ARTICLES

LAYERED CONSTITUTIONALISM

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It is conventional wisdom that the states are free—within wide constitutional parameters—to structure their governments as they want. This Article challenges that received wisdom and argues that the Supreme Court has drawn on an eclectic set of constitutional provisions to develop a broader body of federal constitutional rules of state structure than previously understood.

This Article gathers and systemizes that body of law. It first locates the expected and unexpected constitutional openings onto which federal courts have seized to rule on questions of state structure. The Article then distills the haphazard, often conflicting, and sometimes even bizarre approaches federal courts have used to decide when and why the federal Constitution constrains state structural discretion and what state governance structures it endorses. The Article finally turns to the implications of this body of doctrine for both federalism and federal structural constitutional law. It develops a vocabulary to understand both why these cases have not been incorporated into the federalism canon and the institutional design choices and values they implicate.

Ours is a system of layered constitutionalism, but not one in which each government's constitutionally chartered structures operate discretely. It is one that contains structural interdependencies between the federal and state constitutional structures. The challenge is to locate structural interdependencies in ways that preserve the values of our system of layered constitutionalism—a challenge, this Article shows, that the Court has not yet met.

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INTRODUCTION

Structural disputes are ubiquitous in constitutional law. Constitutions provide a blueprint for government—charting institutions, allocating authority, facilitating coordination, and engineering friction. And although the federal Constitution and all fifty state constitutions establish systems of divided power, they also envision interdependence between their governmental departments—like lawmaking through bicameralism and presentment—which invites both coordination and contestation.

It is therefore unremarkable for the United States Supreme Court to settle a dispute over the scope of executive power or the boundaries between presidential and congressional authority.[1] And it is likewise

1. See, e.g., Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2224 (2020) (holding the CFPB's for-cause removal structure violates the Executive's removal authority); Zivotofsky v. Kerry, 576 U.S. 1, 31–32 (2015) (settling a dispute between President's

unremarkable for a state high court to resolve a disagreement between its legislature and governor.[2] That structural disputes typically play out within the jurisdiction in which they arise is for good reason: How a people structure their own government is one of their most intimate and foundational choices. Indeed, it is a widely accepted principle of American federalism—stated time and again[3]—that the states are free to structure their governments as they see fit, subject to several settled constitutional parameters.[4] For those reasons, the conventional wisdom goes, it would be unusual for a question about the internal structure of Colorado's or Kansas's or Oregon's government to be adjudicated by a federal court, according to federal law, instead of by that state's own court and guided by its own constitutional plan.

This Article shows, however, that in many different substantive areas, the Supreme Court has elaborated a body of *federal* constitutional rules that directly and indirectly govern *state* structure—a set of doctrinal rules more pervasive than previously understood. Indeed, state structural questions play a defining role in a striking range of Supreme Court cases.

To name just a few: *Hollingsworth v. Perry*[5] set up a ruling on the constitutionality of state laws prohibiting same-sex marriage. But the Court instead dismissed the case for lack of standing, reasoning that, as a matter of federal constitutional law, the state had not authorized initiative

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recognition power and Congress's passport power); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585–87 (1952) (articulating the power framework when President acts without congressional authority).

2. See, e.g., Brewer v. Burns, 213 P.3d 671, 673 (Ariz. 2009) (resolving a dispute brought by governor to compel legislature to present budget bills); Nate v. Denney, 464 P.3d 287, 288 (Idaho 2017) (resolving a dispute brought by the legislature to compel the secretary of state to certify a state bill); Op. of the Justs., 123 A.3d 494, 497 (Me. 2015) (providing an advisory opinion sought by governor as to legal effect of certain bills); In re Request of Governor Janklow, 615 N.W.2d 618, 619 (S.D. 2000) (providing an advisory opinion sought regarding the effect of gubernatorial vetoes); In re Turner, 627 S.W.3d 654, 656 (Tex. 2021) (resolving a dispute brought by state legislature over governor's veto power).

3. This longstanding principle was expressed at the time of the Founding. See Federalist No. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961) ("States may choose to substitute other republican forms . . . . The only restriction imposed on them is that they shall not exchange republican for antirepublican Constitutions."), and continues to be expressed by the Supreme Court. See, e.g., Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2197 (2022) ("Within wide constitutional bounds, States are free to structure themselves as they wish."); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Through the structure of its government . . . a State defines itself as a sovereign.").

4. Specifically, states cannot structure their governments in manners that violate their residents' federal constitutional rights; they cannot shield their courts from enforcing federal law consistent with the Supremacy Clause; and they cannot (at least in theory) depart from a basic "republican form of government," although the constitutional provision imposing that limitation is rarely used. See infra notes 269–271. Part III discusses these exceptions at greater length.

5. 570 U.S. 693 (2013).

proponents to represent "the state" in federal court.[6] Just last term, by contrast, in *Biden v. Nebraska*,[7] the Court allowed a challenge to the President's student loan discharge policy to proceed, concluding that the state of Missouri could claim fiscal injuries suffered by a quasi-public corporation as "the state's"—notwithstanding the corporation's own decision to remain out of the lawsuit.[8] Last term, too, the Court decided *Moore v. Harper*[9] by resolving a percolating ambiguity about how the federal Constitution understands the role of state "legislatures" in regulating elections.

But state structural questions also arise in unexpected places: Over the decades, the Court has shaped the course of Eighth Amendment jurisprudence on a matter as significant as the constitutionality of capital punishment. Eighth Amendment "cruel and unusual punishment" doctrine instructs courts to consider whether a punishment conflicts with "the evolving standards of decency that mark the progress of a maturing society."[10] The Court has disproportionally relied on statutes enacted by state legislatures to give content to those evolving views, while dismissing or minimizing the relevance of views expressed through other state actors who—pursuant to state constitutional or statutory law—also express state policy on questions of punishment.[11] And the cases about state structure that this Article identifies reach broader still, to areas ranging from sovereign immunity, to constitutional amendments, to how the Court decides who speaks for the state on the shadow docket.

These cases do not merely nod to state structure on the way to reaching (or, in some cases, not reaching) questions of substantive constitutional law. They pronounce upon basic state structural questions that are ordinarily the province of state constitutional drafters.[12] These cases have not yet been drawn together or scrutinized as a common body of doctrine—a form of federal constitutional regulation of state structure. Once this body of federal doctrine of state structure is made visible, its substantive import is clear: How a government is structured and

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6. Id. at 701.

7. 143 S. Ct. 2355 (2023).

8. Id. at 2366.

9. 143 S. Ct. 2065 (2023).

10. Furman v. Georgia, 408 U.S. 238, 269–70 (1972) (Brennan, J., concurring) (internal quotation marks omitted) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

11. See infra section II.B.

12. Among others, this Article collects federal rules related to who speaks for the state, how power is allocated among a state's coordinate branches, what constraints (from lawmaking by bicameralism and presentment to judicial review) those branches are subject to, and what internal form state institutions must take (from the role of referenda and initiatives in state legislative processes, to the committees and commissions legislatures can encompass, to the role of the governor in the lawmaking process).

decisionmaking authority is diffused—in other words, institutional design—determines substantive law and substantive outcomes.

This Article uses the terms "regulate" and "rule" to capture the broad ways in which the Court has found the Constitution to speak to state structure. These rules of state structure include mandates (requiring state institutions to function in a federally preferred way), prohibitions (barring states from operating in a federally unpreferred way), taxes (raising the cost of state structural choices), and conditions (conditioning state participation in a federal activity on particular state structural choices).

The Supreme Court's siloed and often sui generis treatment of these cases accounts in substantial measure for the lack of coherence to this body of law. Although these rules taken together make up a significant thread of federalism doctrine (and, in turn, shape the federalism dynamic between and among our governments), the Court has never treated them as such, generally omitting considered discussion (and sometimes omitting *any* discussion) of their federalism stakes.[13]

This Article, then, tells both a story about the eclectic and unexpected ways that federal constitutional law regulates and speaks to state structural choices and a story about how, in diffuse and often siloed ways, that body of law came to be—how the Constitution creates openings, how the Supreme Court has seized upon them, and how it has embedded often consequential judgments about state structure in plain sight.

Part I shows that a wide range of constitutional provisions create openings—through spare mentions of "the states"; unelaborated invocations of state "legislatures," "executives," and "judges"; and provisions governing broad topics like Article III standing and cruel and unusual punishment that seem facially to have little or no connection to federalism or state structure—that the Court has seized to develop doctrine that directly and indirectly regulates state structure.

Part II considers the resulting doctrine together for the first time. It shows that because the constitutional spaces described in Part I do not articulate clear and affirmative constraints on state structure (indeed, many do not seem to speak to state structure at all), the rules the Court

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13. For perspective, prominent branches of federalism doctrine have encompassed just a handful of cases and yet invited significant critique and assessment. For example, the anticommandeering rule, a doctrine viewed as highly significant in the federalism world, has been elaborated through just five major cases since it was first recognized in 1992. See New York v. United States, 505 U.S. 144, 161 (1992) (first recognizing the anticommandeering principle); see also Haaland v. Brackeen, 143 S. Ct. 1609, 1641 (2023) (holding that the Indian Child Welfare Act does not violate Tenth Amendment's anticommandeering principle); Murphy v. NCAA, 138 S. Ct. 1461, 1475 (2018) (holding that a federal law prohibiting sports gambling violated the anticommandeering principle); Reno v. Condon, 528 U.S. 141, 151 (2000) (holding that the Driver's Privacy Protection Act does not violate the anticommandeering principle); Printz v. United States, 521 U.S. 898, 993 (1997) (holding that Congress could not commandeer state actors to administer background checks during firearm sales).

has elaborated instead regulate state structure more circuitously by adopting various (sometimes inconsistent) ways to understand the federal Constitution to define what "the state" is, how states must allocate and distribute power, and which institutions count as the state and for what purpose. To that end, the Court has set out constitutional conceptions of the state—and structural blueprints to which its institutions must conform for certain federal purposes—using several techniques.

It analogizes the states to *generic republics* (that is, to what a federal court believes a state should look like) and then taxes states that do not conform to that template. It requires states to embrace agency relationships common in *private organizations* even when a state constitution embraces a different representative framework. It conceptualizes states as *federal adjuncts*, detaching them from their state constitutional contexts when performing certain functions and rendering them arms of the federal system (or, in some cases, declining to do so). It attempts a kind of *modified deference*, mixing together respect for how states have structured their governments with coordinate rules that restrict state discretion. And, at times, it adopts a posture of *nonintervention*, refusing to take a position on intrastate structural disputes—like who can legally speak for the state—but, in so doing, shaping state structure nonetheless.[14]

Considered together, these cases yield an untidy, inconsistent, and sometimes haphazard conception of "the state" and of the legal tenets that ground its structure. And because, as Part II further reveals, the Court frequently lacks a vocabulary for expounding the federalism stakes of this form of state structural regulation, these cases are peppered with undefended assumptions and unjustified references to federalism-orienting principles.

Part III places this body of rules in context and begins to frame its implications for federalism and for federal structural constitutional law. Federalism doctrine and scholarship tend to focus on three design features of our federalist system: its boundaries, its jurisdictional distributions, and (more recently) its "rules of engagement."[15] The rules collected here relate to a different design choice: how to legally organize our system's internal governments. Federalist regimes can, and do, organize their internal governments as administrative organs of the central government, as federal constitutional departments, through corporate charters, or—as in our system—through separate, self-determined constitutions. This Part argues that the choice to structure our constitutional system in the latter manner—to establish what we call a system of *layered constitutionalism*—deserves more attention.

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14. See infra Part II.

15. See infra section III.A. Federalism scholarship, of course, also engages a vivid federalism world that exists outside of doctrinal reach that documents the many subconstitutional forms of federal–state engagement. See sources cited infra notes 277–283.

The implications of that choice for individual rights have been amply plumbed.[16] But constitutions do not just grant rights; they also chart structures. And the structural implications of America's layered constitutionalism—which the doctrinal rules this paper implicate—have received far less attention. Most importantly, in our system of layered constitutionalism, those layers are not crisply separated; instead, the rules collected here form what we call *structural interdependencies*. State institutions are shaped not just by their own constitutions but by the terms and doctrines of the federal Constitution. The question that Part III begins to explore is how deeply these structural interdependencies should run and whether federal courts are suited to the task of making those determinations. It argues that across diverse values that inform the design of a federalist system, state constitutional autonomy serves important functions.[17] If one subscribes (as the Supreme Court has) to traditional federalism values—such as dual sovereignty—then the value of outwardly reasoning and considering state structural autonomy is self-evident.

But for contemporary federalism scholarship, the argument is perhaps surprising. Contemporary federalism, in a wide range of other areas—from politics, to joint programs, to cross-governmental acts of lawmaking and rulemaking—celebrates the porousness and intermeshing of federal and state governments.[18] This Article argues that even for those scholars (one of us among them) who would "shear[] [federalism] of sovereignty"[19]—and allow the states and federal government to energetically negotiate and renegotiate their policy jurisdiction—constitutional autonomy is the formalist *in*dependence that these many forms of functional *inter*dependence need to flourish.[20]

This body of constitutional law also has implications for questions about federal structural constitutional law, namely in conversations about the Court's institutional role in designing a body of intersystemic constitutional law through a system of dispute resolution. In forging federal constitutional rules of state structure, the Supreme Court operates at the intersection of two institutionally sensitive areas: federalism and the separation of powers. Through its involvement in what are often heated state political matters—contests between governors and legislatures, state

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16. Justice William Brennan was widely credited with reinvigorating interest in state constitutions as a second layer of protection for individual rights, see William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977) [hereinafter Brennan, State Constitutions], which spawned—in turn—an enormous body of scholarship. See sources cited infra notes 240 & 242.

