and hold the same majority they won in the 2018 vote).

been falling in Congress.<sup>210</sup> Since 2000, it has been common for the percent of races uncontested to average over 30% across the states and more than 50% in the South.<sup>211</sup> With that many races in which voters have no choice, it's difficult to say that the statewide total reflects what voters would have wanted if they had a choice. As Burden and Snyder observe, “[t]he presence of uncontested elections . . . raises normative questions about whether a democracy is functioning effectively” because democracy presumes that “voters actually get to make choices between competing candidates.”<sup>212</sup> Depending on the distribution of uncontested races in a state, this feature could lead to an under- or overcount of manufactured majorities.

Another approach is to identify states in which one party wins the legislature despite the other party persistently prevailing in statewide elections or at least keeping those statewide elections much closer. These are states in which manufactured majorities are hard to rule out or that verge on manufactured majorities. As Rodden writes, these tend to be states in which “Republicans win large legislative majorities in spite of very competitive statewide elections.”<sup>213</sup> Examples here include the states on the prior list in years when they just barely win a majority of legislative votes but lose statewide. And add to that list more states, including Colorado, Georgia, Missouri, Montana, Kansas, and Kentucky.<sup>214</sup> Over two-thirds of all minoritarian legislative chambers since 1960 overlapped with a partisan split between the legislature and governor.<sup>215</sup>

Of course, it is also possible that some of these split results are not the result of a manufactured majority or a distortion caused by districting. Rather, it may be the result of voters deliberately splitting their tickets. Maybe. But ticket-splitting has declined substantially as polarization has increased.<sup>216</sup> It's unlikely, then, that there is a large share of voters who prefer the Democratic presidential candidate and a state Republican legislative majority, or vice versa. Indeed, studies of ticket-splitting suggest it is often best explained not as a “purely bottom-up phenomenon” by voters' substantive preferences but rather by the presence of uncontested or scarcely contested elections in some districts.<sup>217</sup>

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210. See Barry C. Burden & Rochelle Snyder, Explaining Uncontested Seats in Congress and State Legislatures, 49 *Am. Pol. Rsch.* 247, 247 (2021).

211. See *id.* at 251 & fig.2.

212. *Id.* at 247.

213. Rodden, *supra* note 9, at 186 (listing “Michigan, Ohio, Indiana, Missouri, Pennsylvania, Wisconsin, Florida, Virginia, and North Carolina”).

214. *Id.*

215. See Appendix.

216. Barry C. Burden & David C. Kimball, Why Americans Split Their Tickets: Campaigns, Competition, and Divided Government 27 (2004).

217. *Id.* at 36, 40.

Looking historically, nationally,<sup>218</sup> and internationally underscores the common nature of manufactured majorities. In Arend Lijphart's study of fourteen countries that used winner-take-all voting systems, manufactured majorities occurred in 43.7% of the elections in the second half of the twentieth century—"a stunning level of electoral malfunctioning," as Amy notes.<sup>219</sup>

2. *"Exaggerated" Majoritarian Control.* — Even when the majority party prevails, winner-take-all elections in single-member districts tend to produce what the literature calls a "winner's bonus." While impeding full sweeps by the majority party, they tend to exaggerate the majority's vote share within the legislature's ranks beyond their proportional share—a phenomenon in which "the politically rich get richer."<sup>220</sup> In other words, a candidate receiving 55% of the vote does not receive 100% of the seats, as they would in a winner-take-all statewide election, but they receive something more than the 55% of the seats they would win in a system of proportional representation. When the winner's bonus is fairly small, its normative status is debatable: Its defenders argue that it promotes effective governance, among other benefits, while its detractors note its deviation from precisely proportional representation.<sup>221</sup>

Yet in many states, geography and gerrymandering give the majority party an outsized advantage. Extensive literature documents what Amy has called the "exaggerated majority."<sup>222</sup> This literature observes "the propensity of [single-member districts] to overreward majorities and to deliver strong returns to those controlling the districting process."<sup>223</sup> In turn, exaggerated majorities may both deprive minority parties of voice and decrease the comfortable majority party's incentive to cater even to their own voters, much less other voters.

For example, as Rodden reports, in states "including Missouri, North Carolina, Ohio, and Indiana, Republicans have won very large legislative supermajorities on the order of 65% or more while winning only rather slim statewide majorities. These legislative outcomes are well beyond the typical winner's bonus . . . ."<sup>224</sup> Virginia's 2013 House of Delegates

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218. Amy, *supra* note 7, at 9 ("For example, in the 1990s, after redistricting in Texas, the Democrats were able to win 70 percent of the U.S. House seats, even though the party only garnered 49.9 percent of the vote.").

219. Amy, *supra* note 7, at 39 (discussing Arend Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945–1990* (1994)).

220. Tufte, *supra* note 175, at 540.

221. See, e.g., Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 *Stan. L. Rev.* 1131, 1150–51 (2018) ("Some argue that seat bonuses are normatively undesirable because of the departure from strict proportionality; others argue that they are normatively desirable because the bonus incentivizes robust campaigning and promotes a stable, functioning legislative majority.").

222. Amy, *supra* note 7, at 37.

223. Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 *U. Chi. Legal F.* 205, 206.

224. Rodden, *supra* note 9, at 184.

provides another example. That year, Democratic candidates won 40.3% of all votes for the House of Delegates, and 45.5% of the forty-three contested districts.<sup>225</sup> (The fact that fifty-seven of a hundred House of Delegates seats were uncontested underscores the earlier-noted problem in districted elections.) Yet Democrats came away with only eight of the contested seats, and thirty-three seats overall. The Republicans, in contrast, received a supermajority of seats in the House of Delegates despite winning only 53.5% of the votes.<sup>226</sup> And this pattern is not new. It is a phenomenon that can be traced back well over a century.<sup>227</sup>

Again, this Article does not claim that majoritarianism is the only value that matters; it argues state legislatures are not designed to serve majoritarianism.

#### D. *The Least Majoritarian Branch*

So far, this Part has described how the design of state legislative elections has created both actual minority-party control and the potential for more of it. One might wonder if this is too demanding a critique. No system of majority rule is perfect. And indeed, if majoritarianism is lacking overall, isn't it unreasonable to complain of its absence in any individual branch?

That logic might make sense at the national level, where none of the branches are majoritarian. At the state level, however, the pushback rings hollow. Nonlegislative state elections *are* structured to avoid minoritarian results. Every governorship is elected by a statewide majority vote. And of thirty-nine states that use elections to decide state supreme court seats, all but four—Illinois, Kentucky, Louisiana, and Mississippi—are statewide as well.<sup>228</sup> In the vast majority of states, it is only state legislatures that possess counter-majoritarian features. This Article now turns to the majoritarian character of governors and state supreme courts before returning to state legislatures.

1. *Gubernatorial Elections.* — As of November 2020, governors in all fifty states are selected by statewide elections. This was not always the case. In the earliest state constitutions, the governor was a mere figurehead. He (always he back then) was selected by the legislature, lacked a veto, and

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225. See Josh Israel, How Gerrymandering Gave Virginia Republicans a House Supermajority, ThinkProgress (Nov. 14, 2013), <https://archive.thinkprogress.org/how-gerrymandering-gave-virginia-republicans-a-house-supermajority-245a1154cb3e/> [<https://perma.cc/WW2W-67AE>].

226. See *id.*

227. See Peter H. Argersinger, Representation and Inequality in Late Nineteenth-Century America: The Politics of Apportionment 18 (2012) (“In Kansas during the 1880s, for example, Democratic voters regularly cast from 32% to 40% of the popular vote for Congress but were never able to elect a single candidate.”).

228. Judicial Selection: Significant Figures, Brennan Ctr. for Just. (May 8, 2015), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [<https://perma.cc/GQ3A-P9E3>].

had little appointment or removal power.<sup>229</sup> This was part of a choice to vest the legislature, the closest approximation to the people themselves, with the greatest power in state government.<sup>230</sup>

But the experiment with consolidating power in the legislature went poorly.<sup>231</sup> By the nineteenth century, states were uniformly moving to empower their governors as a means of checking legislatures. “The position of governor was made an elective, rather than an appointed office; his term was gradually lengthened; and he was granted the power to veto not only entire laws, but also particular items within laws.”<sup>232</sup> The goal was to shore up popular control of government, which had slipped away under legislative leadership. And “[f]or the most part, . . . delegates concluded that governors were more likely than the people’s legislative representatives to resist the entreaties of special interests.”<sup>233</sup>

By 1860, every state but South Carolina had joined the majority of states selecting governors through elections.<sup>234</sup> And the overwhelming majority did so through statewide elections. A few documented exceptions to this practice, in which states used electoral-college-like systems to elect statewide officials, were each inseparable from racism. In Georgia, the state legislature adopted a “county-unit system” in the 1890s, “a highly malapportioned electoral system” tied to county boundaries.<sup>235</sup> Under this system, a governor could win by prevailing in rural counties alone, “without receiving a single vote in the state’s fifty-six largest counties.”<sup>236</sup> As Robert Mickey writes, given that “the legislature refused to reapportion itself from 1877 until ordered by federal courts to do so in 1963, the county-unit system”—itself struck down by the Supreme Court in *Gray v. Sanders*—“reinforced in gubernatorial and other statewide elections the extremely strong rural bias of legislative politics.”<sup>237</sup> Only Mississippi’s districted gubernatorial elections system persisted into the twenty-first century; it was recently invalidated by a federal district court and then rejected

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229. See Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 153, 139 (1969) (describing the limited powers of the early American governors).

230. G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, in *Democracy: How Direct?: Views From the Founding Era and the Polling Era* 87, 90 (Elliott Abrams ed., 2002) [hereinafter Tarr, *For the People*].

231. See G. Alan Tarr, *Understanding State Constitutions* 117 (1998) [hereinafter Tarr, *State Constitutions*] (noting that “experience with an almost unfettered legislative power during the nineteenth century soon dispelled those notions” that had given rise to it).

232. John Dinan, *Framing a “People’s Government”: State Constitution-Making in the Progressive Era*, 30 *Rutgers L.J.* 933, 946 (1999).

233. *Id.* at 947.

234. Tarr, *State Constitutions*, *supra* note 230, at 121.

235. Robert Mickey, *Paths Out of Dixie: The Democratization of Authoritarian Enclaves in America’s Deep South, 1944–1972*, at 78 (2015).

236. *Id.*

237. *Id.*; see also *Gray v. Sanders*, 372 U.S. 368, 379–81 (1962).

by voters in a ballot initiative in 2020.<sup>238</sup> In every state in the nation, now, the governor has emerged as the clearest statewide representative, elected regularly by voters of the entire state.

It is not just that gubernatorial elections can't be packed or gerrymandered. Gubernatorial responsiveness to the people is also increased by governors' comparative visibility. Like chief executives at all levels, their ability to govern individually, without the veto points of a multimember body, makes it relatively clear when they are to blame for a given action.<sup>239</sup> Relatedly, because governors are more likely to be household names, David Schleicher has argued that gubernatorial elections are more likely to be based on voters' actual opinions of the governor as a candidate, rather than a proxy for their partisan preference.<sup>240</sup> In this sense, gubernatorial elections are less likely than legislative elections to be "second-order" in relation to national politics and thus to instantiate actual accountability for decisions made in office.<sup>241</sup>

Of course, many decisions in state executive branches are made by state agencies, not the governor. But as governors' responsiveness has risen, so too has their control of state executive branches, such that distinctions between gubernatorial and agency accountability have narrowed. Governors gained, over time, the powers of appointment, reorganization, and supervision.<sup>242</sup> Independent agencies and separately elected executive officials may act as a brake on gubernatorial administration, but independent agencies are not consistently or categorically removed from gubernatorial control in the states.<sup>243</sup> Governors may also claim and exercise agency-directive powers that are legally ambiguous or unsettled and encounter little pushback in state legal ecosystems.<sup>244</sup> For these reasons, it has become plausible to speak of agency accountability in the states as one does at the federal level—to talk of agency actions as those of the "[Governor's name] Administration" rather than of freewheeling agents.<sup>245</sup>

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238. See *McLemore v. Hosemann*, 414 F. Supp. 3d 876, 881 (S.D. Miss. 2019); Mississippi Ballot Measure 2, Remove Electoral Vote Requirement and Establish Runoffs for Gubernatorial and State Office Elections Amendment (2020), Ballotpedia, [https://ballotpedia.org/Mississippi\\_Ballot\\_Measure\\_2,\\_Remove\\_Electoral\\_Vote\\_Requirement\\_and\\_Establish\\_Runoffs\\_for\\_Gubernatorial\\_and\\_State\\_Office\\_Elections\\_Amendment\\_\(2020\)](https://ballotpedia.org/Mississippi_Ballot_Measure_2,_Remove_Electoral_Vote_Requirement_and_Establish_Runoffs_for_Gubernatorial_and_State_Office_Elections_Amendment_(2020)) [<https://perma.cc/M2UP-TNR4>] (last visited Aug. 13, 2021).

239. See Seifter, *Gubernatorial Administration*, *supra* note 26, at 536.

240. David Schleicher, *Federalism and State Democracy*, 95 *Tex. L. Rev.* 763, 775 (2017).

241. See *id.* at 775–76.

242. I detail each of these powers in Seifter, *Gubernatorial Administration*, *supra* note 26, at 487–88.

243. Miriam Seifter, *Understanding State Agency Independence*, 117 *Mich. L. Rev.* 1537, 1543–44 (2019) [hereinafter Seifter, *Understanding State Agency Independence*].

244. Seifter, *Gubernatorial Administration*, *supra* note 26, at 527.

245. See Thad Kousser & Justin H. Phillips, *The Power of American Governors: Winning on Budgets and Losing on Policy 2* (2012) (discussing the visibility and influence of governors); Terry M. Moe, *The Politicized Presidency*, *in* *The New Direction in American Politics*

The rise of gubernatorial power creates a decidedly mixed normative picture.<sup>246</sup> But it presents a clear majoritarian contrast from state legislatures. State courts sometimes recognize the reality that the governor is “the one institution guaranteed to represent the majority of the voting inhabitants of the state.”<sup>247</sup> Too often, though, they ignore this fact and peddle myths of legislative majoritarianism.

2. *Judicial Elections.* — Judges and courts are much less obvious potential vehicles of majoritarianism than governors are. The prevailing modern view is that the appropriate judicial role is interpretive, not representative. Yet judges, like governors, play an important role in state majoritarianism. Judges are elected in thirty-nine states and are elected statewide in thirty-five of them.<sup>248</sup> Even the four states that use districted judicial elections are unlikely to create the same skew as legislative elections. As Diller has observed, “a justice’s allegiance to any particular geographic area is likely muted by the large size of the district as compared to the average state legislative district’s size.”<sup>249</sup> The question of how elected judges interact with state majoritarianism is too fraught to resolve here. But we might consider the interaction in three ways.

First, and most modestly, elective state judges foster majoritarianism simply by allowing people to select the type or identity of judge they would like, quite apart from whether those judges’ rulings are majoritarian themselves. Voters today might prefer a candidate who identifies with one political party or background, or with certain types of experience and not others. When judicial elections were first promoted, one rationale was that voters would prefer candidates with greater independence from partisan politics.<sup>250</sup> Whatever the reason, the idea is that the majority should select the judiciary. This is an idea that aligns with state constitutions’ democracy principle: If the people prefer an independent judiciary over a more beholden one or seek some other quality in judges, then state constitutions protect that choice.

Second, state courts may be a counterweight against legislative counter-majoritarianism. This point is historically rooted. As Jed Shugerman has chronicled, states moved toward elected judiciaries in large part *because* the legislature was seen as so inadequate at representing the people.<sup>251</sup> Or

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235, 238–39 (John E. Chubb & Paul E. Peterson eds., 1985) (regarding presidential administration).

246. See generally Seifter, *Gubernatorial Administration*, supra note 26.

247. *State ex rel. Reynolds v. Zimmerman*, 126 N.W.2d 551, 558 (Wis. 1964).

248. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1162 (2007) [hereinafter Diller, *Intrastate Preemption*]; *Judicial Selection: An Interactive Map*, Brennan Ctr. for Just., <http://judicialselectionmap.brennancenter.org/?court=Supreme> [https://perma.cc/9MB6-9BSU] (last visited Aug. 13, 2021).

249. Diller, *Intrastate Preemption*, supra note 248, at 1162.

250. Jed Handelsman Shugerman, *The People’s Courts: Pursuing Judicial Independence in America* 84 (2012) [hereinafter Shugerman, *The People’s Courts*].

251. *Id.*

as Caleb Nelson puts it: “[T]he reformers who backed the elective judiciary . . . wanted to check legislatures precisely because the legislatures were not reliably majoritarian.”<sup>252</sup> During the nineteenth-century rise of judicial elections, state legislatures were widely held in low esteem, their reputations suffering “an enormous and long-lasting hit” after their role in economic panics and collapses across the country.<sup>253</sup> The public saw legislatures as corrupt and unaccountable to the people, doling out only special favors or epic follies. One alleged virtue of elected judiciaries was to rein in legislative abuses of power.<sup>254</sup> So states adopted judicial elections to create “a check against legislative power,”<sup>255</sup> as part of a broader “anti-legislature agenda”<sup>256</sup> running through the states.

How would judicial elections facilitate this agenda? In large part, the idea was to free judges from the chains of partisan politics—to ensure they would not be beholden to the politicians in the legislature or the governor’s office. “In this context, responsibility to the other branches was the problem, and responsiveness to the people was the solution.”<sup>257</sup> Another theory was that elections would increase the prestige of the judiciary, so that judges would gain the confidence to push back against legislatures.<sup>258</sup> Of course, reformers were not all of one mind regarding the ends they ultimately sought. Although the opposition to “unrestricted and unlimited . . . legislative despotism”<sup>259</sup> was a rallying cry, proponents had a variety of other ends in sight. Some wanted courts to take action against special-interest politics and class legislation,<sup>260</sup> and others wanted judges to espouse natural-law theories or free-market ideologies<sup>261</sup> or to “decrease official power as a whole.”<sup>262</sup>

Third, and most ambitiously, elected judges might advance majoritarianism through their own rulings. Although it might prompt the modern legal listener to recoil, “many . . . Americans did at times regard courts as representative institutions,” responding to the preferences of the parties that nominated them or the voters who elected them.<sup>263</sup> One “prominent legal scholar” wrote in 1893 that state courts “claimed to be themselves the

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252. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 *Am. J. Legal Hist.* 190, 203 (1993).

253. Shugerman, *The People’s Courts*, *supra* note 250, at 85.

254. See *id.* at 84.

255. *Id.* at 58; see also Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 *Harv. L. Rev.* 1061, 1144 (2010).

256. Shugerman, *The People’s Courts*, *supra* note 250, at 105.

257. *Id.* at 99.

258. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 *Historian* 337, 343 (1983).

259. Shugerman, *The People’s Courts*, *supra* note 250, at 97 (quoting N.Y. Delegate Churchill Cambreleng).

260. *Id.* at 103–04.

261. *Id.* at 97.

262. Nelson, *supra* note 252, at 203.

263. Argersinger, *supra* note 227 at 3.



official guardians of the political interests of the state.”<sup>264</sup> And it was a common view among proponents that electing judges was a needed way to provide for “judicial legislation” that would need to stand in for the newly “less powerful” legislature.<sup>265</sup>

Whether and to what extent elected judges *do* advance majoritarian rulings, and whether and to what extent they *should* do so, remain hotly debated questions in American law. On the empirical side, some accounts indicate that state court judges face “the majoritarian difficulty” and are highly susceptible to public opinion, especially in criminal or high-salience cases.<sup>266</sup> In other work, state court judges appear captured by special interest groups, especially their donors.<sup>267</sup> A further complication arises due to the staggered timing of judicial elections.<sup>268</sup> Because elections for seats on any given state court are typically staggered, it can take courts longer than governors to reflect the statewide majority. And indeed, especially in closely divided states, a number of factors (including vacancies and interim appointment processes) might delay or even prevent the majority party from controlling the court.

On the normative side, the judge-as-representative concept is certainly a far cry from the rights-protecting hero<sup>269</sup> or disinterested umpire images that have loomed large in American legal scholarship. For present purposes, it may be useful to narrow consideration to the question of who should influence judges in close or difficult cases or in those cases in which the law seems to run out. This is the question of relative rather than general independence, in Shugerman’s terms.<sup>270</sup> The choice of an elective judiciary was meant to shift that marginal influence toward the public.<sup>271</sup> As Edward Keyes, a Massachusetts delegate supporting judicial elections observed, the question is not “whether [judges] shall be influenced at all, . . . but from what quarter that influence shall come.”<sup>272</sup> Proponents of judicial

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264. *Id.* (quoting John Mayo Palmer, *The Courts and Political Questions*, 1 *Nw. L. Rev.* 113, 122 (1893)).

265. Hall, *supra* note 258, at 350 (quoting N.Y. Delegate Michael Hoffman).

266. Croley, *supra* note 27; see also Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 *Am. Pol. Q.* 485, 497–99 (1995) (finding that judges in competitive districts were sensitive to public preferences regarding the death penalty).

267. See, e.g., Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 *N.Y.U. L. Rev.* 69, 73 (2011) (finding that, in partisan judicial elections, “campaign contributions from business groups are . . . associated with judicial votes in favor of business interests”).

268. Christian Dippel & Michael Poyker, *How Common Are Electoral Cycles in Criminal Sentencing?* 8–10 (Nat’l Bureau Econ. Rsch., Working Paper No. 25716, 2020).

269. See, e.g., Ronald Dworkin, *Hard Cases*, 88 *Harv. L. Rev.* 1057, 1083 (1975) (inventing the judicial character of Hercules to illustrate the judicial role).

270. Shugerman, *The People’s Courts*, *supra* note 250, at 7.

271. Nelson, *supra* note 252, at 212–13.

272. *Id.* at 217 (quoting Official Report of the Debates and Proceedings in the State Convention, State Convention, at 773 (Mass. 1853)).

elections, Nelson notes, “tended to believe that influences of some sort were inevitable, and that the influence of the whole people was preferable to the influence of smaller groups.”<sup>273</sup>

Regardless of how far one goes down this path of judicial majoritarianism, it is hard to see elected judges as being systematically countermajoritarian in the same way that many state legislatures are. Selecting judges by popular vote at least supports the first framing: allowing people to choose the judges they want, in line with the democracy principle. Elected judges might also provide a counterweight to countermajoritarian legislatures, as proponents initially envisioned. Or judicial elections might even directly foster majoritarian rulings, at least at the margins of hard cases. Finally, it is worth noting that judges also face other forms of discipline, including recalls in many states (decided by statewide vote)<sup>274</sup> and the need to maintain support for future (statewide) reelection campaigns. The majority pressure on a judge who can eventually be voted out is stronger than on a legislator who cannot be.

3. *Legislative Elections, Redux.* — From early days, widely publicized problems surrounded legislative elections. Early state constitutions concentrated government power in state legislatures, both based on sour memories of colonial governors<sup>275</sup> and on the theory that the legislature (as then structured) most closely approximated direct democracy.<sup>276</sup> But the remainder of state constitutional development was an exercise in wresting power from state legislatures and channeling the exercise of what remained.