17. See infra section III.B.

18. See infra section III.B.2.

19. Heather K. Gerken, The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 14 (2010) (internal quotation marks omitted).

20. See Bridget A. Fahey, Federalism by Contract, 129 Yale L.J. 2326, 2415–16 (2020) [hereinafter Fahey, Federalism by Contract] ("There are good reasons to 'shear' federalism of the reflexive sovereignty-as-separation recited over and again in Supreme Court cases.").

high courts and state agencies—the Court assumes a role of umpire-from-without, blurring the lines between the federal and state systems of government and issuing judgments that choose political winners and losers, not just in the state before the Court but also potentially many others.[21] The Court's failure to produce a consistent and reasoned body of law in this complex structural terrain suggests that it has yet to develop the tools necessary to manage the sensitivities of this distinctive intersystemic structural intersection.

I. FEDERAL CONSTITUTIONAL OPENINGS

This Part begins with a bird's-eye view of the textual and doctrinal architectures that provide openings for the Supreme Court to articulate federal constitutional doctrine that speaks to state structure. Before getting there, it is worth noting three express and settled federal constitutional rules of state structure. First, the Constitution's Supremacy Clause requires state judges to enforce federal law.[22] As Paul Kahn observed, and California Supreme Court Justice Goodwin Liu recently reiterated, when "state courts interpret the Federal Constitution, they are acting as 'an instrumentality of federal authority' that is unquestionably subordinate to the Supreme Court."[23] Second, the federal Constitution shapes state structure by requiring compliance with federal constitutional rights. This well-known federalism dynamic applies irrespective of the governmental actor who would intrude upon them. Third, the Constitution contemplates that each state's structure will be of a particular governmental type by directing the federal government to "guarantee to every State in this Union a Republican Form of Government."[24] Those overt federal regulations of state structure are not our concern here.

Our concern instead is the covert federal regulations of state structure that have arisen in less direct ways and through less obvious constitutional openings.[25] Although the Supreme Court regularly draws conclusions about state structure from a range of provisions, it rarely views them as a set, instead treating cases that arise under them as either completely or partially sui generis, making a degree of systemization a worthy endeavor. This Part offers a basic account of the federal Constitution's references to states and to their internal structuring, both explicit and implicit.

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21. See infra Part II.

22. U.S. Const. art. VI, § 2 ("This Constitution, and the Laws . . . ; and all Treaties . . . of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."); see also Testa v. Katt, 330 U.S. 386, 389 (1947) (holding that state courts must hear federal claims when they would hear analogous state claims).

23. Goodwin Liu, State Constitutions and the Protection of Individual Rights: A Reappraisal, 92 N.Y.U. L. Rev. 1307, 1329 (2017) (quoting Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 Harv. L. Rev. 1147, 1165 (1993)).

24. U.S. Const. art. IV, § 4.

25. See supra note 4.

A. *"The States"*

To start, several provisions of the federal Constitution mention states as discrete legal entities by referring to "the states," "each state," or components that comprise "the United States." "The States," for instance, are authorized to enter into compacts or agreements with one another[26] and regulate "the Militia" (today, the National Guard) by appointing officers and training troops.[27] "[E]ach State" is obligated to give "Full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State."[28] And no "one of the United States" may be subjected to suit by the "Citizens of another State," a right of sovereign immunity that courts have extended beyond its plain text.[29]

How do these provisions, which refer to the states as unified legal entities, raise internal state structural questions? States are *theys*, not *its*:[30] They are composed of agencies, institutions, subdivisions, and more, each of which has a different incentive and entitlement under state law to claim to be (or not to be) "the state" for a given purpose. For instance, an elaborate body of constitutional doctrine guides federal courts in evaluating whether a state agency, state-chartered committee, or state subdivision is sufficiently "the state" to assert a state's sovereign immunity in court.[31] For that reason, even bare references to "the states" can require

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26. U.S. Const. art. I, § 10 (contemplating that the "State" could, with "the consent of Congress[,]" "enter into" an "Agreement or Compact with another State").

27. Id. art. I § 8, cl. 16 (allocating to Congress the power of "organizing, arming, and disciplining, the Militia" but "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress").

28. Id. art. IV, § 1.

29. Id. amend. XI; see also Alden v. Maine, 527 U.S. 706, 728 (1999) (noting that sovereign immunity extends further than the cases mentioned in the Eleventh Amendment because immunity from suit also derives "from the structure of the original Constitution itself").

30. See Anthony Johnstone, A State Is a "They," Not an "It": Intrastate Conflicts in Multistate Challenges to the Affordable Care Act, 2019 B.Y.U. L. Rev. 1471, 1472 ("Each state contains its own separation of powers among the legislative, executive, and judicial branches."); see also Bridget A. Fahey, Consent Procedures and American Federalism, 128 Harv. L. Rev. 1561, 1564 (2015) [hereinafter Fahey, Consent Procedures] (explaining that "states are not monolithic actors" because "many officials, acting through many different political processes, could conceivably speak for the state"); Roderick M. Hills, Jr., Dissecting the State: The Use of Federal Law to Free State and Local Officials From State Legislatures' Control, 97 Mich. L. Rev. 1201, 1201 (1999) ("[A] 'state' actually incorporates a bundle of different subdivisions, branches, and agencies controlled by politicians who often compete with each other for electoral success and governmental power.").

31. E.g., Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002) (recognizing the role of the state attorney general in waiving sovereign immunity through the decision to remove to federal court); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that a state agency's participation in a federal scheme did not waive sovereign immunity); Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (explaining that municipalities do not exercise the sovereign immunity of the state).

structural judgments about who is empowered to do what within the confines of that legal entity.

B. *State "Legislatures," "Executives," and "Judges"*

The federal Constitution also refers expressly to particular state institutions and articulates the powers they possess—provisions similar to those present in every state constitution. As one might expect, the federal Constitution repeatedly refers to state institutions that exist solely for federal purposes—like each state's electors to the Electoral College, who meet "in their respective states" to cast their votes for President,[32] and each state's delegation to the House of Representatives, which, among other things, steps in to cast a vote for the state in the presidential election process under certain circumstances.[33]

But the federal Constitution also contains a handful of textual references to state institutions that perform more workaday governance activities. The Constitution, for instance, specifies that each state's "*executive* authority" may request the extradition of a person charged "with Treason, Felony, or other Crime, who shall flee from Justice" to a sister state.[34] It allows the "[*e*]*xecutive* (when the Legislature cannot be convened)" to solicit federal help in suppressing "domestic Violence."[35] And it singles out state judges: The Supremacy Clause specifies that the "*Judges* in every State" are "bound" by the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This reference has justified the exclusion of state judges from the protections of the anticommandeering rule, one of our system's central protections for state autonomy.[36]

The most common state institution identified by name in the federal Constitution, though, is state legislatures. A dozen clauses in the constitution mention state legislatures, describing powers that "the state" and the "legislature thereof," "the legislatures of the states," or the "state legislature" (the formulations are numerous) can exercise by acts that

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32. U.S. Const. art. II, § 1, cl. 3; id. amend. XII.

33. Id. amend. XII (providing that if no presidential candidate receives a majority of the electors appointed to the Electoral College, the state's delegation to the House of Representatives shall vote as a unit—with "each state having one vote"—to select the President).

34. Id. art. IV, § 2, cl. 2 (emphasis added).

35. Id. art. IV, § 4 (emphasis added).

36. Id. art. VI, cl. 2 (emphasis added); see also Printz v. United States, 521 U.S. 898, 928 (1997) (explaining that the "terms of the Supremacy Clause" justify the exclusion of state courts from the anticommandeering rule, which otherwise prohibits federal efforts to require states to administer federal law).

range from "cho[o]sing," "consent[ing]," "direct[ing]," and "apply[ing]" a specified power to a proscribed end.[37]

These provisions undoubtedly speak to state structure—they confer powers and obligations on particular state institutions. But they also introduce a range of structural ambiguities. Most obviously, what counts as the "legislature" of the state (or, for that matter, the "executive")? The Supreme Court considered a variant of this question in the 2015 election law case *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[38] namely whether citizen referenda—which some state constitutions deem a part of the legislative process by permitting referenda to require passage, override, and review of acts passed by a state's representative chambers—count as a part of the "legislature." The Supreme Court said "yes," employing a form of deferential reasoning: The federal Constitution's reference to "'the Legislature' [of the state] comprises the referendum," for both are paths through which the people of a state legislate.[39]

The simplicity of the Constitution's reference to "legislatures" (and other state institutions) also conceals significant ambiguity about what process a state "legislature" operating under the federal constitutional ambit may use to conduct its business. Every state constitution specifies

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37. See U.S. Const. art. I, § 2, cl. 1 ("[For members of the House of Representatives,] the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); id. § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."), amended by id. amend. XVII; id. art. I, § 3, cl. 2 ("[I]f Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies."), amended by id. amend. XVII; id. art. I, § 8, cl. 17 ("The Congress shall have Power . . . to exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings . . . ."); id. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ."); id. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . . ."); id. § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."); id. art. V ("The Congress . . . shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid . . . when ratified by the Legislatures of three fourths of the several States . . . ."); id. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

38. 576 U.S. 787 (2015).

39. Id. at 808. This form of deferential reasoning is discussed in greater depth below. See infra section II.D.

how a legislature legislates when performing state functions. But the federal Constitution says nothing about how state legislatures must discharge the duties mentioned therein.

For instance, most state constitutions require state legislatures to act through a constitutionally specified lawmaking process that generally resembles bicameralism and presentment: To become law, an enactment must pass the state's representative chambers and be signed by the governor.[40] When the federal Constitution allocates power to a state "legislature," does it incorporate the ordinary process specified in the state constitution? Does it intend the state legislature to follow a separate federal process (perhaps defined by analogy to Congress, or some other generic legislature)? Or should the legislature instead act as a discrete and independent institution—a body that exists for the specified federal purpose alone and subject only to its self-created rules of decision? In *Smiley v. Holm*,[41] the Court considered whether state laws regulating federal elections (passed pursuant to the federal Elections Clause, which singles out state legislatures) can be vetoed by the state's governor, as with any ordinary legislation. And in *Moore v. Harper*,[42] the Court considered whether such laws are subject to substantive constraints set out in state constitutions (in *Moore*, a state law rule against partisan gerrymandering)—a question with enormous stakes. In each case, the Court said "yes," as elaborated below.[43]

C. *State Structure Implied*

And then there are constitutional provisions that do not expressly refer to states, state institutions, or state structure, but still implicate state structure. Across a range of substantive contexts, courts have found themselves confronting—and, in some cases, locating—state structural questions even absent an express textual invitation to do so.

Some of these cases concern constitutional provisions that refer to activities that states participate in, though the states and state institutions are not mentioned by name. For instance, consider Article III's limitation of the judicial power to the enumerated classes of "Cases" and "Controversies"—a provision that requires litigants in federal court to demonstrate that they have standing to sue.[44] As frequent litigants in federal courts, states can point to a range of harms to their laws,

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40. 53 The Council of State Gov'ts, The Book of the States 70–73 (2021), https://issuu.com/csg.publications/docs/bos_2021_issuu (on file with the *Columbia Law Review*).

41. 285 U.S. 355 (1932).

42. 143 S. Ct. 2065 (2023).

43. See infra section II.B.

44. See U.S. Const. art. III, § 2; Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (articulating that a federal plaintiff must establish injury in fact, causation, and redressability).

institutions, and citizens that satisfy that standing requirement.[45] Such cases do not obviously require federal courts to consider questions of state structure. But periodically cases arise in which standing turns on whether a particular institution purporting to represent "the state" can claim the mantle of some injury suffered by it—or, conversely, whether "the state" can claim the mantle of an injury suffered by a public or quasi-public institution therein. In *Hollingsworth v. Perry*,[46] for instance, the substantive question was whether a state could constitutionally prohibit same-sex marriage, but the antecedent—and, in the end, dispositive—question was whether the private proponents of the state referendum at issue could claim the state's public injury on appeal.[47] Conversely, in last term's *Biden v. Nebraska*,[48] a case about the legality of President Biden's student loan forgiveness plan, the Court had to first confront the antecedent question of whether the state of Missouri could claim as its own an asserted financial injury borne by a state-chartered corporation—an entity that had declined to participate in the litigation.[49] In each case, the Supreme Court found itself grappling with complex questions of state structure—even absent a textual hook or, indeed, textual standards to apply. In each of these cases, the Court must make a judgment about how to classify a state's structural choices for federal judicial review. This, in turn, speaks to the effect of those choices in the first instance.

But there are also provisions of the federal Constitution that do not mention the states, do not mention specific state institutions, and do not mention activities in which the states might engage—but nevertheless position federal courts to make important judgments about state structure.

Consider—perhaps unexpectedly—the Eighth Amendment. The Amendment prohibits "cruel" and "unusual" punishment,[50] a prohibition to which state structure is not immediately relevant. But the Court's doctrinal framework for giving content to those terms imbues them with "the evolving standards of decency that mark the progress of a maturing society."[51] In search of what it deems an "objective" indicator of the nation's consensus standards of decency, the Court has alighted upon the laws passed by state legislatures, using them as the "most reliable" evidence in its canonical cases to determine whether a particular form of

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45. See Seth Davis, The New Public Standing, 71 Stan. L. Rev. 1229, 1233–34 (2019) (exploring the public and private harms that states suffer).

46. 570 U.S. 693 (2013).

47. See id. at 700–01 (concluding that the proponents could not claim the state's injury).

48. 143 S. Ct. 2355 (2023).