A wave of reform in state constitutions in the nineteenth century was largely an effort “to restrain the legislature.”<sup>277</sup> For some delegates, this was the meaning of constitutionalism itself.<sup>278</sup> That the legislature was too powerful and the other branches not powerful enough were the animating principles of state constitutional revision.<sup>279</sup> As Robert Williams has written, the ensuing transformation—from “early state constitutions granting unfettered legislative power to the more recent constitutions restricting

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273. *Id.*

274. Bulman-Pozen & Seifter, *supra* note 13, at 878.

275. See Wood, *supra* note 229, at 134.

276. See Tarr, *For the People*, *supra* note 229, at 4.

277. James A. Henretta, Foreword: Rethinking the State Constitutional Tradition, 22 *Rutgers L.J.* 819, 825 (1991); see also Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* 111–12 (1977) (“New and revised constitutions in the 1870s substantially reduced legislative authority.”); Tarr, *For the People*, *supra* note 230, at 6.

278. Tarr, *State Constitutions*, *supra* note 224, at 120 (“A delegate to South Dakota’s constitutional convention summarized the prevailing view: ‘The object of constitutions is to limit the legislature.’”).

279. See Dinan, *supra* note 232, at 946 (“[T]here was little disagreement during this period about the need to strengthen the executive and judicial branches.”).

legislative power”<sup>280</sup>—is “one of the most important themes in state constitutional law.”<sup>281</sup>

From the beginning, state legislative elections complicated and impeded majority rule. Divergences between statewide vote share and legislative control were common in both the nineteenth and twentieth centuries. In the nineteenth century, the “bias built into the [electoral] system” favored Republicans in state legislatures overall, though not everywhere. Democrats found themselves unable “to win control of many states’ governments despite success in the state’s presidential votes,” and despite “significant coattails and relatively responsive swing ratios.”<sup>282</sup> When Republicans won the presidency, they won the state senate 94% of the time; when Democrats won the presidency, they won the state senate 60% of the time in the nineteenth century and only 45% of the time after 1900.<sup>283</sup> In turn, “control over redistricting eluded these politicians” until the U.S. Supreme Court intervened in the 1960s.<sup>284</sup> In Connecticut, for example, Democrats won the presidential vote in 1884, 1888, and 1892, but could not win a majority in the Connecticut senate.<sup>285</sup> Meanwhile, in the South, “Democrats flagrantly gerrymandered both legislative and congressional districts to minimize the potential influence of black suffrage.”<sup>286</sup> “[T]he result was inequitable representation, with Southern Democrats exerting an influence far beyond that justified by their numbers.”<sup>287</sup>

Indeed, the intense partisan battles in the nineteenth century led to gamesmanship not dissimilar to that of the present day.<sup>288</sup> Gerrymandering was “everywhere . . . a focus of political and ideological controversy” in the nineteenth century and “increasingly dominated state politics.”<sup>289</sup> “As a rule, . . . gerrymanders succeeded, strengthening the majority party’s control over the legislature or even allowing the districting party to retain its power despite polling a minority of the popular votes.”<sup>290</sup> In the “pro-Democratic redistricting of Indiana in 1852[,] . . . Democrats carved the

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280. Robert F. Williams, Government Structure Under State Constitutions, *in* State Constitutions in the Federal System: Selected Issues and Opportunities for State Initiatives 37, 39 (1989).

281. Robert F. Williams, State Constitutional Law Processes, 24 *Wm. & Mary L. Rev.* 169, 201 (1983) [hereinafter Williams, State Constitutional].

282. Erik J. Engstrom & Samuel Kernell, Party Ballots, Reform, and the Transformation of America’s Electoral System 165 (2014).

283. *Id.* at 164.

284. *Id.* at 165. This, in turn, affected the composition of the U.S. Senate, then selected by state legislatures. See Argersinger, *supra* note 226, at 10.

285. Engstrom & Kernell, *supra* note 282, at 164.

286. Argersinger, *supra* note 227, at 11.

287. *Id.* at 12.

288. See *id.* at 8.

289. See *id.* at 9–10.

290. *Id.* at 33.

state into a remarkable 10 (out of 11) Democratic districts despite only garnering 53 percent of the statewide vote.”<sup>291</sup>

This did not help the legislature’s standing in the public’s eyes. Political opponents were quick to pounce on the resulting distortions.<sup>292</sup> As Peter Argersinger explains, the highly disproportionate vote and seat shares conflicted with “the core of the theory of representative government as it had developed by the mid-nineteenth century,” the idea that “each voter should have equal influence and that political parties should win shares of seats in legislative bodies roughly proportional to their shares of the popular vote.”<sup>293</sup> In the press, state legislatures developed a reputation as “the most sordid, obstructive, and anti-democratic law-making agencies in the country.”<sup>294</sup> Indeed, by the turn of the twentieth century, delegates at state constitutional conventions were considering abandoning bicameralism, for fear that it was fostering minoritarianism rather than deliberation. John Dinan describes that “[t]he principal fear was no longer that special interests might secure the passage of legislation that was favorable only to them, but rather that these interests might prevent the passage of laws that were beneficial to the general public.”<sup>295</sup>

In the twentieth century, a period of “stasis” fell over districting, but that did not eliminate districting distortions; to the contrary, it locked in malapportionment. “[M]any of the most egregious violations of equity stemmed from legislatures simply ignoring or deemphasizing requirements for apportioning according to population.”<sup>296</sup> Minority rule became rampant. By the middle of the twentieth century, majorities (by population) did not rule *any* state legislatures.<sup>297</sup> According to one calculation, “in 1947 residents of urban areas made up 59 per cent of the United States population but elected only about 25 per cent of the state legislators in the country.”<sup>298</sup>

If we turned from elections to operation, we would find still other reasons to question the rhetorical casting of legislatures as the pinnacle of democracy. As mentioned earlier, most state legislatures are still part time, undermining their capacity to be the representative center of the state’s

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291. Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 9 (2013).

292. See Argersinger, *supra* note 227, at 27 (“[P]oliticians and editors of both major parties denounce[d] their partisan opponents as little better than common criminals engaged in conspiracies against popular rights.”).

293. Argersinger, *supra* note 226, at 13.

294. Robert S. Allen, Introduction, *in* *Our Sovereign State*, at xxxi (Robert S. Allen ed., 1949).

295. Dinan, *supra* note 231, at 958–59.

296. Argersinger, *supra* note 227, at 18.

297. Stephen Ansolabehere & James M. Snyder Jr., *The End of Inequality: One Person, One Vote and the Transformation of American Politics* (Ira Katznelson ed., 2008).

298. Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 *Harv. L. Rev.* 1057, 1064 (1958).

policy decisions.<sup>299</sup> And many states operate in a polarized fashion that limits the out-party's role.<sup>300</sup> But for purposes of this Article, which focuses on legislative failures to cross the majority threshold, the elections deficiencies suffice.

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This discussion has sought to deepen the account of legislative non-majoritarianism by considering the selection of the other two branches of state government and their origins. Governors and courts have long been seen as counterweights to unrepresentative legislatures.<sup>301</sup> The status of legislatures as states' least majoritarian branch is long-standing, structural, and real.

### III. RETHINKING INTERBRANCH RELATIONS

If state legislatures are states' least majoritarian branch, we need to update prevailing characterizations of interbranch relations in the states and the operationalizing of those characterizations through doctrine. This Part revisits the four doctrines discussed in Part I: the nondelegation doctrine, the major questions doctrine, intrastate preemption, and the independent state legislature doctrine. This Part considers how revisiting legislative majoritarianism might affect the doctrines, and more fundamentally, how we should reframe the underlying relationships between state legislatures and executives, between state legislatures and local governments, and between state legislatures and the federal Constitution.

By way of high-level summary, removing the majoritarian assumption requires shifts in how we apply and discuss all four doctrines. In the non-delegation doctrine and major questions doctrines, the focus is on the relationship between state legislatures and executive branches. There, this Article's insights mean that the legislature ought not be preferred over the executive in the name of democracy, though it might still be preferred over private actors. The intrastate preemption doctrine focuses on the relationship between states and local governments. There, the key takeaways are that local decisionmaking can be a source of, and not just a threat to, statewide democracy—and that in preemption cases, not all state actors are on equal democratic footing. Finally, in the context of the independent state legislature doctrine, properly accounting for state legislative realities underscores just how anti-democratic the doctrine can be. But it also

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299. See Nat'l Conf. of State Legislatures, Full- and Part-Time Legislatures, *supra* note 160.

300. See, e.g., Nat'l Conf. of State Legislatures, State Legislative Policymaking, *supra* note 158, at 5.

301. See Engstrom, *supra* note 291, at 13.

shows how, properly understood, the relevant clauses of the federal constitution incorporate and build on state democratic gains. I explain these insights in the ensuing pages.

In arguing for these doctrinal updates, this Part acknowledges that judicial engagement in “institutional realism” may have both practical and normative limits.<sup>302</sup> As Richard Pildes has argued, institutional realism might at some point become destabilizing, especially if courts are making highly subjective or often-changing determinations.<sup>303</sup> Still, this Article’s proposal that courts consider legislative reality does not seem to approach those limits. Not only have courts already ceased “formalist forbearance” regarding state legislatures, both in the reapportionment context and beyond,<sup>304</sup> but the realities this Article highlights are not obscure or fleeting.<sup>305</sup> Moreover, as explained below, this Article’s proposal is modest; it is simply that courts refrain from going out of their way to create doctrines that elevate state legislatures above other constitutional actors.

A. *Direct Remedies for Minoritarian Legislatures*

Before turning to the ways in which the majoritarian status of the three state branches requires updating state doctrines, this section considers the possible remedies for legislative minoritarianism itself. In those states in which legislatures fail to cross the majoritarian threshold, is there a direct remedy under state constitutions?

This Part sides with state courts and scholars of extreme partisan gerrymandering in arguing that there is, at a minimum, a requirement to redistrict in such circumstances.<sup>306</sup> But the remedy logically extends further: Unconstitutionally districted state legislatures should lack their usual power to legislate until constitutionally mandated redistricting takes place. When composed in violation of the state constitution, that is, state legislatures cannot legitimately wield the full legislative power. Allowing them to do so flouts the principle, expressed explicitly in forty-nine state constitutions, that all political power is vested in the people.

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302. See Pildes, *supra* note 35, at 2–4.

303. See *id.* at 4 (asserting that it is not possible to identify an optimal degree of institutional realism and that the tension between institutional realism and institutional formalism is “one of public law’s general, defining problems”); *id.* at 9 (“As soon as realism rests on more subjective institutional assessments . . . institutional realism will inevitably become more controversial . . . and more destabilizing.”).

304. See *id.* at 37 (stating that by the 1960s the Supreme Court “could no longer blind itself to the institutionally realist view” of state legislatures’ incentives to maintain the status quo).

305. See *id.* at 9 n.17 (“[W]hen structural differentiations . . . exist,” “institutional realism based on those differentiations starts from the most defensible premises.”).

306. See generally Bulman-Pozen & Seifter, *supra* note 13 (discussing cases and literature).

This was the conclusion reached by a superior court in North Carolina in 2018.<sup>307</sup> The North Carolina Court of Appeals rejected the theory, concluding that some combination of judicial restraint, the “de facto officer” doctrine, and precedent forbid the courts from divesting legislatures of their duties, even when they are unconstitutionally formed.<sup>308</sup> The theory does not appear to have been repeated elsewhere in recent gerrymandering discussions, except in a thoughtful student note.<sup>309</sup> Perhaps that is because the theory seems, as the appeals court thought, like a judicial overreach, and one that would sow “chaos and confusion.”<sup>310</sup> Is it really the judicial role to bar the legislature from legislating, especially given that the redistricting process may be complex, contested, and lengthy?

These arguments of caution and restraint are weighty but not obviously superior to the alternative of giving actual force to the democracy requirements in state constitutions. If state constitutions mandate that majorities rule, forbid legislatures from undermining popular will by selecting their constituents, and so on, are state courts *authorized* to allow the legislatures to continue to bring the legislative power to bear on the state’s residents? A number of state courts have recently indicated that enforcing the separation of powers is a judicial duty, even when it requires rejecting the work of the other branches.<sup>311</sup> Those calls to judicial action seem even more apt in the democracy context.

Nor would stopping an illegally formed entity in its tracks be novel, as applied to legislatures or other bodies. Some courts previously refused to allow malapportioned state legislatures to continue their ordinary legislative duties, even as they upheld their past acts in light of equitable principles.<sup>312</sup> In other contexts, courts and commentators routinely accept the invalidation of prospective acts of an unconstitutionally structured body. In administrative law, for example, a steady diet of separation of powers cases indicates that agency officials cannot continue to act if they were un-

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307. See *N.C. State Conf. of NAACP v. Moore*, No. 18 CVS 9806, 2019 WL 2331258 (N.C. Super Ct. Feb. 22, 2019), rev’d, 849 S.E.2d 87 (N.C. Ct. App. 2020). The superior court stated that the “General Assembly lost its claim to popular sovereignty,” did “not represent the people of North Carolina,” and therefore lacked the power to propose constitutional amendments. *Id.* at \*11–12. The superior court did not hold that the legislature lacked the power to enact ordinary legislation.

308. See *N.C. State Conf. of NAACP v. Moore*, 849 S.E.2d 87, 95 (N.C. Ct. App. 2020).

309. See Spencer Scheidt, Note, “A Cloud of Constitutional Illegitimacy”: Prospectivity and the De Facto Doctrine in the Gerrymandering Context, 69 *Duke L.J.* 959 (2020).

310. See *Moore*, 849 S.E.2d at 96.

311. See, e.g., *Cooper v. Berger*, 809 S.E.2d 98, 111–14 (N.C. 2018) (striking down legislative limitations on gubernatorial control of the state’s elections board as a violation of the governor’s take care authority and the separation of powers); *Workman v. Carmichael*, 819 S.E.2d 251, 275 (W. Va. 2018) (asserting judicial authority to review impeachment proceedings).

312. See Scheidt, *supra* note 309, at 975 (citing *Davis v. Synhorst*, 225 F. Supp. 689, 694 (S.D. Iowa 1964), *aff’d sub nom. Hill v. Davis*, 378 U.S. 565 (1964)).

constitutionally appointed or structured until the structural problem is resolved.<sup>313</sup> What is more, the countermajoritarian concerns that motivate these critiques of federal courts do not apply with the same force to state courts, as Helen Hershkoff has persuasively argued.<sup>314</sup>

All of this is to say that there are good reasons to question whether unconstitutionally composed legislatures should be permitted to wield their usual legislative powers prospectively until their constitutional defect is cured. It is a debate that should be explored and taken seriously. But that requires a full treatment in separate work and is not the argument pursued in this Article. Instead, the focus here is on how prominent doctrines should be reconsidered in light of legislative realities.

B. *State Legislatures vs. Executives: Revisiting the Nondelegation and Major Questions Doctrines*

As Part I explains, state case law often anchors the nondelegation doctrine in majoritarian reasoning. To the extent states have adopted the major questions doctrine, they apply the same logic. In both cases, the idea is that only accountable legislatures, not governors—or, worse, “unelected bureaucrats”—should make significant policy decisions. In the nondelegation context, the remedy is to invalidate the statute at issue; in the major questions context, the remedy is to construe it narrowly.<sup>315</sup> Because the difference is primarily one of remedy, and not of logic, this section considers them together in exploring the legislative–executive relationship, focusing on the nondelegation cases, which are more numerous.

It is worth noting that some nondelegation cases do give other rationales, and many nondelegation cases today still reflect the “judicial uncertainty and subjectivism” that Louis Jaffe observed.<sup>316</sup> But majoritarian reasoning is a key pillar of both doctrines, and they are wobbly without it. Using two recent cases as illustrations, this section first explains why majoritarian reasoning cannot anchor the doctrines. It then explains how majoritarian deficits in state legislatures weaken alternative rationales for the doctrines.

First, the cases. Two prominent recent cases relied on nondelegation and major-questions principles in striking down measures taken by state executive branch actors.<sup>317</sup> In each of these cases, one in Wisconsin<sup>318</sup> and

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313. See, e.g., *Lucia v. Sec. Exch. Comm’n*, 138 S. Ct. 2044, 2055 (2018); *Buckley v. Valeo*, 424 U.S. 1, 137–42 (1976).

314. See Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 *Harv. L. Rev.* 1833, 1839–40 (2001).

315. Joseph Postell has noted that in some states, the distinction is blurred, with courts applying the nondelegation doctrine as a species of ultra vires analysis. See Postell, *supra* note 82, at 325.

316. See Jaffe, *supra* note 85, at 584.

317. For an overview of these and similar cases, see Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 *Yale J. Health Pol’y L. & Ethics* 50, 101–06 (2020).

318. *Wis. Legislature v. Palm*, 942 N.W.2d 900, 932–37 (Wis. 2020).



one in Michigan,<sup>319</sup> the state supreme courts echoed federal cases praising the doctrines. And in each case, both the court and external surrogates invoked democracy and accountability among the reasons for the decision.

In Michigan, the question was the legality of various COVID-19 restrictions that Governor Gretchen Whitmer had imposed pursuant to the Emergency Powers of Governor Act, enacted in 1945. In a 4-3 decision, the Michigan Supreme Court held that the Act violated the nondelegation doctrine, marking the first time that the court had ever invalidated an entire statute on nondelegation grounds.<sup>320</sup> The statute conferred upon the governor the power to impose “reasonable” orders that she “considers necessary to protect life and property” during a “public emergency within the state.”<sup>321</sup> A theme of democratic necessity ran throughout the court’s opinions. The majority stated that the statute’s delegation of authority to the governor was flawed because “no individual in the history of this state has ever been vested with as much concentrated and standardless power to regulate the lives of our people, free of the inconvenience of having to act in accord with other accountable branches of government.”<sup>322</sup> And it underscored that an important basis for the nondelegation doctrine is to ensure that “the people” are not “unprotected from uncontrolled, arbitrary power in the hands of administrative officials.”<sup>323</sup> An opinion concurring in part and dissenting in part, in contrast, observed that “the Governor undoubtedly will be politically accountable to voters for her actions in our next gubernatorial election, the ultimate check.”<sup>324</sup>

The legislative-democracy themes loomed large in public and professional discussions of the case. In amicus briefs, organizations played up the democracy angle. The brief filed by the American Legislative Exchange Council, for example, stated that “the legislature” is the branch “closest to

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319. *Midwest Inst. of Health v. Governor of Mich.* (In re Certified Questions From U.S. Dist. Ct.), 958 N.W.2d 1, 16–25 (Mich. 2020).

320. Nicholas Bagley, *A Warning from Michigan*, Atlantic (Oct. 7, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/america-will-be-michigan-soon/616635/> [<https://perma.cc/ZMJ8-B8ZA>]; see also *Blue Cross & Blue Shield of Mich. v. Milliken*, 367 N.W.2d 1, 48 (Mich. 1985) (“[T]he unconstitutional provisions are easily severable, the remainder of the act need not be affected.”).

321. Mich. Comp. Laws. Ann. § 10.31(1) (West 2020) (invalidated by *Midwest Inst. of Health*, 958 N.W.2d at 25).

322. *Midwest Inst. of Health*, 958 N.W.2d at 30.

323. *Id.* at 17 (quoting *State Conservation Dep’t v. Seaman*, 240 N.W.2d 206, 209–10 (1976)). The full *Seaman* quote states: “We must be mindful of the fact that such standards must be sufficiently broad to permit efficient administration in order to properly carry out the policy of the Legislature but not so broad as to leave the people unprotected from uncontrolled, arbitrary power in the hands of administrative officials.” *Seaman*, 240 N.W.2d at 210. Prior cases had emphasized the first part of that statement.

324. *Midwest Inst. of Health*, 958 N.W.2d at 51 (McCormack, C.J., concurring in part and dissenting in part).

the people,”<sup>325</sup> and the amicus brief of the Republican-controlled Michigan Senate and House of Representatives argued that “the Legislature—the peoples’ elected representatives”—must be the branch to “protect citizens’ health, safety, and welfare.”<sup>326</sup> In newspaper articles following the decisions, the Republican House Speaker stated that:

The people of this state have been denied a voice and a seat at the table in decisions that have impacted every facet of their lives and their futures over the past eight months. They deserve to have their representatives bring their voice and their concerns into this decision-making process.<sup>327</sup>

The Republican Party Chairwoman added that “[t]he court rightly recognized that the constitution gives the Legislature a role to represent the people of this state.”<sup>328</sup> Conservative legal organizations published blog posts emphasizing legislative accountability: “The governor is not representative of the people,” one wrote, “just 50.1% of the vote.”<sup>329</sup>

A similar story unfolded in Wisconsin roughly six months earlier. There, the Secretary-Designee of the Department of Health Services had issued a safer-at-home order restricting gatherings across the state.<sup>330</sup> The Legislature sued,<sup>331</sup> and the Wisconsin Supreme Court struck down the order as exceeding the Secretary-Designee’s powers.<sup>332</sup> Although the case was litigated on statutory grounds, the court used nondelegation principles as a reason to construe the Secretary-Designee’s ostensibly broad authority narrowly—a sort of nondelegation or major-questions

325. Brief for Am. Leg. Exch. Council as Amicus Curiae Supporting Plaintiffs at 21, *Midwest Inst. of Health*, 958 N.W.2d 1 (No. 161492), <https://www.alec.org/app/uploads/2020/09/Midwest-Institute-of-Health-v-Whitmer-00014576xAf0CA.pdf> [<https://perma.cc/3HCX-2D2M>].

326. Brief for Mich. House of Reps. and Mich. Senate as Amici Curiae Supporting Plaintiffs at 6, *Midwest Inst. of Health*, 958 N.W.2d 1 (No. 161492), <https://www.clearinghouse.net/chDocs/public/PR-MI-0004-0017.pdf> [<https://perma.cc/M69L-X4ZC>].

327. Dave Boucher & Todd Spangler, Michigan Supreme Court Rules Against Whitmer on Emergency Powers but Effect Unclear, *Detroit Free Press* (Oct. 2, 2020), <https://www.freep.com/story/news/politics/2020/10/02/michigan-supreme-court-rules-against-whitmer-emergency-powers/3596332001/> [<https://perma.cc/83N4-R9ZG>] (last updated Oct. 3, 2020).

328. *Id.*

329. Ethan Yang, The Constitutional Reckoning of State Lockdown Orders, *Am. Inst. for Econ. Rsch.* (Oct. 7, 2020), <https://www.aier.org/article/the-constitutional-reckoning-of-state-lockdown-orders/> [<https://perma.cc/R2GM-79SV>].

330. Wis. Dep’t of Health Servs., Emergency Order No. 28: Safer at Home (Apr. 16, 2020), <https://evers.wi.gov/documents/covid19/emo28-saferathome.pdf> [<https://perma.cc/2vsm-leh7>].