49. See id. at 2365–68 (concluding that the state could claim the corporation's injury).

50. U.S. Const. amend. VIII.

51. Furman v. Georgia, 408 U.S. 238, 269–70 (1972) (Brennan, J., concurring) (internal quotation marks omitted) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); see also sources cited infra note 117.

punishment is constitutional or not.[52] But in many states, it is not the legislature alone but also the governor, elected judges, and elected county prosecutors who are empowered to express voter preferences on the death penalty.[53] This line of case law, in other words, turns on an implicit judgment about state structure—on which state actors give voice to its citizens' "standards of decency." And the Eighth Amendment is not alone: In a wide range of cases, as Roderick Hills has catalogued,[54] ranging from the Sixth Amendment right to a jury trial to the Fifth Amendment substantive due process right, the Court counts state legislative enactments to measure national consensus. In doing so, it makes an implicit decision about which state institutions matter for federal purposes, and which do not.

In constitutional doctrine, in short, opportunities lurk for federal courts to make judgments about state structure—including, as in the Eighth Amendment context, impressing state legislatures to speak to the citizens' values even when other state actors are charged with that role. As the next Part discusses, the choices courts make in weighing those questions matter: If, for instance, the Court conducted its search for popular "standards of decency" by respecting how states themselves have allocated power over questions of punishment, the result in cases about the death penalty's constitutionality could significantly shift.[55] But in the Eighth Amendment context, the Court has not attempted to justify its structural judgments by reference to states' own choices about their structure—or, for that matter, by reference to broader principles of federalism.

D. *Supreme Court Practice*

A final way that questions of state structure come to be litigated before federal courts—primarily, to our knowledge, the Supreme Court—is entirely within the Court's control. With some frequency, the Court must confront ambiguity about who is authorized to represent the state before the Court as a matter of court procedural rules. These intrastate disputes unfold in "letter briefing" on the Court's shadow docket[56] and pit one state official against the other—each claiming to lawfully represent the state or

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52. Penry v. Lynaugh, 492 U.S. 302, 331 (1989) ("In discerning those 'evolving standards,' we have looked to objective evidence of how our society views a particular punishment today."), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002); see also *Atkins*, 536 U.S. at 312 ("[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (quoting *Penry*, 492 U.S. at 331)).

53. See infra notes 131–136 and accompanying text.

54. Roderick M. Hills, Jr., Counting States, 32 Harv. J.L. & Pub. Pol'y 17 (2009).

55. See infra note 117.

56. See William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1 (2015) (introducing the term "shadow docket").

its interests, and typically claiming that the adverse state official lacks the representative authority it asserts. In these cases, too, the Court must determine who genuinely speaks for the State—or, as elaborated below, avoid answering that question altogether.

* * *

In working in these constitutional spaces and operating without a wide-angle lens and common grounding principles, the Court has developed a body of federal doctrine that speaks to state structure. But because these cases are not treated as a set, by either commentators or the Court, little is known about how the Court confronts their unique sensitivities. The next Part turns to those questions.

II. CRAFTING FEDERAL CONSTITUTIONAL RULES OF STATE STRUCTURE

The provisions laid out in the last section create openings for the Supreme Court to craft federal constitutional doctrine of state structure outside the constitutional passages that overtly contemplate state structure. These rules are not, for example, the product of the Guarantee Clause, which instructs the federal government to "guarantee to every State in this Union a Republican Form of Government."[57] Nor are they means to vindicate federal constitutional rights by requiring states' government structures to respect them. They instead create entry points in spare text and from constitutional provisions that do not mention the states for courts to elaborate doctrine grounded in other constitutional objectives about the distribution of power among state institutions, the procedures through which those institutions can lawfully act, and the push and pull between them.

This Part draws together that federal constitutional law of state structure. By looking across cases, it takes stock of how the Court performs the sensitive role of making state structural judgments and asks whether this body of law is characterized by coherent orienting principles or consistent doctrine. It is not. Instead, the Court uses untidy, inconsistent, and sometimes strange analytical strategies to decide whether and where the federal Constitution speaks to state structure, what the Constitution's preferred state structures are in those areas, and how the Court's intervention will affect its institutional interests. Our account draws doctrine from across many areas of law, including Article III standing, the Elections and Electors Clauses, Article V constitutional amendments, sovereign immunity, and the Eighth Amendment.

This Article distills five approaches the Court has used to craft federal constitutional rules of state structure and lays out the content of the resulting rules. Because these rules of state structure are not overtly expressed—and sometimes not even discernibly hinted at in the

57. U.S. Const. art. IV, § 4.

Constitution—the Court arrives at them in diverse and convoluted ways and uses them to accomplish a variety of goals. Sometimes it announces an overtly regulatory rule of state structure: by, for example, clarifying the structural predicates a state must meet to engage in a federal constitutional activity. Other times, it specifies which state actor can speak for the state for a particular constitutional purpose, taxing the voices of those who do not conform. In still others, it announces a rule of disregard, which allows constraints on, or harms to, state structure to proceed unabated. So, too, the Court sometimes arrives at those rules by granting certiorari on a question that crisply tees up the federal constitutional significance of a state's structural choice. Other times, the Court elaborates a rule of state structure incidental to, or embedded within, a wholly different constitutional question. Those paths, circuitous though they sometimes are, are worth describing in some detail because they provide a telling lens onto how the Court—in both its intellectual and institutional capacities—regards the states and their constitutional plans.

First, the Court analogizes states to *private corporations*, recognizing agents as the states' lawful representatives for a particular constitutional purpose only if they conform to private law agency templates. Second, it views states as *federal adjuncts*, removing state institutions from their own constitutional systems of government and attaching them instead to the federal government and the federal system. Third, it analogizes states to *generic republics* and specifies institutional structures for them that deviate from their own constitutional plans and conform instead to the Court's simplified view of "republics" and "democratic societies." Fourth, it attempts *deference* to the states' own constitutional structures but only accomplishes it in part, pairing elements of regard for state structural self-determination with elements of federal control. Finally, it adopts a strategy of *nonintervention*, attempting to dodge or remain neutral to questions of state structure in ways that shape state structure nevertheless.[58]

The Part concludes by drawing three conclusions from these cases. *First*, and most obviously, the Court has seized the openings mentioned in Part I to regulate state structure in a range of constitutional areas—and in the service of constitutional goals beyond the vindication of federal rights, the republican guarantee, and federal supremacy. To take this doctrine seriously means to understand the federal Constitution to require states to conform their governments to many distinct structural templates in different areas and contexts.

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58. These are, of course, federal questions—they interpret the federal Constitution and announce rules of federal law. But the federal Constitution can be understood to defer to, or incorporate, the states as they have chosen to structure themselves. Or, in mentioning the states, or contemplating action by the states, it could instead be understood to express a distinctly federal view about what should count as the state, how its institutions should interact with one another, and through which voices it should speak. Through these strategies, the Court has largely held the latter and largely done so without justification.

Second, although courts have not hesitated to craft constitutional rules that speak to state structure—providing, for instance, that state agencies may claim the mantle of the state only if they conform to agency principles, or that state judgments "count" for federal purposes only if rendered through certain procedures—they often do so only in passing, not justifying the regulations they are creating by reference to first principles or, in many cases, acknowledging they are creating federal regulations at all. Put differently, the way the federal Constitution regulates state structure—and *that* it regulates state structure at all—is sometimes plainly stated in these cases, but it is more often conceptually obscured by the lack of clear vocabulary for describing the type of state structural rules that this Article collects. Our project, then, is not to collect constitutional regulations that are all similarly labeled or characterized. Instead, it is to notice and bring into dialogue doctrines that share the function of regulating state structure, but do not always disclose or clearly characterize that fact.

Finally, although in some cases courts acknowledge the structural choices that the states have made in their own constitutions, in general those structures are either subordinated to a perceived federal structural rule or ignored entirely. That should come as a surprise: The state constitution is the durable source for a state's structure and, indeed, its identity. In nearly every case, the Court could have adopted a rule of deference to the state's own structural self-definition. It could have held that when the federal Constitution references "states" or state "legislatures," "executives," or "judges," for example, it means to allow each state to decide by its own constitutional plan who counts as the state and what counts as each of those named state institutions. But, as discussed in Part III, it has largely declined to take that deferential path.

A. *States as Private Organizations*

This Part begins with the Court's use of analogies to private entities in making judgments about state structure—most notably in *Hollingsworth v. Perry*.[59] Substantively, the case was notable for presenting the constitutionality of state laws barring same-sex marriage. Ultimately, however, the case turned on state structure: whether the proponents of a state initiative had standing to defend that initiative on appeal in federal court.[60] What is interesting is the method the Court used to answer that question and what it signals about how the Court understands the role of state structure in our system of federalism.

Although the federal Constitution does not provide for direct democracy, nearly half of the states have referenda or initiative processes.[61] Referenda and initiatives are most influential when the state government

59. 570 U.S. 693 (2013).

60. See supra notes 46–47 and accompanying text.

61. M. Dane Waters, Initiative and Referendum Almanac 12–13 (2d ed. 2018).

is unlikely or unable to enact particular legislation. A number of political and structural factors, including legislative timing, malapportionment, and party control can create a situation in which initiatives pass over the objection of state elected officials, and the state attorney general, as a result, may refuse to defend the subsequently enacted law in state court.[62] When that happens, the initiative can be effectively nullified by legal challenge. Whether the challenge is right or wrong, strong or weak, the Attorney General can simply let the law be invalidated by declining to defend it.[63] To remedy that problem, some states empower the proponents of a successful initiative to defend the resulting law in court. In federal court, however, parties (even defendants pursuing an appeal) must meet Article III standing's requirements and must maintain standing through all stages of the litigation.[64] If a state law is challenged in federal court, that state will always have standing to defend it. Official initiative proponents, however, are not state officers for any other purposes. But if a state empowers them to defend the law they helped pass, can they claim the mantle of the state's standing?

That was the question in *Hollingsworth*. In answering it, the Supreme Court used one of the most unusual external heuristics canvassed here: private law principles of agency. Harkening back to a style reminiscent of that employed in *Swift v. Tyson*,[65] the Supreme Court looked to a kind of general law to determine whether initiative proponents have standing to defend a state statute in federal court.

In 2008, California voters passed a popular initiative, Proposition 8, that banned same-sex marriage—directly teeing up federal equal protection and due process challenges. Embracing enforcement and nondefense,[66] state officials—including, among others, California's governor and attorney general—declined to defend the law in federal court.[67] The district court thus allowed the proponents of the initiative to intervene and defend its constitutionality. When they lost, state officials declined to appeal and the official proponents appealed in their stead.

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62. See, e.g., *Hollingsworth*, 570 U.S. at 702; Arizonans for Official English v. Arizona, 520 U.S. 43, 49–53 (1997); Don't Bankrupt Wash. Comm. v. Cont'l Ill. Nat'l Bank & Tr. Co., 460 U.S. 1077, 1077 (1983) (mem.) (dismissing an appeal by initiative proponents for "want of jurisdiction it appearing appellant lacks standing").

63. For a comprehensive discussion of state practice on this issue, see generally Katherine Shaw, Constitutional Nondefense in the States, 114 Colum. L. Rev. 213 (2014).

64. See Already, LLC v. Nike, Inc., 568 U.S. 85, 90–91 (2013).

65. 41 U.S. (16 Pet.) 1, 19 (1842) (holding that the case should be governed by "general principles"), overruled by Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

66. See generally Neal Devins & Saikrishna Prakash, The Indefensible Duty to Defend, 112 Colum. L. Rev. 507 (2012) (exploring differing state regimes that charge attorneys general with differing amounts of discretion in defending the constitutionality of state law); Shaw, supra note 63 (surveying different approaches states have taken in wielding the executive nondefense power).

67. See Shaw, supra note 63, at 239.

The Ninth Circuit then certified the question to the California Supreme Court whether the initiative proponents had authority under state law to represent the state in the appeal.[68] The California Supreme Court held that the initiative proponents did, explaining that under California law, initiative proponents are authorized "to appear and assert the state's interest" in suits challenging an initiative's validity.[69] That was enough for the Ninth Circuit: If it is California's interests at stake in the case, that court reasoned, then it is for California to determine how, and by whom, those interests are defended. Allowing the suit to proceed, the Ninth Circuit affirmed and the initiative proponents appealed to the U.S. Supreme Court.

But the Supreme Court reversed, dismissing the Ninth Circuit's view that California's understanding of state law was entitled to deference.[70] Instead, the Court held that the Constitution endorsed a freestanding theory of state structuring, to which any state litigating in federal court must conform. Entities seeking to advance a state's interests do not just need to be selected and endorsed by the state, the Court reasoned; they must also bear an "agency relationship" to the state.[71] Citing the Restatement (Third) of Agency—one compilation of the private law of agency—the Court noted that the state "never described petitioners as 'agents of the people,' or of anyone else,"[72] and the "basic features" of an agency relationship were missing: The principal could not control the agent's actions,[73] the agents owed no fiduciary obligations to the principal, and the principal was not responsible for the agent's attorneys' fees.[74]

Justice Anthony Kennedy, writing in dissent, found that odd. State governments, the dissent explained, embrace all sorts of representative relationships in designing institutions and processes—not just those that reflect the private law of agency.[75] Indeed, designating official proponents to defend the state's resulting law in court is an important design feature of referenda and initiatives. The dissent reasoned that it "is for California, not this Court, to determine whether and to what extent" the proponents have authority "to assert the State's interest in postenactment judicial

68. See Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (9th Cir. 2011).

69. Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).