331. See Riley Vetterkind & Mitchell Schmidt, Republican Legislature Asks Wisconsin Supreme Court to Suspend Stay at Home Order, *Wis. State J.* (Apr. 22, 2020), [https://madison.com/wsj/news/local/govt-and-politics/republican-legislature-asks-wisconsin-supreme-court-to-suspend-stay-at-home-order/article\\_f2533246-314f-53c2-89b9-b098471b0917.html](https://madison.com/wsj/news/local/govt-and-politics/republican-legislature-asks-wisconsin-supreme-court-to-suspend-stay-at-home-order/article_f2533246-314f-53c2-89b9-b098471b0917.html) (on file with the *Columbia Law Review*).

332. *Wis. Legislature v. Palm*, 942 N.W.2d 900, 918 (Wis. 2020).

canon.<sup>333</sup> Writing for the court's majority, Chief Justice Patience Roggensack invoked nondelegation principles as a guide for the court's narrowing analysis, even though there was no nondelegation claim at issue in the case.<sup>334</sup> Writing in concurrence, Justice Rebecca Grassl Bradley elaborated on democratic themes, among others, noting that delegations to administrative agencies "must be carefully circumscribed in order to avoid the people being governed by unelected bureaucrats" because "the Founders' vision of our constitutional Republic" was that "supreme power is held by the people through their elected representatives."<sup>335</sup> She lamented that Secretary Palm's order "arrogated unto herself the power to make the law and the power to execute it, excluding the people from the lawmaking process altogether."<sup>336</sup>

As in Michigan, democracy talk easily migrated from the court to the public sphere. In an op-ed for the *Washington Examiner*, the general counsel for Wisconsin Manufacturers & Commerce described the Republican lawsuit as "the culmination of a decade long project to ensure that legislators, the elected officials closest to the people, oversee law and policy creation in Wisconsin instead of bureaucrats."<sup>337</sup> Multiple outlets reiterated Bradley's lament regarding the arrogation of power away from "the people."<sup>338</sup> They resonated with the legislative leadership's own longstanding claim that it is "the most representative branch of government and the closest to the people of Wisconsin."<sup>339</sup>

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333. See *id.* at 912 ("We do not construe" the relevant law "as an 'open-ended grant' of police powers to an unconfirmed cabinet secretary." (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion) (explaining that statutory construction that affords a "sweeping delegation of legislative power" has the potential to cause constitutional problems in future cases))).

334. See, e.g., *id.*

335. *Id.* at 927 (Grassl Bradley, J., concurring) (quoting *Koschkee v. Taylor*, 929 N.W.2d 600, 612 (Wis. 2019)).

336. *Id.* at 920.

337. Corydon Fish, Opinion, As Gov. Tony Evers Overreaches on Coronavirus Lockdowns, Wisconsin's Legislature Pushes Back, *Wash. Examiner* (Oct. 14, 2020), <https://www.washingtonexaminer.com/opinion/op-eds/as-gov-tony-evers-overreaches-on-coronavirus-lockdowns-wisconsins-legislature-pushes-back/> (on file with the *Columbia Law Review*).

338. David Keene, Opinion, Governors Can Not Ignore State Constitutions to Impose COVID-19 Restrictions, *Wash. Times* (May 25, 2020), <https://www.washingtontimes.com/news/2020/may/25/governors-can-not-ignore-state-constitutions-to-im/> (on file with the *Columbia Law Review*); Joe Kelly, Wisconsin Justices Strike Down Covid Lockdown Order, *Courthouse News Serv.* (May 13, 2020), <https://www.courthousenews.com/wisconsin-justices-strike-down-covid-lockdown-order/> [<https://perma.cc/KM5D-5FXE>]; Jacob Sullum, Wisconsin Supreme Court Says the State's COVID-19 Lockdown Violated the Rule of Law and the Separation of Powers, *Reason* (May 14, 2020), <https://reason.com/2020/05/14/wisconsin-supreme-court-says-the-states-covid-19-lockdown-violated-the-rule-of-law-and-the-separation-of-powers/> [<https://perma.cc/DWD3-DSZL>].

339. See Erik Gunn, Open Records Request Reveals Overwhelming Opposition to Lame Duck Session, *Wis. Examiner* (Sept. 3, 2019), <https://wisconsinexaminer.com/2019/09/03/open-records-request-reveals-overwhelming-opposition-to-lame-duck/> [<https://perma.cc/3CMY-SHHW>] (quoting Wisconsin Assembly Speaker Robin Vos).

1. *Updating Majoritarian Reasoning.* — If majoritarianism is indeed an operative value, the state nondelegation and major questions doctrines require significant course corrections.

In states where the legislatures do not cross the majoritarian threshold, rooting these doctrines in majoritarian principles is nonsensical. The legislatures of Michigan and Wisconsin, for example, were minoritarian bodies at the time that the courts and officials waxed poetic about their democratic character. In the 2018 elections (the last before the cases were litigated and decided), Republican legislators in Michigan won just 46% of the votes but a majority of the seats in both chambers.<sup>340</sup> The same story holds in Wisconsin, home of one of the most “perfect” gerrymanders in the country, where “Republicans can win close to a supermajority of [H]ouse seats even with a *minority* of the vote.”<sup>341</sup> In 2018, Republicans won 47% of the votes for the state Assembly and 64% of the seats.<sup>342</sup>

In these cases and others like them, insisting that the legislature make important policy decisions cannot be rooted in majoritarianism. What the doctrine really does is subject a statute that passed via bicameralism and presentment—and, by virtue of the governor’s participation, has some marker of majoritarianism—and subject it to a minority veto in the legislature’s name. Majoritarian reasoning thus works as subterfuge: The doctrine deploys majoritarian rhetoric but achieves outright counter-majoritarian results. Indeed, if anything, majoritarian reasoning is *pro*-delegation in such cases. And where the legislature crosses the majoritarian threshold and the battle is between two majoritarian branches, a majoritarian nondelegation doctrine does no work. This section considers, in turn, the implications for nondelegation cases questioning delegations to governors, administrators, and private entities.

First, decisions against delegations to governors, like the Michigan case, have the democratic hierarchy backwards. In arguing that delegations enhance rather than undermine accountability at the federal level, Jerry Mashaw wrote that “[a]ll we need to do is not forget that there are also presidential elections and that . . . presidents are heads of administrations.”<sup>343</sup> So too with governors. Indeed, on some accounts, executive branch elections may be more likely than legislative elections to be salient and policy based, making them a better accountability mechanism for

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340. See, e.g., Jonathan Oosting, Why Democrats Won More Votes, but GOP Won More Legislative Seats in Michigan, *Detroit News* (Nov. 20, 2018), <https://www.detroitnews.com/story/news/local/michigan/2018/11/20/democrats-republicans-michigan-legislature-realignment/2005251002/> [<https://perma.cc/Q8Q4-K79N>].

341. Michael Li, Gerrymandering Meets the Coronavirus in Wisconsin, *Brennan Ctr. for Just.* (Apr. 8, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-meets-coronavirus-wisconsin> [<https://perma.cc/4WZX-3M6R>].

342. Schmidt, *supra* note 205.

343. Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 *J.L. Econ. & Org.* 81, 95 (1985).

delegated decisions.<sup>344</sup> Moreover, as section II.D.1 notes, David Schleicher has offered reasons to believe that gubernatorial elections are less likely than legislative elections to be “second-order” in relation to national politics and thus to instantiate actual accountability for decisions made in office.<sup>345</sup>

Second, decisions invalidating delegations to administrators, like *Wisconsin Legislature v. Palm*, are similarly questionable: Agency administrators are accountable in several ways that the legislature is not. Many state agency heads are themselves elected.<sup>346</sup> Even when they are not, they are accountable through the elected governor, at whose pleasure they usually serve.<sup>347</sup> They are also accountable to the legislature in various ways—through confirmation, in states that require it, and through the many informal hearings and inquiries at a legislature’s disposal.<sup>348</sup> Secretary-Designee Andrea Palm herself was directly responsible to the legislature through her still-pending confirmation, which the legislature had not approved.<sup>349</sup> Thus, while Palm’s stay-at-home order was at that time overwhelmingly popular in Wisconsin<sup>350</sup> (and the legislature was not<sup>351</sup>), both the legislature and governor had ample options to limit her decisionmaking. State administrators may also be accountable to the public directly through public participation procedures, and though

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344. *Id.* at 95–96 (describing legislative elections as hinging on voters’ assessment of the legislator’s “effectiveness in supplying governmental goods and services to the local district,” whereas executive branch elections are more likely to be based on “general governmental policies”).

345. See Schleicher, *supra* note 239, at 765.

346. Seifter, *Understanding State Agency Independence*, *supra* note 243, at 1552–54.

347. See *id.* at 1555, 1559–60.

348. Cf. Josh Chafetz, *Congress’s Constitution: Legislative Authority and the Separation of Powers* 72, 78 (2017) (describing Congress’s oversight power over federal agencies).

349. *Wis. Legislature v. Palm*, 942 N.W.2d 900, 949 n.15 (Wis. 2020) (Dallet, J., dissenting) (“It is the Legislature who controls her confirmation and has yet to vote despite her approval by a bipartisan Senate Committee in August of 2019.”).

350. Charles Franklin, *New Marquette Law School Poll Finds Strong Support for Coronavirus Closings, Even as It Shows Substantial Economic Impact*, Marq. Univ. L. Sch. Poll (Apr. 1, 2020), <https://law.marquette.edu/poll/2020/04/01/new-marquette-law-school-poll-finds-strong-support-for-coronavirus-closings-even-as-it-shows-substantial-economic-impact/> [<https://perma.cc/J7WM-DAJC>] (“Eighty-six percent say that it was appropriate to close schools and businesses, and restrict public gatherings, while 10 percent say that this was an overreaction to the pandemic.”).

351. For example, in a Marquette University poll from May 2020, 46% of respondents approved of the legislature’s overall job, compared to 59% who approved of Governor Evers’s overall job. In addition, 33% of respondents trusted the legislature to lead the state’s reopening efforts, compared to 53% who trusted the governor. Marquette Law School Poll: May 3–7, 2020, Marq. Univ. L. Sch. Poll, [https://law.marquette.edu/poll/wp-content/uploads/2020/05/MLSP60Toplines\\_html.html#q23:\\_who\\_is\\_trusted\\_to\\_lead\\_reopening/](https://law.marquette.edu/poll/wp-content/uploads/2020/05/MLSP60Toplines_html.html#q23:_who_is_trusted_to_lead_reopening/) [<https://perma.cc/2ZZK-LTWK>] (last visited July 23, 2021).

emergency decisionmaking has limited the formal versions of those avenues during the pandemic, they continue informally.<sup>352</sup> Finally, as Mashaw notes, administrators may possess a type of responsiveness, and thus accountability, that legislators do not: the ability to tailor decisions to local and situational circumstances.<sup>353</sup>

This Article does not argue that delegations are necessarily good or bad, wise or unwise. It simply suggests that there is no constitutional reason rooted in majority rule for insisting that the decision be made by the legislature itself. Of course, state legislative composition won't always be as egregious as it was in Michigan and Wisconsin at the time of the two cases discussed here. Sometimes, a delegation from the legislature to governor is an assignment from one basically majoritarian branch to another. But that does not revive the nondelegation argument. It reveals it as a doctrine without a theoretical mooring as to executive delegations.