70. Hollingsworth v. Perry, 570 U.S. 693, 712 (2013).

71. Id. at 713.

72. Id. at 712.

73. Id. at 713 (citing Restatement (Third) of Agency § 101 cmt. f (Am. L. Inst. 2005)).

74. Id. at 713–14 ("[I]t is hornbook law that 'a principal has a duty to indemnify the agent against expenses and other losses incurred by the agent in defending against actions brought by third parties if the agent acted with actual authority in taking the action challenged by the third party's suit.'" (quoting Restatement (Third) of Agency § 8.14 cmt. D (Am. L. Inst. 2005))).

75. Id. at 717 (Kennedy, J., dissenting).

proceedings."[76] The federal Constitution, the dissent argued, has nothing to say about whether a state can eschew "a conventional agency relationship" as inconsistent with the "purpose of the initiative process."[77]

In the end, the Court effectively conditioned a state's participation in a crucial federal function—the defense of its law in federal court—on the state's conformity to a structural template that the Court located in the federal Constitution. Consequently, the Court significantly weakened the potency of direct democracy within the states. When someone successfully challenges an initiative in federal court[78] and state officials decline to defend the law on appeal, there is no appeal. This is a steep tax on direct democracy: A state must either establish a full agency relationship with proponents (including indemnity) or else accept a weakened system of direct democracy in the areas of greatest need—friction between the public and its representatives.

The Court's identification of a federal rule—that state institutions must bear an agency relationship to the state to stand in the state's shoes in federal court—is particularly noteworthy when set next to its treatment of structural issues in another case argued the next day: *United States v. Windsor*, a case about same-sex marriage within the federal (rather than the state) government.[79] When the DOJ declined to defend the federal Defense of Marriage Act, which defined marriage, for federal purposes, to include only marriages between different-sex spouses, a House of Representatives leadership group known as the Bipartisan Legal Advisory Group ("BLAG") sought to step in and defend the law itself.[80] Rather than resort to a private law agency framework to evaluate BLAG's relationship to the United States and thus its standing to defend the law, the Court—recognizing the complexity of that question—found creative ways to avoid it. That is not surprising: Federal structural questions are often considered hard or delicate, whereas state structural questions are considered simple or irrelevant.[81]

B. *States as Federal Adjuncts*

This section turns to a more complex strategy the Court has employed in a handful of contexts—and that litigants have pressed in others, including in the recent *Moore v. Harper* decision.[82] Recall that in almost a dozen locations, the federal Constitution mentions specific state

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76. Id.

77. Id. at 721.

78. These suits, of course, cannot be transferred to state court (where federal standing rules do not apply).

79. 570 U.S. 744 (2013).

80. Id. at 753–55.

81. Id.

82. 143 S. Ct. 2065 (2023).

institutions: State "legislatures" pass election codes pursuant to the Elections Clause, they ratify constitutional amendments in Article V, and they decide whether to cede state lands under the Enclaves Clause (among other things); state "executive authorities" may seek the federal help guaranteed by the Domestic Violence Clause; state "judges" must comply with the Supremacy Clause, and so on.[83]

Scholars have elaborated the significant variation in how states have structured their legislatures, executives, and judiciaries going back to the Founding period.[84] At a minimum, then, it is not a surprise that the states have chosen a variety of differently structured institutions to discharge the functions mentioned in constitutional provisions that name those state branches. But in several areas of law, the Court has addressed questions about how the appearance of those named branches of state government in the text of the federal Constitution shapes the choices states have in structuring, empowering, and constraining their three branches of government.

This section shows how the Court came to effectively federalize named state institutions in some but not all of those contexts—detaching them from their state constitutional ecosystem and treating them as federal adjuncts when performing the functions contemplated in the federal Constitution. This form of state structural regulation is most apparent in the Court's elaboration of Article V of the Constitution, which governs the amendment process. After an amendment is proposed, "the Legislatures of three fourths of the several States, or by Conventions in three fourths" must ratify it.[85] All states commit aspects of the legislative power not just to their state house, senate, and governor but also to the people directly through popular initiative (by which the people can enact laws) and popular referenda (through which they can veto laws).[86]

The Eighteenth Amendment—which prohibited the "manufacture, sale, or transportation" of alcohol[87]—provides an example of how state legislative structure influences federal constitutional amendment. Consider Ohio. In defining the structure of its "legislative" branch, Ohio's then-operative constitution established a bicameral General Assembly, consisting of a House and Senate. But it also created a formal role for "the

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83. See supra section I.B.

84. See sources cited infra notes 236; see also Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 264–73 (Rita Kimber & Robert Kimber trans., Rowman & Littlefield Publishers, Inc. 2001) (1973).

85. U.S. Const. art. V.

86. Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 119 Mich. L. Rev. 859, 876–78 (2021) (noting that "twenty-four states have an initiative process" and "[e]very state provides for the legislative referendum, which allows the legislature (or sometimes another government actor) to place a measure on the ballot for popular approval by a majority of voters").

87. U.S. Const. amend. XVIII, § 1.

people" acting through popular referenda to veto most acts of the Assembly, including its ratification of federal constitutional amendments.[88] After the Ohio Assembly voted to ratify the Eighteenth Amendment, the people pressed a veto.[89] The U.S. Supreme Court, in *Hawke v. Smith*, held that citizen override effort federally unconstitutional, though it was specifically provided for in the state constitution.[90]

The Court, to its credit, acknowledged the argument for deference to each state's decision about how to structure its legislative process—that the term "legislature" might simply refer to "legislative action" taken in whatever "medium" the state constitution specifies.[91] But it rejected that idea by reasoning that Article V effectively federalizes state legislatures: Although it "is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state," the "power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution."[92] When acting to ratify constitutional amendments, in the Court's view, the state legislature acts as a federal body—and the "choice of means of ratification [is] wisely withheld from . . . the several states."[93] The stakes, in short, of federalizing state bodies acting pursuant to constitutional references to them is to allocate to the federal Supreme Court, rather than state Supreme Courts or state constitutions, the capacity to decide what institutional forms those bodies must take. And here the federal Court concluded that Article V imagines state legislatures as only "the representative body which made the laws of the people," and not the people acting in their popular legislative capacity.[94]

That conception of the "legislature" is not invented out of whole cloth; it is—conveniently—the theory of legislative action embraced by the federal Constitution in Article I's blueprint for Congress, which makes no provision for popular initiative or referenda. But it is also strikingly divergent from the conception of legislative power in the fifty states, all of which, to some measure, allow popular participation in the legislative process.[95] The Court, in short, did little to explain why the Constitution extracts state legislatures from their local structural ecosystem or why it

88. Ohio Const. art. II, § 1 (amended 1953) (defining the "Legislative" department but also establishing that "[t]he people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States").

89. David E. Pozen & Thomas P. Schmidt, The Puzzles and Possibilities of Article V, 121 Colum. L. Rev. 2317, 2355 (2021) ("The people of Ohio . . . narrowly rejected the Eighteenth Amendment in a referendum . . . ." (emphasis omitted)).

90. 253 U.S. 221, 231 (1920).

91. Id. at 229.

92. Id. at 230.

93. Id.

94. Id. at 227. That reasoning also bears markers of the "generic republic" cases discussed below. See infra section II.C.

95. Bulman-Pozen & Seifter, supra note 86, at 876–78.

requires them to act according to the framework of legislative activity crafted for Congress with different text, structure, and purpose. But it seems that to be appended to the federal system means acting by a federally dictated institutional logic.

Although the Court limited its holding in *Hawke* to the context of constitutional amendments, that approach to state structure proved influential, prompting efforts by federal and state courts to federalize other tasks reserved to state "legislatures" by the federal Constitution. In 1931, the Minnesota Supreme Court cited *Hawke*'s reasoning in interpreting the federal Elections Clause[96]—which empowers "the Legislature" of the states to establish the state laws that govern the "Times, Places and Manner of holding" federal elections subject to congressional override.[97]

Article IV of the Minnesota Constitution, which describes the "legislature," requires all laws to be passed by both chambers of the legislature and "presented to the governor."[98] This is an approach to lawmaking that also exists in the federal Constitution's system of bicameralism and presentment. But Minnesota's House and Senate leaders argued that the federal Elections Clause overrode that state constitutional rule when the state house and senate passed laws regulating federal elections. The Minnesota Supreme Court agreed, echoing *Hawke*: The Elections Clause envisions the state legislature "serving primarily the federal government" and acting as a "*mere agency* [thereof] to discharge" its election law duties.[99] The "Governor's veto," the court elaborated, "has no relation to such matters; that power pertains, under the state Constitution, exclusively to state affairs."[100]

Perhaps surprisingly, the U.S. Supreme Court reversed, limiting *Hawke*'s federalization of the state legislature to the Article V amendment context. When ratifying constitutional amendments, the Court reasoned in *Smiley*, the "nature" of the state legislative act is federal.[101] By contrast, when passing election codes—even for federal elections—the state legislature "mak[es] laws *for the state*."[102] "[I]t follows," therefore, "that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments."[103] The Court's basic logic is that the federal Constitution sometimes federalizes and sometimes

96. See State ex rel. Smiley v. Holm, 238 N.W. 495, 499 (Minn. 1931).

97. See U.S. Const. art. I, § 4, cl. 1. For a list of other mentions of state institutions, see supra section I.B.

98. Smiley v. Holm, 285 U.S. 355, 363 (1932) (citing Minn. Const. art. IV, § 1).

99. Id. at 364 (emphasis added).

100. Id. at 364–65.

101. Id. at 366–67.

102. See id. at 367 (emphasis added).

103. Id. at 367–68.

defers to states in structuring their legislative processes for activities contemplated in the text of the federal Constitution.

But the decision in *Smiley* did not put an end to efforts to federalize state legislatures. Chief Justice William Rehnquist would return to that form of federal regulation of state structure in his influential concurrence in *Bush v. Gore*.[104]

Florida's razor-tight margin in the 2000 election prompted the Florida Supreme Court to order the infamous recount of "hanging chads."[105] On December 12, 2000, thirty-four days after that year's presidential election, the U.S. Supreme Court ended that recount on equal protection grounds.[106] Rehnquist concurred to explain that he would have separately resolved the case on the grounds that the Florida Supreme Court lacked the authority under the federal Constitution's Electors Clause to order a recount. (The Electors Clause is often paired with the Elections Clause and empowers state "legislatures" to select delegates to the Electoral College.)[107]

The Florida Legislature had enacted a law specifying that Florida's delegates to the Electoral College would assign the winner of the state's popular vote. It further specified a procedure and statutory deadline for resolving issues tallying those votes.[108] In Rehnquist's view, the Florida Supreme Court had misinterpreted state law: By ordering the recount, the Florida Supreme Court "plainly departed from the legislative scheme."[109]

What authority would allow the U.S. Supreme Court to interpret the laws enacted by the Florida legislature contrary to the interpretation given by the state's high court? In Rehnquist's view, the Electors Clause federalized state legislatures and their respective election codes in at least two respects. First, the Electors Clause is one of the "few" instances (according to Rehnquist) in which the federal Constitution confers power on state legislatures.[110] In turn, he reasoned, because the "text of the election law" is the unalloyed voice of the legislature acting pursuant to that federal authority, it "takes on independent significance," separate from "interpretation by the courts of the States," which exercise no federal power under the Clause.[111] The election laws enacted by state legislatures are federal law at least for this purpose. Second, "[w]hile presidential electors are not officers or agents of the federal government, they exercise

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104. 531 U.S. 98 (2000) (per curiam).

105. See id. at 102 (describing the procedural history of the case); Gore v. Harris, 772 So. 2d 1243, 1247–48 (Fla. 2000).

106. *Bush*, 531 U.S. at 103.

107. U.S. Const. art. II, § 1, cl. 2.

108. See *Bush*, 531 U.S. at 113–14 (Rehnquist, C.J., concurring).

109. Id. at 118–120.

110. Id. at 112. But see supra section I.B (cataloguing numerous ways the federal Constitution speaks to state legislatures).

111. See *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

federal functions," which infuses a federal character into the state legislative processes used to select them.[112]

Rehnquist's concurring opinion has continued to exert influence. Early on the long and windy road that yielded *Moore*, Justice Samuel Alito (joined by Justices Clarence Thomas and Neil Gorsuch) issued a separate opinion dissenting from the Court's decision not to grant a stay pending appeal to North Carolina legislators—relying heavily on Rehnquist's concurrence.[113] Indeed, Rehnquist's theory that in acting pursuant to the Electors Clause, state legislatures exist not in a state-level constitutional habitat but instead in a federal constitutional space, inspired the so-called "independent state legislature theory" at the heart of *Moore* itself.

In that case, the North Carolina legislature had drawn congressional districts pursuant to the Elections Clause, which the state Supreme Court found to affect a partisan gerrymander in violation of several state constitutional rights.[114] The Speaker of the North Carolina House and others pressed an extreme version of the federal adjunct theory: When enacting laws pursuant to the Elections Clause, they argued, state legislatures serve a "*federal* function governed and limited by the *federal* Constitution," with the "clear" implication that "*only the federal* [*C*]*onstitution* can limit the federal function of regulating federal elections."[115] Put differently: When passing state laws that regulate the conduct of federal elections, state legislatures act "independent[ly]" of their state constitutional context and are subject only to the restrictions of the federal Constitution. But the Court again rejected the attempt to extend *Hawke*'s approach of federalizing state processes and institutions beyond Article V. Instead, it employed a form of hybrid reasoning discussed in greater detail in section II.D.

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These two approaches to federal constitutional rules of state structure are prescriptive: A state that did not follow the Court's preferred agency relationship simply could not press its case in federal court. And a state that did not use the Court's preferred legislative process simply would not have its ratification decision recognized. They also adopted distinct and inconsistent analogies when deciding what structural arrangements the federal Constitution specified for the states—in the former, arrangements

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112. See id. at 112 (internal quotation marks omitted) (quoting Burroughs v. United States, 290 U.S. 534, 545 (1934)).

113. Moore v. Harper, 142 S. Ct. 1089, 1090–91 (2022) (Alito, J., dissenting from the denial of an application for a stay) (citing *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring)).

114. N.C. Const. art. I, § 10; see also Moore v. Harper, 143 S. Ct. 2065, 2074–75 (2023) ("The North Carolina Supreme Court reversed, holding that the legislative defendants violated state law . . . ." (citing Harper v. Hall, 868 S.E.2d 499, 528 (N.C. 2022))).

115. Brief for Petitioners at 22, *Moore*, 143 S. Ct. 2065 (No. 21-1271), 2022 WL 4084287.

similar to the private law of agency; in the latter, arrangements similar to the federal government's own structural plan. The next section turns to a less prescriptive way that the federal Constitution speaks to state structure: by conditioning a state's "voice" in the creation of federal constitutional meaning on its decision to channel citizens' preferences through the Court's preferred institutional channels. In doing so, the Court offers yet another analogy for sketching the structural arrangements to which the federal Constitution requires the states to conform.

C. *States as "Generic Republics"*

This section identifies a more complicated and less prescriptive, but still consequential way the Court makes judgments about state structure. And it reveals a third template the Court uses to decide what its preferred state structures are: The states should embody the principles of what we call a "generic republic"—an imagined and idealized "democratic" regime.

The Eighth Amendment's Cruel and Unusual Punishment Clause would not seem to be an area with significant state structural stakes.[116] But modern Eighth Amendment doctrine does not just require state and federal governments to respect individual rights; it also gives the people of the states—speaking primarily through state *legislatures*—a meaning-giving role in defining what constitutes punishment that is impermissibly "cruel" or "unusual."

For more than fifty years, the Court has held that the words of the Amendment "must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society."[117] To do that, the Court relies on metrics that it sees as "objective" and that demonstrate a "national consensus" that the punishment in question is impermissible.[118] Although it has unevenly considered a range of indicators in looking for that kind of consensus, the Court has long preferred state legislatures as its most influential indicator.[119] By tallying the acts of state legislatures that

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116. U.S. Const. amend. VIII.

117. Furman v. Georgia, 408 U.S. 238, 269–70 (1972) (Brennan, J., concurring) (internal quotation marks omitted) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Reciting the principle of evolution is standard in Eighth Amendment cases. E.g., Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1048 (2017) (citing "evolving standards of decency" in its Eighth Amendment analysis); see also Roper v. Simmons, 543 U.S. 551, 561 (2005) (quoting *Trop*, 356 U.S. at 101)); Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (same); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (same).

118. Penry v. Lynaugh, 492 U.S. 302, 331–34 (1989), abrogated by Atkins v. Virginia, 536 U.S. 304 (2002).

119. McCleskey v. Kemp, 481 U.S. 279, 300 (1987) ("In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain 'objective indicia that reflect the public attitude toward a given sanction.' First among these indicia are the decisions of state legislatures, 'because the . . . legislative judgment weighs heavily in ascertaining' contemporary standards." (alteration in original) (first quoting Gregg v.

either authorize or prohibit a particular form of punishment, the Court produces what it sees as an impartial measure of "the moral values of the people."[120] Because the Court has tethered the meaning of the Amendment to the moral values of contemporary populations, in short, its own doctrine has required it to identify institutions through which to measure the expression of those values. And it has, in many high-profile cases, given weight to state legislatures over other state representative institutions even when state law allocates the authority to articulate punishment policy to other actors as well.

For just a few examples of the many influential uses of state-legislative tallying: After a Court plurality declared a moratorium on the death penalty in *Furman*,[121] the Court used the legislative counting methodology to reinstitute the death penalty four years later.[122] Legislative tallying was a centerpiece of the Court's finding that imposing the death penalty for the crime of rape was cruel and unusual in *Coker v. Georgia*.[123] It was deployed to find the death penalty unconstitutional for accomplices participating in robbery felony murders (people like the driver of a getaway car in a robbery gone wrong)[124] but also to qualify that holding several years later and permit the death penalty in other cases of felony murder.[125] The Court tallied legislative enactments to sustain the death penalty's constitutionality for defendants with intellectual disabilities in 1989.[126] And it did

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Georgia, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); then quoting id. at 175)); see also *Atkins*, 536 U.S. at 312 ("[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (quoting *Penry*, 492 U.S. at 331)).

120. *Atkins*, 536 U.S. at 323 (Rehnquist, C.J., dissenting) (internal quotation marks omitted) (quoting *Gregg*, 428 U.S. at 175–76 (joint opinion of Stewart, Powell, and Stevens, JJ.)); see also *Furman*, 408 U.S. at 383 (Burger, C.J., dissenting); Gore v. United States, 357 U.S. 386, 393 (1958).

121. 408 U.S. at 239–40 (majority opinion) ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

122. *Gregg*, 428 U.S. at 179–80 & n.23 ("The most marked indication of society's endorsement of the death penalty . . . is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person." (footnote omitted)).

123. 433 U.S. 584, 594–95 (1977).

124. See Enmund v. Florida, 458 U.S. 782, 792–93 (1982) (rejecting the death penalty for accomplices who "did not take life, attempt to take it, or intend to take life"); id. at 792–93 ("While the current legislative judgment with respect to [this] imposition of the death penalty . . . is neither 'wholly unanimous among state legislatures,' nor as compelling as the legislative judgments considered in *Coker*, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue." (quoting *Coker*, 433 U.S. at 596)).

125. See Tison v. Arizona, 481 U.S. 137, 152–54 (1987) (tallying legislatures that permit the death penalty for felony murders in which the defendant's participation was substantial enough that they could have "acted with reckless indifference to human life").

126. Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (sustaining the death penalty for defendants with intellectual disabilities, in part based on legislative enactments).

the same to find the death penalty unconstitutional as applied to intellectually disabled defendants thirteen years later.[127] It used legislative approval to first sustain the death penalty's application to juveniles, and legislative disapproval to later reject it.[128]

That choice might be sensible if legislatures were the states' exclusive institutional channel for expressing voter preferences about forms of punishment. But in recent decades, scholars and litigants have increasingly challenged the idea that state legislatures are the only structural conduit that states elect for conveying the "the moral values of the people" on death penalty questions.[129] In many states, other officials are legally empowered, and often obligated, to exercise independent judgment about forms of appropriate punishment.[130]

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127. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (abrogating *Penry* and rejecting the death penalty for defendants with intellectual disabilities); id. at 312 (noting that legislative enactments are the "clearest and most reliable objective evidence of contemporary values" (quoting *Penry*, 492 U.S. at 331)). In *Atkins*, as in some other cases, the Court also acknowledged additional indicators of popular views of the death penalty (including use in practice, opinion polls, and the views of professional organizations), but it continued its "first among equals" posture toward state legislatures by signaling that the additional "factors are by no means dispositive" and were relevant because "their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue." Id. at 316–17 n.21. Notably, however, the Court has found legislative tallying logically inapposite (even on its own terms) in some Eighth Amendment inquiries. In Miller v. Alabama, 567 U.S. 460, 465 (2012), for example, the Court held unconstitutional the mandatory imposition of life without parole for juveniles. At the time, in a large number of states, a "confluence of state laws" operating together made it possible that a juvenile could be subjected to mandatory life without parole for certain crimes. Id. at 485–86. Specifically, instead of expressly and clearly making life without parole a mandatory punishment for juveniles convicted of certain crimes, states permitted juveniles to be transferred to adult court where they were then vulnerable to whatever mandatory sentencing was applicable to adult offenders. See id. The Court declined to rely on a tally of the states whose systems in effect permitted mandatory juvenile life without parole because it found too high a likelihood that such a result was inadvertent given its indirect mode of accomplishment. Id. at 483–84. The dissent disagreed, pressing the Court to make a legislative tally. See id. at 494 (Roberts, C.J., dissenting).

128. Compare Stanford v. Kentucky, 492 U.S. 361, 370–71 (1989) (noting that "'first' among the 'objective indicia that reflect the public attitude toward a given sanction' are statutes passed by society's elected representatives" and that the tally "does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual" (quoting McCleskey v. Kemp, 481 U.S. 279, 300 (1987)), with Roper v. Simmons, 543 U.S. 551, 564 (2005) (noting that "[thirty] States prohibit the juvenile death penalty" and relying on that tally to find that application unconstitutional).

129. See Miriam Seifter, Countermajoritarian Legislatures, 121 Colum. L. Rev. 1733, 1735 (2021) (noting the "democratic romanticism" that has informed a received "understanding that state legislatures are 'the people's representatives'" (quoting Democratic Nat'l Comm. v. Wis. State Leg., 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring))); id. at 1762–77 (arguing that legislatures are frequently less majoritarian than other state elected offices).

130. See, e.g., Brandon L. Garrett, Local Evidence in Constitutional Interpretation, 104 Cornell L. Rev. 855, 865 (2019) (describing the role state judges play in imposing the death

One alternative conduit through which these moral views might be expressed on death penalty questions is through the office of the state's governor. In many states, governors have a constitutionally specified, and sometimes exclusive, right to grant clemency in capital cases,[131] which many have exercised to impose outright moratoria on the death penalty—a broad, prospective, and generally applicable action characteristic of lawmaking.[132] And a significant number of governors in such states have used their powers to grant mass clemency to all prisoners then on death row or all defendants sentenced to death during their term in office.[133]

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penalty); Joseph Landau, New Majoritarian Constitutionalism, 103 Iowa L. Rev. 1033, 1073 (2018) ("In total, there are 39 jurisdictions . . . that have either abolished the death penalty or have carried out so few executions . . . that they are likely considered functionally abolitionist, at least under new majoritarian analysis."); David Niven & Aliza Plener Cover, The Arbiters of Decency: A Study of Legislators' Eighth Amendment Role, 93 Wash. L. Rev. 1397, 1433 (2018) ("The data we collected . . . suggest that state legislation is an imperfect indicator of 'evolving standards of decency.'"); Robert J. Smith, Bidish J. Sarma & Sophie Cull, The Way the Court Gauges Consensus (and How to Do It Better), 35 Cardozo L. Rev. 2397, 2423–28 (2014) ("The question for both [prosecutors and juries] is how infrequently they exercise their discretion to impose the death penalty.").

131. See Michael Heise, Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure, 89 Va. L. Rev. 239, 255 (2003) ("[M]any states assign to their governors sole clemency decisionmaking authority.").

132. See, e.g., Off. of Governor John W. Hickenlooper, Executive Order D-2013-006, Death Sentence Reprieve (May 22, 2013); Pennsylvania Governor Declares Moratorium on Death Penalty, ABA (June 1, 2015), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2015/summer/pennsylvania-governor-declares-moratorium-on-death-penalty/ (on file with the *Columbia Law Review*); Press Release, Governor John Kitzhaber, Governor Kitzhaber Statement on Capital Punishment (Nov. 22, 2011), https://media.oregonlive.com/pacific-northwest-news/other/Microsoft%20Word%20-%20Final%20Final%20JK%20Statement%20on%20the%20Death%20Penalty.pdf [https://perma.cc/62U2-96F2]; Press Release, Off. of Governor Gavin Newsom, Governor Gavin Newsom Orders a Halt to the Death Penalty in California (Mar. 13, 2019), https://www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california/ [https://perma.cc/VN4T-QLJ6]; Press Release, Wash. Governor Jay Inslee, Gov. Jay Inslee Announces Capital Punishment Moratorium (Feb. 11, 2014), https://governor.wa.gov/news/2014/gov-jay-inslee-announces-capital-punishment-moratorium [https://perma.cc/A3FK-HCXB].

133. See, e.g., Richard E. Meyer, Governor Calls Practice 'Anti-God': Anaya Spares All Inmates on New Mexico Death Row, L.A. Times (Nov. 27, 1986), https://www.latimes.com/archives/la-xpm-1986-11-27-mn-13558-story.html (on file with the *Columbia Law Review*); Julia Shumway, Oregon Gov. Kate Brown Commutes 17 Death Sentences, Ending Death Row, Or. Cap. Chron. (Dec. 13, 2022), https://oregoncapitalchronicle.com/2022/12/13/oregon-gov-kate-brown-commutes-17-death-sentences-ending-death-row/ (on file with the *Columbia Law Review*); Eric Slater, Illinois Governor Commutes All Death Row Cases, L.A. Times (Jan. 2, 2003), https://www.latimes.com/archives/la-xpm-2003-jan-12-na-commute12-story.html (on file with the *Columbia Law Review*). Earlier in the twentieth century, Governor Winthrop Rockefeller of Arkansas, Frank Clement of Tennessee, Lee Cruce of Oklahoma, and others likewise issued mass clemencies for prisoners on death row. See Arkansas Spares All on Death Row: Outgoing Gov. Rockefeller Commutes 15 Sentences, N.Y. Times, Dec. 30, 1970, at 26; Gov. Clement Saves 5 From Death Chair, N.Y. Times, Mar. 20, 1965, at 1; Lee Cruce Dead; Former Governor: Second State Executive of Oklahoma Was a Pioneer of

Sometimes it is the case, moreover, that full death penalty repeals entail legislative–executive action in the form of prospective bans by the legislature and retroactive clemencies by governors.[134]

County-level officials—especially elected prosecutors and judges—also exercise great power over the death penalty.[135] In the five years preceding *Glossip v. Gross*, a significant method-of-execution case, "just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide," even as—in the Court's legislative tally when the case was decided—twenty-seven states continued to authorize capital punishment.[136]

This suggests that if the Court looked to institutions beyond legislatures to ascertain our moral intuitions on forms of punishment and measured those judgments at the county level, the death penalty would shift from being a close call (in the legislative tally) to highly disfavored (in the county tally).[137] Yet the Court has never seriously considered centering prosecutors as a barometer of the people's preferences on forms

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Indian Territory: A Lawyer and Banker: Consistently Refused to Enforce the Death Penalty During His Administration, N.Y. Times, Jan. 17, 1933, at 22.