Finally, on the other hand, taking the doctrines' majoritarian premises seriously might allow the doctrines to continue to prevail as to private delegations. State courts have long been suspicious of broad transfers of power into private hands, and some states treat private delegations with special skepticism.<sup>354</sup> This skepticism can be understood on majoritarian grounds. The Texas Supreme Court articulated such a view in a prominent case striking down a statute that had authorized a private agricultural foundation to propose monetary assessments against cotton growers. In explaining why private delegations must receive "a more searching scrutiny," the court stated that "the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government."<sup>355</sup>

Even as to private delegations, majoritarianism cannot itself provide a precise standard for a private nondelegation doctrine, and it does not suggest that private delegations should be entirely off-limits. As the Texas Supreme Court noted, private delegations "are frequently necessary and

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352. To be sure, state agencies may lack accountability when they fly under the public's radar. See Miriam Seifter, *Further From the People? The Puzzle of State Administration*, 93 N.Y.U. L. Rev. 107, 109–10 (2018). But salience has not been a problem with pandemic-related orders like the one at issue in *Palm*.

353. Mashaw, *supra* note 336, at 98 ("[G]overnmental responsiveness also entails situational variance at any one time. If our laws were truly specific, this would also be impossible.").

354. For a recent treatment of state courts' evaluation of private delegations, see Postell, *supra* note 82, at 310 ("In some states, recent judicial opinions have explicitly affirmed that delegations to private actors will be subjected to greater scrutiny than delegations to public authorities.").

355. *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997).

desirable,<sup>356</sup> and many—like professional licensing schemes—are routinely upheld by courts.<sup>357</sup> Still, majoritarian analysis can help provide a principle around which to reason about the delegation’s permissibility and a factor to weigh in the decision. When the legislature crosses the majoritarian threshold, it is a democratically superior decisionmaker to entirely private entities, even if the legislature remains the state’s least majoritarian branch. A court may properly consider this factor as a weight against the delegation, though the court may also find it offset by other considerations if majorities have other means of representation in the private entity’s decisionmaking process. The Texas standard for nondelegation, which involves eight criteria that include public representation within the private delegate and oversight of it by government officials, aligns with this idea.<sup>358</sup>

2. *Challenging Nonmajoritarian Reasoning.* — Of course, the nondelegation and major questions doctrines do not rest *wholly* on majoritarian reasoning. Articulating and supporting alternative rationales on their own terms, without democracy crutches, would be a marked improvement. That said, taking legislative democracy deficits into account weakens the two leading alternative rationales for the doctrines. Ultimately, grappling with state democratic commitments casts doubt on whether the doctrine has any valid applications except in extreme cases of legislative alienation.

a. *Lockean Arguments.* — The first alternative nondelegation rationale that some state courts have invoked is a Lockean argument: Relying upon John Locke’s Second Treatise of Government, state courts posit that the people have consented for only legislatures to make law, and that means no one else can do it.<sup>359</sup> The Michigan Supreme Court’s decision in *In re Certified Questions*, for example, cited the famous passage from Locke as part of its background discussion.<sup>360</sup> A concurring opinion in the *Palm* decision in Wisconsin also cited the passage to argue against the concentration of power.<sup>361</sup>

I will bracket for present purposes the existing arguments that Lockean reasoning cannot support a nondelegation doctrine at all. Julian Davis Mortensen and Nicholas Bagley have argued that reading a nondelegation principle into the oft-cited Locke passage mistakes Locke’s actual opposition to legislative *alienation* for opposition to delegation, which he lacked.<sup>362</sup> However, this section focuses on the state context in particular;

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356. *Id.*

357. See Postell, *supra* note 82, at 313 (noting that occupational licensing laws “routinely survive scrutiny”); Jaffe, *supra* note 85, at 581 (noting that many state courts have pursued a “wavering course”).

358. See *Tex. Boll Weevil*, 952 S.W.2d at 472.

359. See John Locke, Second Treatise of Government § 141 (1690).

360. 958 N.W.2d 1, 17 (Mich. 2020).

361. See *Wis. Legislature v. Palm*, 942 N.W.2d 900, 921 (Wis. 2020) (Grassl Bradley, J., concurring).

362. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 *Colum. L. Rev.* 277, 307 (2021).

as Louis Jaffe recognized, “the practical issues involved are different for the states than for the federal government.”<sup>363</sup> Three main challenges arise.

First, at the federal level, Locke’s connection to nondelegation cases is originalism: Justice Gorsuch has asserted that Locke was “one of the thinkers who most influenced the framers’ understanding of the separation of powers.”<sup>364</sup> Richard Primus has questioned this connection: Pointing to the work of prominent historians, he notes that Locke “does not seem to have been a major influence in the formation of the Constitution,” as well as the fact that Locke’s vision of the separation of powers was decidedly different from that adopted in the Constitution.<sup>365</sup> But if Locke’s treatise is a curious citation for the federal Framers, it is an even more peculiar reference for state constitutional interpretation. State constitutions, after all, have often been amended throughout their history, and their “framers” are often the people themselves, voting on amendments. Many state constitutions are quite recent. If it is a stretch to believe that Locke was influencing constitution-makers despite writing “a hundred years before and three thousand miles away,”<sup>366</sup> it is even more dubious that his writing was on the minds of those drafting constitutions in the recent past. Was the Michigan Constitution, adopted in 1963, really attempting to ensure a Lockean tenet against delegation?

Second and related, while state legislatures often were conceived with plenary power, “[t]he original delegation of plenary legislative power was soon thereafter followed by repeated amendments of our constitution to restrain, impair or balance the use of the legislative power.”<sup>367</sup> As state constitutions redistributed power, the courts, the executive, and the people have all come to wield aspects of legislative power.<sup>368</sup> State court judges make rules and run programs that would raise eyebrows at the federal level; some state courts view the executive branch as possessing a share of the legislative power; twenty-four states limit legislative lawmaking through the popular initiative; and most state constitutions confer home rule authority on local governments. The Lockean reasoning that the power must rest where the people put it through their constitutional drafting thus does not obviously yield a nondelegation doctrine.

Finally, it is especially odd to invoke Lockean reasoning where minoritarian legislatures are concerned. A commitment to government based on

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363. Jaffe, *supra* note 85, at 562.

364. *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

365. Richard Primus, John Locke, Justice Gorsuch, and *Gundy v. United States*, Balkinization (July 22, 2019), <https://balkin.blogspot.com/2019/07/john-locke-justice-gorsuch-and-gundy-v.html> [<https://perma.cc/8C8V-LT8L>].

366. *Id.*

367. *Silver v. Pataki*, 711 N.Y.S.2d 402, 407 (N.Y. App. Div. 2000), *aff’d per curiam*, 755 N.E.2d 842 (N.Y. 2001) (citing Peter J. Galie, *Ordered Liberty: A Constitutional History of New York* 83–84, 103–05, 121–22, 166–70 (1996)).

368. Bulman-Pozen & Seifter, *supra* note 13, at 902–03.



consent by the majority of the people is, after all, one of Locke's most enduring contributions to democratic thought. His very definition of political society is one in which "the majority have a right to act and conclude the rest."<sup>369</sup> And as the U.S. Supreme Court has reminded in relying on Lockean reasoning to uphold independent redistricting commissions, Locke believed in "[t]he people's ultimate sovereignty."<sup>370</sup> Here, as there, "it would be perverse"<sup>371</sup> to insist that a legislature that does not respond to a majority of the people must be elevated above its sibling branches that do.

b. *Libertarian Arguments.* — Recent developments suggest a second alternative rationale for the nondelegation and major questions doctrines: libertarian reasoning. Although this does not seem to be among state courts' typical leading rationales, several state courts, echoing a strand of federal discourse, have recently invoked libertarian justifications for the nondelegation doctrine. Under this theory, delegating major policy decisions to other bodies may pose a threat to individual liberty.

This theory faces a number of hurdles. First, in some cases it is actually built upon the same majoritarian fallacy described earlier. A concurrence in the Wisconsin decision, for example, wrote: "The concentration of power within an administrative leviathan clashes with the constitutional allocation of power among the elected and accountable branches of government at the expense of individual liberty."<sup>372</sup> In this framing, it seems, liberty is threatened because of the exercise of power by nonmajoritarian actors. This framing is thus a form of majoritarian analysis but with the mistaken premise that maintaining the people's power requires keeping decisions in the legislature's hands.<sup>373</sup>

Other jurists ground liberty in a very different assumption: that exclusive legislative control of important policy decisions protects liberty either by serving as a nonmajoritarian bulwark or at least by making the process sufficiently arduous that it cannot be done with the same dispatch as executive decisionmaking. The former rationale is evident in Justice Gorsuch's dissent in *Gundy*, when he writes that because "majorities can threaten minority rights, the framers insisted on a legislature composed of different bodies subject to different electorates as a means of ensuring that any new

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369. Locke, *supra* note 359, at § 95.

370. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 820 (2015).

371. *Id.*

372. *Wis. Legislature v. Palm*, 942 N.W.2d 900, 927 (Wis. 2020) (quoting *Koschkee v. Taylor*, 929 N.W.2d 600, 611 (Wis. 2019) (Grassl Bradley, J., concurring)).

373. For another example, see *Koschkee*, 929 N.W.2d at 612 ("The philosophical roots of rule by bureaucratic overlords are antithetical to the Founders' vision of our constitutional Republic, in which supreme power is held *by the people* through their elected representatives, and 'the creation of rules of private conduct' is 'an irregular and infrequent occurrence.'" (emphasis omitted) (quoting *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 86 (2015) (Thomas, J., concurring in the judgment))).

law would have to secure the approval of a *supermajority* of the people's representatives."<sup>374</sup> He wrote that this structure "assured minorities that their votes would often decide the fate of proposed legislation."<sup>375</sup> In other words, the legislative design was to limit majoritarianism—and, by definition, allow a minority perspective to prevail—so that laws that might be "the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice."<sup>376</sup>

There are a number of objections to this form of libertarian constitutionalism that will not be the focus here. For one, whether the federal Constitution embodies such libertarian principles is itself a contested question. Whereas some scholars have enthusiastically identified libertarian strains in the founding document, the notion has been called into serious question by legal scholars and historians alike.<sup>377</sup> Moreover, the descriptive premise that the absence of legislation consistently advances rather than undermines liberty or autonomy is itself controverted. As Lisa Heinzerling observes, the Gorsuch vision is "asymmetrical" in that it only seeks to promote "the liberty that comes from freedom from governmental interference," not "the liberty that comes from government protection and assistance."<sup>378</sup> Yet the pandemic has brought into sharp relief how government inaction, or "underreach,"<sup>379</sup> as David Pozen and Kim Lane Scheppele have recently called it, can substantially inhibit freedom of choice.<sup>380</sup>

This Article makes a different point here. The idea that state constitutions embody a commitment to libertarianism in lawmaking strong enough to overcome state constitutions' strong and explicit commitment to democracy is a difficult argument that would require substantial justification. The countercurrents are powerful. To be sure, state constitutions are concerned with protecting individual liberty; they often secure more protections than the federal Constitution.<sup>381</sup> And some states note that the legislative delegations might require special scrutiny when they appear to

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374. *Gundy v. United States*, 139 S. Ct. 2116, 2134 (Gorsuch, J., dissenting) (emphasis added).

375. *Id.*

376. *Id.* at 2135.

377. See William J. Novak, The Myth of the "Weak" American State, 113 *Am. Hist. Rev.* 752, 757–58 (2008).

378. Heinzerling, *supra* note 72, at 16.

379. David E. Pozen & Kim Lane Scheppele, Executive Underreach, in *Pandemics and Otherwise*, 114 *Am. J. Int'l L.* 608, 614–15 (2020).

380. See Heinzerling, *supra* note 72, at 16–18; Ganesh Sitaraman, The Political Economy of the Removal Power, 134 *Harv. L. Rev.* 352, 399 (2020) (critiquing "libertarian constitutionalism" on the ground that it obscures "the equal and opposite principle of needing to enable strong government in order to prevent private tyranny").