134. Ray Long, Quinn Signs Death Penalty Ban, Commutes 15 Death Row Sentences to Life, Chi. Trib. (Mar. 9, 2011), https://newsblogs.chicagotribune.com/clout_st/2011/03/quinn-signs-death-penalty-ban-commutes-15-death-row-sentences-to-life.html (on file with the *Columbia Law Review*); Jeremy W. Peters, Corzine Signs Bill Ending Executions, Then Commutes Sentences of Eight, N.Y. Times (Dec. 18, 2007), https://www.nytimes.com/2007/12/18/nyregion/18death.html (on file with the *Columbia Law Review*); John Wagner, Gov. O'Malley to Commute Sentences of Maryland's Remaining Death-Row Inmates, Wash. Post (Dec. 31, 2014), https://www.washingtonpost.com/local/md-politics/gov-omalley-commutes-sentences-of-marylands-remaining-death-row-inmates/2014/12/31/044b553a-90ff-11e4-a412-4b735edc7175_story.html (on file with the *Columbia Law Review*) (describing mass commutation two years after the state legislatively abolished the death penalty); Press Release, Colo. Governor Jared Polis, Gov. Polis Signs Death Penalty Repeal Bill, Commutes Death Row Sentences to Life in Prison Without Parole (Mar. 23, 2020), https://www.colorado.gov/governor/news/gov-polis-signs-death-penalty-repeal-bill-commutes-death-row-sentences-life-prison-without [https://perma.cc/Y7B6-L2J2].

135. Glossip v. Gross, 576 U.S. 863, 918–19 (2015) (Breyer, J., dissenting) (citing Robert J. Smith, The Geography of the Death Penalty and Its Ramifications, 92 B.U. L. Rev. 227, 231–32 (2012)); Lee Kovarsky, Muscle Memory and the Local Concentration of Capital Punishment, 66 Duke L.J. 259, 264 (2016); see also Richard C. Dieter, The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All, Death Penalty Info. Ctr. (2013), https://files.deathpenaltyinfo.org/legacy/documents/TwoPercentReport.pdf [https://perma.cc/MUV3-MMDH]; Garrett, supra note 130, at 865.

136. *Glossip*, 576 U.S. at 919 (citing Robert J. Smith, The Geography of the Death Penalty and Its Ramifications, 92 B.U. L. Rev. 227, 231–32 (2012)).

137. In a 2020 report, the Bureau of Justice Statistics indicated that twenty-eight states legislatively authorized the death penalty, though only five of those states held an execution during that year. Tracy L. Snell, Capital Punishment, 2020—Statistical Tables, Bureau of Just. Stat. 1 (2021). In 2021, Virginia legislatively banned the death penalty, making the current tally twenty-seven legislatively authorized states. See Samantha O'Connell, Virginia Becomes First Southern State to Abolish the Death Penalty, ABA (Mar. 24, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/virginia-death-penalty-repeal/ [https://perma.cc/5577-E8MK].

of punishment—though specialist prosecutors, much more than generalist legislators, would be expected to run on their views on forms of punishment.

It should matter, then, whether states have chosen to authorize their legislatures to make exclusive judgments about punishment or have spread the authority to make such judgments across multiple representative officers.[138] As even the brief account above suggests, it does not appear that most states have chosen to grant their legislatures either exclusive or even dominant authority in this area.

Those institutional choices demonstrate how the Supreme Court can indirectly regulate state structure in plain sight. States that choose to allocate powers over other institutional actors who are *also* responsible for expressing citizen preferences are not counted, or play only a supportive role, in the Court's tally. Legislative tallying operates here as a tax on the voices of citizens in states that use a plurality of means to express views on capital punishment. The more exclusively a state uses its legislature, the less risk that its constituents' judgments will be misconstrued, misunderstood, or ignored.

Why rely so heavily on legislative enactments? The Court has rarely tried to justify this posture. But Rehnquist, writing in dissent in *Atkins*, offered the following explanation:

> The reason we ascribe primacy to legislative enactments follows from the *constitutional role legislatures play in expressing policy of a State*. [I]n a *democratic society* legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people. And because the specifications of punishments are *peculiarly questions of legislative policy*, our cases have cautioned against using the aegis of the Cruel and Unusual Punishment Clause to cut off the *normal democratic processes*.[139]

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138. This choice is not a question of institutional competency. In *Lawrence v. Texas*, for example, the Court considered expressly whether and how states enforced their antisodomy statutes in determining that Bowers v. Hardwick, 478 U.S. 186 (1986), was a deficient precedent. 539 U.S. 558, 573–74 (2003).

139. Atkins v. Virginia, 536 U.S. 304, 323 (2002) (Rehnquist, C.J., dissenting) (alteration in original) (emphasis added) (internal citations and quotation marks omitted) (first quoting Gregg v. Georgia, 428 U.S. 153, 175–76 (1976) (joint opinion of Stewart, Powell & Stevens, JJ.); then quoting Gore v. United States, 357 U.S. 386, 393 (1958); then quoting *Gregg*, 428 U.S. at 176). These ideas arise in other passages in the Court's death penalty opinions. See, e.g., Weems v. United States, 217 U.S. 349, 379 (1910) ("The function of the legislature is primary, its exercise fortified by presumptions of right and legality . . . ."); id. (referring to the primacy of legislatures as among the "elementary truths"). One reason for focusing on legislatures appears to be a federally centric idea that it is the job of elected officials, not courts, to channel the will of the people. See Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) ("The reason for insistence on legislative primacy is obvious and fundamental: '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'" (quoting *Gregg*, 428 U.S. at 175–76). Because many states elect their supreme court judges, that idea may have more structural force in the federal system of appointment and lifetime tenure.

Although this passage initially hints at an answer rooted in the role of courts in constitutional analysis, it quickly shifts to a simplified "generic republic" analogy. This passage doesn't specify *which* constitution—federal or state—sets out the role a "legislature[] play[s] in expressing [the] policy of a State." Does Rehnquist mean the federal Constitution? Under that account, the idea would be that the "evolving standards of decency" standard embedded in the Eighth Amendment *itself* requires the Court to consider the views primarily of state legislatures, rather than the many forms of popular expression each state has itself elected. Given how much more crisply Rehnquist could have articulated that argument had he wanted it, it is perhaps more likely that he meant to express the more basic intuition that *state* constitutions give state legislatures a central role in expressing the policies of a state. That's certainly true to an extent, but, in structural separation-of-powers questions, the devil is in the details.

State constitutions, as this Article and others have discussed, are structurally diverse.[140] It is a kind of category error for the Court to assume—as it appears to do in this context—that state legislatures are the sole institution that reflect "the people's" moral views on punishment questions in all fifty states. Indeed, any assumption, without evidence, that each of our fifty constitutionally chartered states makes the same choices about how to allocate power should be a red flag.

Perhaps for that reason, Rehnquist quickly pivots away from a descriptive legal claim about the allocations of power state constitutions proscribe and toward an appeal to the "normal democratic processes" in "democratic societies." He ends, then, with a more general statement about how generic republics, which American states are presumed to be, would express voter sentiments on forms of punishment.

D. *Partial Deference*

The Court does sometimes attempt the approach to these questions that is perhaps most intuitive: interpret the federal Constitution merely to incorporate the states' own institutional choices. From this vantage, when the federal Constitution uses the term "state legislature," it means to refer to the legislature as defined by the state. And when it says "state," the federal Constitution means the state acting and speaking through mechanisms the state itself has constitutionally organized for the relevant task. Want to know whether a speaker who purports to represent the state does in fact? Consult state law. Under this account, when confronted with federal constitutional openings that refer to the state or its institutions (or that implicitly incorporate questions of state structure), the Court should defer to the states' own way of organizing power and use state law as the indicator of those choices.

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140. See discussion infra notes 232–236.

But where the Court has gestured at a strategy of deference, it has been a qualified one in which the Court cites approvingly a state's right to decide how it will organize itself but also limits or constrains that deference in one of several ways. In some cases, the Court pairs a degree of deference with the "generic republic" analogy mentioned above. In *Moore v. Harper*,[141] and in an important predecessor case, *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[142] the Court declined to read into the federal Elections Clause a definition of state "legislature" that would have been discordant with the ways that many states structure their governments. But even as the Court took seriously each state's own constitutional structure, it also tempered its deference by noting that the state's structural choices corresponded to what the Court viewed as a kind of federally approved form of republican government.[143] That fainthearted deference did not prevent the Court from giving effect to the constitutional structures of the state in those cases, but future cases could force the Court to choose between treating the states deferentially and treating them more like generic republics. As we discuss next, in other cases, the Court has paired a degree of deference with an anticircumvention constraint intended to prevent the state from altering its structures (or claiming different structures than it has) to take advantage of a federal constitutional benefit (like sovereign immunity). That choice grants the states a degree of latitude, but still places them under federal supervision.

1. *Deference and Generic Republics.* — First, consider *Arizona*. The 2015 case was a blockbuster—and commentators noted its potential to dramatically shape how many states conduct federal elections.[144] And supporters of election reform generally praised Justice Ruth Bader Ginsburg's opinion for the Court.[145] Although the opinion looks deferential on the surface, the Court tempered that deference with the kind of "generic republic" analogy that has been used to constrain state choices and could be used to constrain future state choices in the Elections Clause context.

After a decennial census, state "legislatures" must redraw federal electoral districts to account for population shifts, which is often a partisan

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141. 143 S. Ct. 2065 (2023).

142. 576 U.S. 787 (2015).

143. See id. at 795–96 (noting how the Arizona Constitution's legislative charter maps onto provisions from the federal Constitution).

144. See, e.g., Reid Wilson, Supreme Court Takes Up Highly Political Arizona Redistricting Case, Wash. Post (Mar. 2, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/02/supreme-court-takes-up-highly-political-arizona-redistricting-case/ (on file with the *Columbia Law Review*).

145. See, e.g., Adam Liptak, Supreme Court Rebuffs Lawmakers Over Independent Redistricting Panel, N.Y. Times (June 29, 2015), https://www.nytimes.com/2015/06/30/us/supreme-court-upholds-creation-of-arizona-redistricting-commission.html (on file with the *Columbia Law Review*).

exercise.[146] In 2000, Arizona amended its constitution by popular initiative to create institutional structures that would reduce partisan gerrymandering.[147] The amendment reallocated authority to draw districts from the Arizona House and Senate to the newly created Independent Redistricting Commission.[148] The question before the Court was whether that nonpartisan redistricting commission complied with the Elections Clause, which requires that election regulations be "prescribed in each State by the Legislature thereof."[149]

The Court began by articulating a principle of deference, explaining that "it is characteristic of our federal system that States retain autonomy to establish their own governmental processes"[150] and gesturing at a simple, deferential way of resolving the case: Arizona placed the Independent Redistricting Commission's "redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority."[151] Although the Court did not express it in exactly this way, the implication was that the state, in effect, had created a tricameral legislature, consisting of a House, a Senate, and an Independent Redistricting Commission. What business was it of the Court's to question the way Arizona structured its legislative branch? The answer the Court gestured at was both elegant and noninterventionist: none. So long as the state regulates elections through an institution that it considers legislative, no federal question remains.

But the Court did not wholeheartedly embrace that view. In other parts of the opinion, it characterized the Commission, contrary to Arizona's constitutional framework, as "operating independently of the state legislature."[152] And the Court spent most of the opinion developing an alternative theory. Recall that Arizona had created the Commission by using a popular initiative to amend the constitution. The Court seized on that fact to hold that a voter initiative is itself an exercise of "legislative" power that, it seems, transitively infuses the institutions created by such an initiative with a legislative character. Even if the Commission were not itself part of the state legislature, the idea goes, its creation through a legislative constitutional amendment made it legislative for federal constitutional purposes.

What's more, to establish the "legislative" character of the voter initiative, the Court relied on the kinds of sources and reasoning

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146. See Bruce E. Cain, Redistricting Commissions: A Better Political Buffer?, 121 Yale L.J. 1808, 1817–18 (2012) (describing the problem of "legislators drawing district lines that they ultimately have to run in" as a form of "legislative conflict of interest").

147. *Arizona State Legislature*, 576 U.S. at 791.

148. Id. at 792.

149. U.S. Const. art. I, § 4, cl. 1.

150. *Arizona State Legislature*, 576 U.S. at 816.

151. Id. at 817 (citing Ariz. Const. art. IV).

152. Id. at 813.

characteristic of the "generic republic" analogy. It cited dictionary definitions of the word "legislature," relied on concepts of "people's ultimate sovereignty" as "expressed by John Locke in 1690," and it spoke in broad terms about the "genius of republican liberty" articulated by James Madison and the "true principle of a republic" expressed by Alexander Hamilton.[153] The use of referenda was "in full harmony with the Constitution's conception of the people as the font of governmental power."[154]

In the end, the Court's opinion is a puzzle: It employs the language of deference, but it simultaneously suggests that there are federal constitutional principles with which state structures must be "in full harmony."[155]

Here, the Court's generic conception of legislative power is thin and only modestly justified. Most importantly, it does not deal with the fact that many features of state legislative design (with which it does not engage) are at least arguably in disharmony with the structure of the federal Constitution or Lockean forms of representation. Do state "legislatures" act in harmony with constitutional conceptions of legislative power when they delegate election-related tasks to administrative agencies? When they use a legislative veto to oversee election-related regulations? When they act with or without presentment to the governor? What about, for example, when they create nonpartisan redistricting commissions without the popular initiative that transitively imbued Arizona's commission with legislative power? Such commissions are a distinctly modern form of constitutional design with no clear corollary in Founding Era thought. Often called "fourth branches" or "guarantor institutions," moreover, the

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153. Id. at 813, 819–20 (first citing John Locke, Two Treatises of Government 385 (P. Laslett ed., 1964) (1690); then quoting Federalist No. 37, at 223 (James Madison); then quoting Powell v. McCormack, 395 U.S. 486, 540–41 (1969) (invoking a famous part of Federalist No. 61, penned by Alexander Hamilton, to make the point that the Constitution fixed how representatives would be elected).

154. Id. at 819.

155. Id. A charitable reading of the Court's strategy might be to see it as attempting something like the "patterning" that Thomas Merrill has advocated for in the constitutional property context. Thomas W. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 952 (2000). The Constitution mentions "property" several times, but property is traditionally regulated by state law. See id. at 886–87. To give meaning to the Constitution's references to property, then, the Supreme Court must decide whether to find some independent constitutional content, incorporate the definitions of "property" in state and federal positive and common law, or do a bit of both. Merrill suggests the latter course: To define "property," the Court should identify within the Constitution "general criteria that serve to differentiate property rights from other types of interests," but it should also consult "independent sources such as state law" to determine the kinds of property interests that in fact exist within those federal criteria. Id. at 952–54. Perhaps here the Court is trying to delineate some "general criteria" that define legislative power but also incorporate into its definition of legislature the ways states have applied those criteria in practice. If that is what the Court is trying to do, it is not doing it well—something that will come as no surprise to advocates of patterning in the property context because, as Merrill shows, courts might gesture at patterning there, but they do not rigorously do it in practice. See id. at 998–99.

underlying goal of these institutions is precisely to insulate governmental actors from the kind of popular control the Court so embraces.[156] The Court does not seem to anticipate, and does not grapple with, those complexities.

This most recent Term, the Court reprised the same blend of deferential language and the generic republic analogy in *Moore v. Harper*.[157] The North Carolina legislature drew districts that the state supreme court found to violate a provision of the state constitution prohibiting partisan gerrymandering.[158] After significant litigation, North Carolina's legislative leaders appealed to the U.S. Supreme Court, arguing—channeling Rehnquist's *Bush v. Gore* concur-rence—that because it performed a federal function when regulating elections pursuant to the Elections Clause, it was not subject to the constraints of the state constitution or even the judicial review of the North Carolina Supreme Court.[159] Whereas *Arizona* asked what state institutions counted as the state "legislature," *Moore* asked what state-level constitutional constraints the state "legislature" could be subjected to.

Although *Moore* ultimately rejected the legislators' attempt to wholly federalize the legislature and employed some deference to state constitutional design, the Court also veered into reasoning that suggests that there were limits to that federal deference. The core intellectual work of the opinion, for instance, is an extensive elaboration of the importance of judicial review from a kind of first-principles perspective. Citing the judiciary's significance within the federal system and within several states (including North Carolina), as well as generalized principles of good governance, the Court concluded by endorsing Chief Justice John Marshall's statement on the subject in *Marbury v. Madison*: that judicial review is "one of the fundamental principles of our society."[160]

Reasoning about the benefits of judicial review seems all to the good and hardly harmful. But the strategy of pairing the language of deference with statements about "harmony" between the state's choices and consistency with "fundamental principles" could have hidden costs. Some state structural innovations—like, for example, the "guarantor institutions" discussed above—will not be consistent with a traditional republican blueprint precisely because they are designed to *remedy* perceived defects in that blueprint. Other state choices will be discordant with federal structural trends and so, perhaps too, with the "republican" blueprints that federal judges conjure out of their generalized knowledge.

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156. See infra note 239 (reviewing the literature on the innovation, and deviation from past practice, that so-called "Fourth Branch" institutions like nonpartisan districting commissions represent).

157. 143 S. Ct. 2065, 2080–81 (2023).

158. Id. at 2074–76.

159. Id. at 2080.

160. Id. at 2081 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803)).

Consider an Elections Clause problem that some expect to drive the next set of legal challenges in this context.[161] Many state constitutions are friendlier to the delegation of legislative powers than is the federal Constitution.[162] And there is a long history of delegation in the election context. Legislatures delegate election regulation and administration authority to governors, secretaries of state, local election officials, courts, and others.[163]

But some have challenged these entities' exercise of delegated authority, including by reference to the intellectual traditions of the Founding period from which the generic republic analogy is often drawn.[164] A challenge of that sort could test the tension between the Court's invocation of deference and its discussion of the benefits of generic republics. Will a state legislature that delegates significant election powers to state agencies be structuring its legislature as it sees fit, consistent with the deference parts of *Arizona* and *Moore*? Or will such action be deemed "nonlegislative" under the Court's more general sense of what constitutes "legislative power" and what design choices are consistent with "fundamental principles"?

2. *Deference, Bad Faith, and Circumvention.* — *Moore* ends with a weighty suggestion. Although state courts may perform their standard judicial review of statutes passed pursuant to the elections clause—and "apply state constitutional restraints" to those codes—federal courts can step in and halt that review if the state court's actions "so exceed the bounds of ordinary judicial review as to unconstitutionally intrude" on the role of the legislatures.[165] In short, if the state court reviews election laws in a manner that is qualitatively different from the way it treats laws in any other context, the Supreme Court may conclude that the state court is not acting in good faith and pull back on its posture of deference. The suggestion appears to be to defer to states unless they seem to be acting in bad faith.

This echoes an approach the Court uses in another structural context—one that embraces deference most overtly. The Eleventh

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161. See Mark S. Krass, Debunking the Nondelegation Doctrine for State Regulation of Federal Elections, 108 Va. L. Rev. 1091, 1094 n.12, 1109–11 (2022) (describing literature and judicial challenges arguing for Elections Clause constraints on state statutes that delegate election administration authority to executive branch and local officials).

162. See, e.g., Derek Clinger & Miriam Seifter, State Democracy Rsch. Initiative, Unpacking State Legislative Vetoes 12–14 (2023), https://uwmadison.app.box.com/s/hl6eyasw6yrc5i4k9futlzi09pk9ofau (on file with the *Columbia Law Review*) (describing states that allow a legislature to delegate legislative power to just one of its chambers or to a legislative committee—popularly known as a legislative veto—notwithstanding its unconstitutionality in the federal system).

163. See id.

164. See, e.g., Gundy v. United States, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting) (articulating such principles).

165. *Moore*, 143 S. Ct. at 2089–90.

Amendment guarantees to "the state" sovereign immunity, which shields states from suit in federal courts when that immunity applies.[166] What institutions, then, count as "the state"?

To answer that question, courts have developed a body of rules—known as the "arm of the state" doctrine—that is broadly deferential but contains exceptions meant in part to capture the possibility that institutions will attempt to circumvent the rules to claim broader immunity. The touchstone of the Court's inquiry in the arm-of-state context is the "provisions of state law that define the agency's character."[167] Each state may define its relationship to entities that sit at the boundary of "the state"—universities, public corporations, and interstate organizations like the Port Authority—differently. Such entities may, therefore, be part of "the state" in California, but not in Colorado.

But defining "the state" for sovereign immunity purposes is not quite as simple as deferring to how a state has structured its government and situated the would-be arm of the state. Sometimes formal law does not capture the full functional relationship. Imagine an entity that is characterized in the state's legal code, for instance, as a state agency, but functions sufficiently independently that it does not seem that the state really treats the agency as its own. Put differently, formally characterizing an entity as a state agency or state instrumentality is cheap, but treating the entity as functionally part of the state by funding it, indemnifying it, and overseeing it is a resource-intensive endeavor.

The Port Authority, for instance, was described by the states of New York and New Jersey as a "joint or common [state] agency" and a "body corporate and politic."[168] It is also run by commissioners selected by each of its participating states and subject to the veto of each state's governor and the regulation of both states' legislatures.[169] Functionally, however, the Port Authority is structured to insulate the states from its hazards. Most importantly, it is (mostly) financially independent of its participating states.[170] When asked to decide in a 1994 case whether the Authority was an arm of the state, the U.S. Supreme Court thus considered multiple factors that are designed to encompass how the state speaks through both its formal characterizations and its functional structuring choices. In the

166. See U.S. Const. amend. XI; supra section I.A (discussing this amendment).

167. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 n.5 (1997).

168. Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J., 819 F.2d 413, 415 (3d Cir. 1987) (internal quotation marks omitted) (quoting Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 689–90 n.53 (1978)), abrogated by Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994); see also N.J. Stat. Ann. 32:1–4 (West 1963); N.Y. Unconsol. Laws §§ 6401, 6404 (McKinney 1979).

169. *Hess*, 513 U.S. at 36.

170. Id. at 37.

end, it concluded the Port Authority was not part of its founding states and not able to assert their sovereign immunity.[171]

Arm-of-the-state doctrine thus, in some sense, reflects the features and limitations of a regime of deference to a state's structuring choices and the choices that courts have when they elect to defer. Courts can certify a question to the state supreme court and defer to its answer, as the Ninth Circuit did in *Hollingsworth*. But if it fears that a state will have incentive to expansively or narrowly characterize what counts as "the state," it can instead look to various functional indicators—generally drawn from the state's own law—rather than just accept a state's characterization in litigation documents or its formal statements about the would-be agency.

These considerations arise in contexts outside sovereign immunity. In *Biden v. Nebraska*, a case decided last term, the U.S. Supreme Court considered a similar question in a standing case, asking whether a state could claim as its own an injury suffered by an institution that was arguably part of the state and arguably not.[172] Six states sued the federal Secretary of Education over his decision to discharge student loan debt. The Court concluded that just one of those states, Missouri, had suffered sufficient harm to continue its suit.[173]

Missouri's standing story, however, was fairly intricate. Decades before, the state had established a nonprofit public corporation to service student loan debts known as MOHELA, the Missouri Higher Education Loan Authority.[174] MOHELA's involvement in the student loan market meant that the announced changes in federal student loan policies would at least arguably have harmed its bottom line, granting it the kind of injury sufficient to establish standing in federal court. But MOHELA not only declined to press its own lawsuit: it resisted Missouri's effort.[175] Missouri was thus in the awkward position of arguing that a nonprofit corporation that wanted nothing to do with the lawsuit was, in fact, sufficiently a part of the state that the state could claim its alleged harms as the state's own.

The majority agreed, reasoning that MOHELA's formal connection to the state was sufficient to permit the state to claim its injury as its own: "It was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State."[176] The dissent, however, emphasized that because

171. Id. at 32–33.

172. 143 S. Ct. 2355 (2023).

173. Id. at 2366.

174. Mo. Rev. Stat. § 173.360 (2023) (originally enacted as Missouri Higher Education Loan Authority Act, L. H.B. 326, 1981 Mo. Laws. 338, 340–41).

175. *Biden*, 143 S. Ct. at 2387 (Kagan, J., dissenting) (explaining that "MOHELA did not cooperate with the Attorney General's efforts" to develop the lawsuit). Indeed, when Missouri's Attorney General wanted documents from MOHELA to support its suit, the Attorney General had to file a formal sunshine law demand on the entity. Id.

176. Id. at 2366 (majority opinion).

MOHELA was a public corporation, it had the power to sue and be sued.[177] And so, the dissent's reasoning goes, federal courts should assume that the state had intended (before this litigation) that MOHELA would assert and defend its own interests in litigation, not have them mediated through the state as a unified entity. In the dissent's frame, the Court's emphasis on formal factors allowed the state to make a claim about state structure in bad faith—claiming MOHELA as its own when for standing purposes but disclaiming MOHELA when, for instance, the corporation is sued and the state does not wish to defend it. Under that account, federal courts should not only defer to states' stated preferences but to their revealed preferences as well.

E. *Nonintervention*

The last four sections have traced the Court's development of federal constitutional rules of state by acts of commission—by formulating doctrine that affirmatively speaks to state structural discretion. This section argues that federal courts can also influence state structural discretion by acts of omission—by declining to prevent unrelated legal principles, or the Court's own rules, from overriding or interfering with state structural choices. In these cases, the Court adopts a stated posture of nonintervention in a state structural dispute that arises incidentally to another constitutional question. But in declining to intervene, the Court ends up resolving the state question—as in many constitutional avoidance cases, the Court here cannot avoid impacting state structure, even as it tries to dodge, hedge, or sidestep it.

Consider the strange case of *Virginia Office for Protection and Advocacy* (*VOPA*) *v. Stewart*.[178] In that case, the Court acknowledged, but declined to create a doctrinal home for, a novel state structural interest implicated by state sovereign immunity doctrine and its *Ex parte Young* exception.[179] *Young* rests on the longstanding idea that because state laws that violate federal law are void, an individual who enforces them is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct" such that "[t]he state has no power to impart to him any immunity."[180]

Ordinarily, the plaintiff in such a lawsuit is a private individual or entity. But *VOPA* was unusual precisely because the plaintiff was not an individual, but one of the state's own agencies: the Virginia Office for Protection and Advocacy. The state had created the agency as part of a federal–state program in which, as a condition of receiving federal funds to support intellectually disabled individuals, the state agreed to either

177. Id. at 2387 (Kagan, J., dissenting) (citing Mo. Rev. Stat. § 173.385.1(3) (2016)).

178. 563 U.S. 247 (2011).