381. See Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* 11–12 (2013) (arguing that Americans' positive rights are enshrined primarily in state constitutions).

encroach on particular constitutional rights.<sup>382</sup> But state constitutions also are full of affirmative rights and obligations that require governments to act—rights to education, labor protections, and more.<sup>383</sup> They do not, therefore, obviously associate liberty with the freedom from government action but rather recognize that some types of liberty require government involvement. Even when state constitutions show distrust of government officials, through innovations like single-subject rules and recall provisions, they embrace a need for governance itself; the state constitutional preference is simply to entrust more of that governance to the people directly. Moreover, state constitutions' express commitment to a "democracy principle" of rule by popular majorities<sup>384</sup> seems to bar the view, expressed by Justice Gorsuch, of a constitutional commitment to minoritarian lawmaking.

If they are to develop an argument that would overcome these significant hurdles, state courts cannot assume lightly that their constitutions incorporate the same principles as the federal Constitution. The field of state constitutional law ably shows in voluminous work that the differences between the state and national founding documents run deep.<sup>385</sup> The Michigan Supreme Court's reasoning in *In re Certified Questions* disregards such differences. As noted earlier, the Michigan Constitution was adopted at a 1963 convention. Yet the court seems to assume, without explanation, that the document somehow embodied Founding Era views regarding limited government. As Rick Hills has argued, this is mistaken: The convention documents themselves (which the court does not discuss) display an "obvious purpose": "to create a powerful state government to address the challenges of the civil rights movement" and "to broaden, not restrict the governor's powers."<sup>386</sup>

### C. *Intrastate Preemption*

Much of the case law and commentary on state–local relations tracks a basic dichotomy: the majoritarian state versus the minoritarian locality.

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382. Such state cases consider liberty interests when applying the nondelegation doctrine in areas that raise special liberty concerns, like criminal law. See, e.g., *People v. Holmes*, 959 P.2d 406, 410 (Colo. 1998) (en banc) ("We carefully scrutinize a statutory scheme that establishes criminal penalties for violation of administrative rules because such a delegation implicates an important liberty interest, including the right to reasonable notice of that conduct deemed criminal.").

383. See Zackin, *supra* note 381, at 11–12.

384. Bulman-Pozen & Seifter, *supra* note 13, at 887–89.

385. E.g., Tarr, *State Constitutions*, *supra* note 231, at 6–28; Williams, *State Constitutional*, *supra* note 281, at 178–79.

386. Rick Hills, *Attack of the Clones: How State Courts' Adoption of SCOTUS' Constitutional Doctrinal Disputes Defeats the Purpose of Federalism*, Balkinization (Oct. 4, 2020), <https://balkin.blogspot.com/2020/10/attack-of-clones-how-state-courts.html> [<https://perma.cc/249L-3KBN>].

In this framing, sometimes express and sometimes implicit, the state government speaks for the people of the state as a whole, whereas localities are statewide minorities with some (contested) degree of their own power. The core “vertical” doctrines of intrastate preemption and home rule allow local control of matters of “local concern” but limit local infringement on majoritarianism, especially when the state legislature explicitly preempts local action. Even as the outcomes of particular cases can be unpredictable, the overarching frame seems stable: Whatever other benefits local power might bring, it is statewide control that best serves the statewide majority.

An extensive literature in local government law offers varied normative perspectives on local power, but it, too, echoes the notion of the majoritarian state and minoritarian localities. In some accounts, like Heather Gerken’s, empowering minorities by rendering them local majorities is primarily a normative benefit, serving important equality goals while also promoting variety, experimentation, and more.<sup>387</sup> In other accounts, like Sheryl Cashin’s and Richard Briffault’s, vesting local power in statewide minorities has promoted exclusionary, parochial decisionmaking that entrenches existing wealth disparities within a state or metropolitan area.<sup>388</sup> Local self-interest may require state government to “take a state-wide perspective” and “overrid[e] parochial actions.”<sup>389</sup> More recently, Nestor Davidson has argued that courts might fruitfully navigate localism’s “double-edged sword”<sup>390</sup> by foregrounding the state constitutional value of the “general welfare”: Local actions that “offend the values of the state as a whole” may warrant limitation by the state.<sup>391</sup> Wherever one comes down, a core task in the literature has been to reconcile the benefits of localism with its potential burdens on statewide majority rule.

The majoritarian framing allows state legislatures a lot of mileage as they engage in preemption of local decisionmaking. Sometimes this framing seems genuine; it is the strongest argument against allowing small groups to harm the majority. Other times it is purely rhetorical, even

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387. See *Romer v. Evans*, 517 U.S. 620 (1996); Gerken, *supra* note 33, at 11–12; cf. Richard Briffault, “What About the ‘Ism’?” Normative and Formal Concerns in Contemporary Federalism, 47 *Vand. L. Rev.* 1303, 1314 (1994) (“The multiplicity of governments can increase sensitivity ‘to the diverse needs of a heterogenous society,’ as Justice O’Connor suggested, if some interests that are a minority at the national level constitute a majority within the jurisdiction of a state.”).

388. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *Colum. L. Rev.* 1, 1–2 (1990) [hereinafter Briffault, *Our Localism*]; Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 *Geo. L.J.* 1985, 1988 (2000) (“Localism, or the ideological commitment to local governance, has helped to produce fragmented metropolitan regions stratified by race and income.”).

389. Briffault, *Our Localism*, *supra* note 388, at 6.

390. Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 *Yale L.J.* 954, 958 (2019).

391. *Id.* at 992.

pernicious, as when legislators suggest that urban voters, even when most numerous, give an unrepresentative picture of the electorate.<sup>392</sup> In some cases, this language is self-defeating: To say that “[i]f you took Madison and Milwaukee out of the state election formula, we would have a clear majority,”<sup>393</sup> is to recognize that there is no majority when the whole state is included.

The point here is that devolving power, not just centralizing it, can be a way to effectuate majority rule. The state legislature will not always speak for a statewide majority, but a city might well do so. It will thus sometimes be local power, not statewide power, that serves the state constitutional value of majoritarianism. Under those circumstances, the majority-rule underpinnings of the doctrines negotiating state and local power should tilt them in favor of devolution (subject, of course, to other legal limits).

Consider the recent fights over labor protections and the minimum wage. When cities around the country have attempted to impose a minimum wage, state legislatures, evincing capture by powerful industry groups, have widely preempted local control of the question.<sup>394</sup> Twenty-five states currently preempt local governments from setting minimum wages; fifteen of these have enacted these laws since 2012.<sup>395</sup> But it is the cities, not the states, that appear to be conveying the popular will. In Florida, for example, where a 2003 statute preempted local minimum wage decisions, voters recently passed a minimum wage constitutional amendment by a supermajority vote.<sup>396</sup> Polling shows that increasing the minimum wage is very popular elsewhere, too—81% in Louisiana, for example,<sup>397</sup> and 67% nationwide.<sup>398</sup>

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392. See Badger, *supra* note 119.

393. *Id.*

394. See Laura Huizar & Yannet Lathrop, Nat’l Emp. L. Project, *Fighting Wage Preemption: How Workers Have Lost Billions in Wages and How We Can Restore Local Democracy* 8–11 (2019), <https://s27147.pcdn.co/wp-content/uploads/Fighting-Wage-Preemption-Report-7-19.pdf> [<https://perma.cc/M3EH-PVGH>].

395. *Id.* at 13.

396. A prior constitutional amendment passed in 2004, authorizing the state legislature or “any other public” body to increase the minimum wage above the federal rate. A state court ruled that the amendment had not affected the preemption provision in the 2003 statute. See Natalie Storch & Kimberly Doud, *Florida Passes Amendment 2, Gradually Increasing Florida’s Minimum Wage to \$15 an Hour*, *Littler Workplace Pol’y Inst.* (Nov. 9, 2020), <https://www.littler.com/publication-press/publication/florida-passes-amendment-2-gradually-increasing-floridas-minimum-wage> [<https://perma.cc/WV29-WKFFV>].

397. See Michael Henderson, *Reilly Ctr. for Media & Pub. Affs.*, *The Louisiana Survey 2019*, at 6 (2019), <http://pprllsu.com/wp-content/uploads/2019/05/Louisiana-Survey-2019-Report-Full-Final.pdf> [<https://perma.cc/4VF8-3PK9>].

398. Leslie Davis & Hannah Hartig, *Two-Thirds of Americans Favor Raising Federal Minimum Wage to \$15 an Hour*, *Pew Rsch. Ctr.* (July 30, 2019), <https://www.pewresearch.org/fact-tank/2019/07/30/two-thirds-of-americans-favor-raising-federal-minimum-wage-to-15-an-hour/> [<https://perma.cc/2YXY-QJVM>]; cf. Richard C. Schragger, *The Political*

Even when the city would be a statewide minority too—say, a small town with distinctive concerns—preemption by a countermajoritarian body does not affirmatively advance democracy. Indeed, preemption without majoritarianism calls into question the legitimacy of legislatures' power over local governments, as Diller has argued.<sup>399</sup> And Nikolas Bowie's recent work on the constitutional right to local self-government suggests that the state constitutional right to assembly may protect local government voice and guard against "disproportional representation," including through extreme partisan gerrymandering.<sup>400</sup> The state constitutional right to assembly might undermine preemption carried out by countermajoritarian legislatures.<sup>401</sup>

D. *The Independent State Legislature Doctrine*

The independent state legislature doctrine, too, requires revisiting in light of state legislative realities.

As with the nondelegation doctrine, the independent state legislature doctrine appears fragile for reasons other than the majoritarian premises examined here. It appears doctrinally foreclosed as a matter of longstanding Supreme Court precedent. In addition to *Arizona State Legislature*, mentioned in Part I, earlier cases rejected the view that the Elections Clause divests courts of the power to review state legislative regulation of federal

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Economy of City Power, 44 *Fordham Urb. L.J.* 91, 130 (2017) ("What is now a national minimum wage movement had little political traction until cities adopted their own wage floors in the mid-2000s.").

399. See Diller, *The Political Process of Preemption*, *supra* note 117, at 354 ("[A]n implicit premise of the legitimacy of state legislatures' power over their subdivisions was compliance with . . . the majoritarianism envisioned by *Reynolds*.").

400. See Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 *Yale L.J.* 1652, 1662–63 (2021) ("A constitutional right of self-government has the potential not only to provide disenfranchised individuals and communities with a constitutional interest in participating in government, but also to provide local governments with authority to pursue broader initiatives without the explicit permission of central governments.").

401. This analysis yields a corollary that preemption by governors should be less concerning on majoritarian grounds than preemption by state legislatures directly. That said, strong gubernatorial administration also raises the risk that powerful governors face few checks when they go astray, see Seifter, *Gubernatorial Administration*, *supra* note 26, at 490–91. It is not possible to weigh these considerations in the abstract.

elections<sup>402</sup> or frees state legislatures from compliance with state constitutions.<sup>403</sup> Adopting the doctrine also would lead to untenable practical results and upend federalism principles by invalidating scores of provisions in state constitutions that regulate elections and redistricting.<sup>404</sup>

This Part instead focuses on two insights for state democracy, one normative and one interpretive.

The normative point helps to adjudicate between two views that have been advanced regarding the independent state legislature doctrine. In one view, advanced by Justice Gorsuch, the Eighth Circuit, several Fourth Circuit judges, and some commentators, hewing to the choices of the state legislature alone best serves democracy. It does so because the legislature is the body closest to the people, closer than the state's unelected executives, its courts, and the federal courts.<sup>405</sup> In the opposing view, wresting a decided election away from the voters is shockingly undemocratic.<sup>406</sup> In this view, the people have already spoken; the legislature is attempting to countermand them and is seeking to do so free from the checks of presentment and judicial review that typically confine it.

If this question were close, recognizing the countermajoritarian nature of some state legislatures—which happen to be the legislatures that mattered in the 2020 election and perhaps beyond—would resolve it. The state-legislatures-as-pinnacle-of-democracy argument does not work when the legislature speaks for a statewide minority. And the independent state legislature doctrine is more likely to come up in such states, because closely contested elections and divided government provide the natural

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402. See *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) (noting that “nothing in the language of [Article I, Section 4 of the Constitution] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen’s right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction”).

403. See *Smiley v. Holm*, 285 U.S. 355, 368 (1932) (rejecting the idea that the Elections Clause would “endow the Legislatures of the state with the power to enact laws in any manner other than that in which the Constitution of the state has provided”).

404. See Brief of Amicus Curiae Governor Arnold Schwarzenegger in Support of Defendants’ Opposition to Motion for Temporary Restraining Order and Preliminary Injunction at 15 tbl.1, 24 tbl.2, *Boguet v. Boockvar*, No. 3:20-CV-00215-KRG (W.D. Pa. Oct. 28, 2020), ECF No. 62-1 (providing tables of state constitutional provisions governing voting, elections, and redistricting); Douglas, *Undue Deference*, supra note 126, at 19–20 (“[P]erhaps the best rejection of the independent state legislature doctrine relates to the consequences of its logical extension: it would call into question tons of election rules—especially if the doctrine means that legislatures cannot delegate their authority to another actor, as at least Justice Gorsuch seemed to indicate.”).

405. See supra section I.B.

406. See, e.g., Richard Primus, *Opinion, Why Michigan’s Top Legislators Should Cancel That Meeting With Trump*, Politico (Nov. 19, 2020), <https://www.politico.com/news/magazine/2020/11/19/michigan-legislators-trump-meeting-438538> [<https://perma.cc/6LJY-LTK9>] (“State legislatures have the power to change the system for choosing electors in *future* elections, but not to reject an already conducted election just because they don’t like the result.”).

reasons to raise it. Moreover, even when the state legislature crosses the majoritarian threshold, it is not clearly more majoritarian than the other entities that might participate in shaping the state's election rules: governors, state agencies, and state courts.

Three of the states in which the doctrine was invoked in 2020—North Carolina, Wisconsin, and Pennsylvania—had heavily gerrymandered and minoritarian legislatures at the time.<sup>407</sup> Consider the North Carolina case as an example. There, the State Board of Elections had voted unanimously (and, the Fourth Circuit added, “in bipartisan fashion!”) to extend, from three to nine, the number of days after Election Day by which mailed ballots could be accepted.<sup>408</sup> A group of plaintiffs entered into a settlement with the Board based on this extension, and a state court approved the settlement.<sup>409</sup> The two Republican leaders of the North Carolina legislature sued, alleging, *inter alia*, that the Board had exceeded its authority under North Carolina statutes, and that in turn the Board (and presumably the state court approving the consent judgment) had violated the Elections Clause.<sup>410</sup> In their complaint, they applied majoritarian reasoning, urging that the Elections Clause exists to ensure that the regulation of federal elections is entrusted “to the branch of state government that is closest to the people.”<sup>411</sup>

That is a difficult claim for North Carolina's legislative leadership to sustain. On one side of the dispute, there are two North Carolina legislators who preside over a legislature so gerrymandered that a North Carolina court held it in violation of the state constitution.<sup>412</sup> As a state court explained in *Common Cause v. Lewis*, the state legislature's 2017 district lines were skewed “to advantage Republicans and reduce the effectiveness of Democratic votes.”<sup>413</sup> And in turn, the court concluded (because “there was little meaningful dispute”<sup>414</sup>) that the lines “evinced a fundamental distrust of voters by serving the self-interest of political parties over the public good,”<sup>415</sup> that the extreme partisan gerrymandering did not serve

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407. In a third state, Minnesota, one chamber of the legislature (the Senate) was apparently minoritarian, but in any event, the legislature did not oppose the extension of the absentee ballot deadline. See *Carson v. Simon*, 978 F.3d 1051, 1066 (8th Cir. 2020) (Kelly, J., dissenting). The federal court thus seemed to ascribe to the legislature a position on a question that it thought it had delegated to the executive branch.

408. *Wise v. Circosta*, 978 F.3d 93, 97 (4th Cir. 2020).

409. See *id.*

410. See Complaint for Declaratory and Injunctive Relief at 2, *Moore v. Circosta*, No. 4:20-CV-182 (E.D.N.C. filed Sept. 26, 2020), 2020 WL 5913336.

411. *Id.* at 2.

412. *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584, at \*10 (N.C. Super. Ct. Sept. 3, 2019).

413. *Id.* For further discussion of this case, see Bulman-Pozen & Seifter, *supra* note 13, at 910–12.

414. *Common Cause*, 2019 WL 4569584, at \*10.

415. *Id.* at \*110.



“the will of the people,” but rather “the will of the map drawers”<sup>416</sup> and therefore violated “the fundamental right of North Carolina citizens to have elections conducted freely and honestly.”<sup>417</sup> The court ordered the drawing of a new map, but it was not yet in effect in the run-up to the 2020 elections.<sup>418</sup>

The Board of Elections, on the other hand, is an executive branch agency that is appointed by and reports to the elected governor. Indeed, although a lame-duck North Carolina legislature had attempted to remove the governor’s control over the Board in 2016, the North Carolina Supreme Court rejected that effort, ruling that gubernatorial control over the Board was constitutionally required.<sup>419</sup> Several rounds of litigation followed, as well as a failed constitutional amendment the legislature proposed to recreate the independent, eight-member board.<sup>420</sup> Moreover, on this measure that the legislature challenged, the Board’s five members had voted, unanimously and across party lines.

The North Carolina case drives home the fallacy of depicting the independent state legislature doctrine as a majoritarian necessity. It is hard to see how honoring the wishes of the two leaders of the unconstitutionally gerrymandered legislature would have been a better approximation of the will of the people than adhering to the decision of the officials appointed by the popularly elected governor. (It is harder still to see how doing so could ever be reason to override the votes of the people in the election at issue.) If the independent state legislature doctrine can be defended, it must be based on something other than notions of democracy, and that alternative basis must be strong enough to overcome its antidemocratic character.

A second point about the independent state legislature doctrine is interpretive. Several scholars have persuasively argued that the doctrine cannot empower state legislatures to the exclusion of state constitutions, because there is no such thing as a free-floating state legislature, unmoored from its constitution.<sup>421</sup> As other scholars explain, state constitutions create, limit, and define state legislatures.<sup>422</sup> When interpreting the

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416. Id. at \*4.

417. Id. at \*2.

418. Id. at \*135.

419. *Cooper v. Berger*, 809 S.E.2d 98, 114 (N.C. 2018), aff’d, 852 S.E.2d 46 (N.C. 2020).

420. The history is usefully recounted in *Crowell v. North Carolina*, No. 1:17CV515, 2018 WL 6031190, at \*1–3 (M.D.N.C. Nov. 16, 2018).

421. See, e.g., Akhil Reed Amar, Vikram David Amar & Neal Kumar Katyal, Opinion, *The Supreme Court Should Not Muck Around in State Election Laws*, N.Y. Times (Oct. 28, 2020), <https://www.nytimes.com/2020/10/28/opinion/supreme-court-elections-state-law.html> (on file with the *Columbia Law Review*) (“This idea that state constitutions are irrelevant, and that all that matters is what state legislatures say, is preposterous.”).

422. See Douglas, *Undue Deference*, supra note 125, at 19.

federal Constitution, an interpreter must thus “take ‘legislatures of the states’ as it finds them—subject to control by the people of the states.”<sup>423</sup>

Reflecting on the evolution of state legislatures reveals a corollary to this argument that is significant for American constitutionalism and democracy. Federal constitutional interpretation must indeed take state legislatures as it finds them under state constitutional law. And that means that as states have amended their constitutions to engineer more democratic legislatures, they effectively amend the federal Constitution as well.

This reality may seem surprising given the extensive discussions in constitutional law circles of how Article V’s supermajority requirements make the federal Constitution unamendable in modern times.<sup>424</sup> Many scholars have lamented, as a result, that it is both urgent yet seemingly impossible to update the federal Constitution to make it more democratic.<sup>425</sup> Yet the long history of state constitutional amendments are one way the American people have done just that.<sup>426</sup> As state constitutions moved from legislatures in which all power of the state was consolidated to bodies that are more responsive to the people and other branches, state constitutions updated the Elections Clause and the Presidential Electors Clause.

This observation is less strange when one recalls, as Donald Lutz has written, that the federal Constitution is “an incomplete text.”<sup>427</sup> It relies in a number of places on choices made by state constitutions. The federal Constitution incorporates states’ voter qualifications, for example, and, as discussed here, relies on state regulation of elections in the Elections Clause and Presidential Electors Clauses.<sup>428</sup>

State constitutions, then, are one of precious few avenues for injecting actual democracy into the federal Constitution and into federal elections. That gives the interpretive point regarding the independent state legislature doctrine a normative dimension and underscores the initial critique of the doctrine. States have reformed state legislatures over the course of two centuries to bend them more toward the will of the people. They have been far from entirely successful, as this Article shows—but their starting points were far worse. And in reforming state democracy, state constitutions have played a role, even if small, in reforming national democracy. It is thus all the more upside down to think that (unelected) federal courts

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423. Amar, *supra* note 123, at 1053.

424. See, e.g., Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *Colum. L. Rev.* 121, 121 (1996) (identifying Article V as one of the “many democracy-restraining features of the Constitution”).

425. Levinson, *Our Undemocratic Constitution*, *supra* note 37, at 169–70.

426. Cf. Bulman-Pozen & Seifter, *supra* note 13, at 861 (discussing how state constitutions can serve as a way to combat antidemocratic behavior when the federal Constitution does not provide such protection).

427. Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 13 *Intergovernmental Persp.* 14, 16 (1987).

428. Bulman-Pozen & Seifter, *supra* note 13, at 902–03.

could interpret the federal Constitution to wrest decisions (about elections) away from the legislature that the people constructed—the one that at least now has the checks of gubernatorial presentment, procedural and substantive limits, and state judicial review—and in favor of a platonic, partisan entity that does not report to anyone.

#### CONCLUSION

Majority rule is of course not all that matters to state governance. State constitutions counsel value pluralism, not myopia. Democracy itself must be tempered by state constitutional commitments to individual rights and the separation of powers, and it is not meaningful without political equality. Moreover, majority rule itself can be enhanced in any number of ways, including through measures that attempt to improve deliberation, participation, and minority input. But majority rule is a state constitutional value—one that state government, and state constitutional doctrine, are often honoring in the breach. Looking ahead, this disjunction can be corrected in two types of ways.

First, there are a set of reforms that this Article has not focused upon. Reformers committed to democracy are already rethinking how we structure elections and proposing ways to move away from legislative dependence on winner-take-all elections in single-member districts. Although such structural reform tends to be a difficult path politically, experimentation at the state and local level may be just the place to start.<sup>429</sup> Moreover, there are a host of ways that state legislatures might reform legislative practice to blunt the force of manufactured majorities, including by promoting deliberation, giving minority parties greater voice, and seeking to restore a culture of compromise.

More immediately, there are the changes that this Article promotes: revisions to doctrine and discourse that more accurately take stock of present-day state legislatures. In some circumstances, majoritarian decision-making matters to the allocation of power between the horizontal state branches or between states and localities. When that is true, it is past time to jettison misleading myths about the character of state branches—and to subject legislatures, like their sibling branches, to careful analysis.

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429. See Joshua A. Douglas, *Local Democracy on the Ballot*, 111 *Nw. U. L. Rev. Online* 173, 174 (2017).