179. See id. at 260–61 (declining to find novelty).

180. Ex parte Young, 209 U.S. 123, 159–60 (1908).

create a state agency or authorize a private entity to (among other things) advocate for the interests of those individuals in court.[181] Virginia created VOPA, a state agency, for that purpose, and VOPA, in turn, filed suit against the commissioner of a different state agency—the Virginia Department of Behavioral Health and Developmental Services—for discovery in VOPA's investigation of the alleged violation of the rights of two patients in a state-run hospital.[182] In short, the case had an odd posture: one state agency suing another state agency in federal court (pursuant to federal law).

The case generated three separate opinions, each of which agreed that the suit was strange. Justice Antonin Scalia, writing the majority opinion allowing the suit to continue, acknowledged that the rarity with which federal courts assumed a role of hearing "lawsuits brought by state agencies against other state officials . . . gave [them] us pause" about allowing the suit to proceed.[183] But he nonetheless was dismissive of the stakes, writing, "[W]e do not understand how a State's stature could be diminished to any greater degree when *its own agency* polices its officers' compliance with their federal obligations, than when a *private person* hales those officers into federal court for that same purpose."[184] Kennedy, concurring, expressed more serious concerns: "Permitting a state agency like VOPA to sue officials of the same State," he wrote, "does implicate the State's important sovereign interest in using its own courts to control the distribution of power among its own agents."[185] The dissenting Justices, for their part, agreed that the state had a structural (or, in the dissent's language, "sovereign") interest in not being made to "turn . . . against itself" in a federal court.[186]

When one state agency can sue another in federal court, the state loses the ability to control how disputes among its own agencies are resolved—a basic question of governmental design. In some instances, for example, a state may wish to have competing interests within the state sue one another in state court. (This happens, of course, in the federal system, too, when Congress sues an executive official in federal court.[187]) Or when, as here, the two state institutions are executive in nature, the state may

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181. See *VOPA*, 563 U.S. at 250–51 (citing Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15001 (2006); Protection and Advocacy for Individuals With Mental Illness Act, 42 U.S.C. § 10801 (2006)).

182. Id. at 251–52.

183. Id. at 260.

184. Id. at 257–58.

185. Id. at 263 (Kennedy, J., concurring).

186. Id. at 271 (Roberts, C.J., dissenting).

187. Even this is not without its structural issues in the federal system. See Z. Payvand Ahdout, Separation-of-Powers Avoidance, 132 Yale L.J. 2360, 2368 (2023) [hereinafter Ahdout, Separation-of-Powers Avoidance] (uncovering the careful measures federal courts take to avoid mediating direct disputes between Congress and the Executive as parties).

wish to resolve their dispute through managerial techniques—like having the governor simply direct one agency to give way to the other.

The difficulty for this case was how (and whether) to address those agreed-upon structural concerns. The dissent argued, in effect, for a new restriction on the application of *Ex parte Young*, limiting its use in cases in which state "dignitary" interests, like the structural concerns described above, are at play.[188] As in the standing context,[189] the dissent aimed to cognize a difference between public and private plaintiffs based on institutional and structural concerns. The majority, though, evaded those concerns. It conceded that "there are limits on the Federal Government's power to affect the internal operations of a State" but thought the *Ex parte Young* framework—which has historically focused on the identity of the defendant (a state official, not the state itself) rather than the identity of the plaintiff—was not the right place to accommodate those interests.[190] In our view, both intuitions are fair. That *Young* may not be the right home for these concerns is reasonable. So too is the dissent's if-not-here-then-where worry. Since an alternative vehicle to *Young* does not exist, to evade the question, as the Court did, is to deny the interest and to tax state structural choices in ways that matter, at least to the state involved. Immediately after this decision, Virginia did away with VOPA and instead opted to charge a private advocate with responsibility for representing the interests of intellectually disabled individuals in court.[191]

The Court's evasive posture in *VOPA* is not out of character. This Part has canvassed many cases in which the state structural interest is under-contemplated and under-conceptualized. But even when the Court has had total discretion to fix that problem, it has instead used a strategy of evasion. Consider, for instance, how the Court has exercised its authority to manage its own docket. There, on the Court's shadow docket and for the most part out of sight, state officials have fought in letters to the Court over who is lawfully empowered to speak for the state before the Court itself. And the Court has generally resisted any effort to resolve those disputes, instead adopting a kind of all-comers approach.

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188. *VOPA*, 563 U.S. at 269 (Roberts, C.J., dissenting).

189. See, e.g., Z. Payvand Ahdout, Enforcement Lawmaking and Judicial Review, 135 Harv. L. Rev. 937, 984–87 (2022) [hereinafter Ahdout, Enforcement Lawmaking and Judicial Review] (exploring federal judicial approaches to public and private plaintiffs in the standing context); Aziz Z. Huq, Standing for the Structural Constitution, 99 Va. L. Rev. 1435, 1438 (2013) (questioning what types of plaintiffs ought to have standing to vindicate structural constitutional values).

190. *VOPA*, 563 U.S. at 260.

191. See Va. Code Ann. § 51.5-39.1 (2024) (repealing code provisions establishing VOPA with effective date January 1, 2014); id. § 51.5-3913 (converting VOPA to a nonprofit entity).

This issue arose in *Moore v. Texas*, a death penalty case that came before the Court several times.[192] Moore had argued that he was ineligible for the death penalty because of his intellectual disability, and in *Moore I*, the Court agreed, finding Texas's framework for assessing intellectual disability claims infirm and remanding his case to the Texas Court of Criminal Appeals—the state's highest criminal tribunal—with instructions to adopt a constitutionally compliant methodology.[193] Purporting to apply a new methodology, the Texas criminal court reaffirmed its initial finding that Moore was not intellectually disabled, prompting Moore to return to the Supreme Court and seek summary reversal.[194] By that time, though, the Harris County District Attorney, the state prosecutor assigned to Moore's case, had decided that Moore was right: He did have a qualifying intellectual disability.[195] The prosecution said as much in its brief responding to Moore's petition for certiorari seeking summary reversal.[196]

That might have made the case an easy one in that even the prosecutor wanted Moore's conviction reversed. But, to complicate matters, the Texas Attorney General sought to intervene before the Court and "defend[] the decision below."[197] The problem was that the Attorney General was not authorized under Texas law to make decisions adverse to prosecutors in criminal cases before state or federal courts.[198] The Supreme Court thus had to decide—in the posture of an unusual intervention motion filed for the first time before the Court itself—who could lawfully represent the state.

Instead of consulting state law, however—which supports the position of the Harris County District Attorney and not the Attorney General—or deciding *who* actually represents the state, the Court hedged: It simply proceeded with the case and allowed the Attorney General to appear as an

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192. See Moore v. Texas (*Moore II*), 139 S. Ct. 666 (2019) (per curiam); Moore v. Texas (*Moore I*), 137 S. Ct. 1039 (2017).

193. *Moore I*, 137 S. Ct. at 1053 (citing Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004)).

194. Ex parte Moore, 548 S.W.3d 552 (Tex. Crim. App. 2018), cert. granted, judgment rev'd sub nom. *Moore II*, 139 S. Ct. 666.

195. *Moore II*, 139 S. Ct. at 670 (citing the prosecutor's statements).

196. Brief in Opposition at 9, *Moore II*, 139 S. Ct. 666 (No. 18-443), 2018 WL 5876925 (expressing "agree[ment] with the petitioner that he is intellectually disabled and cannot be executed").

197. Opposition of Petitioner to Motion of the Attorney General of Texas for Leave to Intervene as a Respondent at 3, *Moore II*, 139 S. Ct. 666 (No. 18-443), 2018 WL 6064848.

198. See Saldano v. State, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002) ("The [Texas] Constitution gives the county attorneys and district attorneys authority to represent the State in criminal cases."); see also Tex. Gov't Code Ann. § 402.02 (West 2023) (authorizing the Attorney General to "assist[] the district or county attorney" but only "upon request"); Tex. Crim. Proc. Code Ann. art. 2.01 (West 2023).

amicus curiae.[199] The Court's evasion of the state law issue, by declining to render judgment about which of the two diverging state actors spoke for the state in court, was not without consequence. Although many interested parties write amicus briefs to the Supreme Court, research suggests that amicus briefs by states are particularly influential.[200] Here, moreover, the Court's evasion was potentially in tension with its own rules. The Court can grant certiorari without a brief in opposition, "except in a capital case."[201] As the Texas Attorney General pointed out, there is at least a plausible question whether a brief that agrees with the petitioner, even if styled as a brief in opposition, satisfies that rule.[202]

A similar issue arose in the October 2015 Term, when Illinois Governor Bruce Rauner filed an amicus brief in a case about the constitutionality of "agency fees" in public-sector unions. The brief explained that Rauner was "the Governor of the State of Illinois" and that "facts . . . he encountered upon being sworn in as Governor on January 12, 2015" drove his keen interest in the case.[203] The amicus brief proceeded to offer, from the governor's own perspective, "several salient examples from Illinois['s] experience with public-sector collective bargaining."[204] The brief prompted the Illinois Attorney General to file a letter with the court indicating that, under Illinois law, the state speaks with just one unified voice and the elected official who determines the positions voiced by the state is the attorney general, not the governor.[205] The Governor's attorneys filed a response letter of their own—indicating that the Governor was speaking in his individual, not his official, capacity—and

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199. Supreme Court of the United States, Dkt. 18-443 (Feb. 19, 2019) ("Motion of Attorney General of Texas for leave to intervene as a respondent DENIED. The Court has considered this filing as an amicus brief.").

200. See Ahdout, Enforcement Lawmaking and Judicial Review, supra note 189, at 967, 989; Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content, 49 Law & Soc. Rev. 917, 936 (2015) (finding based on "computer assisted content analysis" that "the [J]ustices are more likely to embrace information from amicus briefs filed by state governments and elite organizational interests"); id. at 926 ("[L]aw clerks have identified state amicus briefs as second only to those filed by the U.S. Solicitor General in terms of receiving special consideration . . . .").

201. Sup. Ct. R. 15 ("A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not mandatory except in a capital case . . . .").

202. See Opposition of Petitioner to Motion of the Attorney General of Texas for Leave to Intervene as a Respondent, supra note 197, at 6–7.

203. Brief of Bruce Rauner, Governor of Illinois, and Kaneland, Illinois; Unified School District # 302 Administrative Support Staff at 1, Friedrichs v. Cal. Teachers Assoc., 578 U.S. 1 (2016) (No. 14-915), 2015 WL 5317005.

204. Id. at 5–6.

205. Letter from Carolyn Shapiro, Solic. Gen. Ill., to Scott Harris, Clerk of the Ct., Sup. Ct. U.S., at 1–2 (Sept. 25, 2015), https://www.documentcloud.org/documents/2483671-madigan-1.html (on file with the *Columbia Law Review*) ("[T]he Attorney General is the chief legal officer of the state and its *only* legal representative in the courts . . . . " (quoting Scachitti v. UBS Fin. Servs., 831 N.E. 2d 544, 553 (Ill. 2005))).

the Attorney General replied again, arguing that the Governor's brief did not purport to speak in an individual capacity and, in any event, Illinois law would not have authorized that course of action.[206] Once more, the Court did not resolve the dispute, instead simply docketing the Governor's brief.[207]

There are many more examples of intrastate disputes about who "speaks" for the state.[208] And that is predictable: Many states have divided governments in which different elected officials will be drawn to opposing sides in federal litigation. Elections, moreover, can alter the legal strategies during the pendency of a lawsuit. State-level constitutional frameworks for determining who speaks for the state in different forms of litigation can also vary significantly.[209] In some, different departments of the state can each speak for themselves and the state allows itself, as a result, to speak in cacophony. In others, the state prioritizes unity and designates the attorney general or a different official (as Texas law prescribed for the prosecutor in *Moore*). What matters is that each state's own structural choice be respected, not disregarded.

In these cases, to that end, the Court had a range of options. It could have simply decided the state law question on the briefs and motions filed. It could have looked to its own case law, which has in recent years emphasized the importance of accepting, as intervenors, all those state institutions "lawfully authorized [as] state agents."[210] Or it could use an even simpler method, which would still take seriously the significance of state constitutions and state law in assigning state authority: It could

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206. See Letter from Jason Barclay, Gen. Couns. to Governor, and Dennis Murashko, Deputy Gen. Couns. to Governor, to Scott Harris, Clerk of the Ct., Sup. Ct. U.S., at 1 (Oct. 1, 2015), https://www.documentcloud.org/documents/2483672-rauner.html (on file with the *Columbia Law Review*) ("[T]he *amicus curiae* brief filed on Governor Rauner's behalf pursuant to Supreme Court Rule 37 makes very clear that it is filed only in his individual capacity . . . ."); Letter from Carolyn Shapiro, Solic. Gen. Ill., to Scott Harris, Clerk of the Ct., Sup. Ct. U.S., at 1 (Oct. 9, 2015), https://www.documentcloud.org/documents/2483673-madigan-2.html (on file with the *Columbia Law Review*) ("Mr. Barclay and Mr. Murashko claim that Governor Rauner submitted his amicus brief 'in his individual capacity.' But the brief makes no such claim . . . . Moreover, it would be unlawful for Mr. Barclay and Mr. Murashko, while acting as state employees . . . to represent Mr. Rauner in his individual capacity . . . .").

207. See Docket, Friedrichs v. Cal. Teachers Assoc. (docketing brief of Governor Bruce Rauner on Sept. 11, 2015).

208. See, e.g., Johnstone, supra note 30, at 1486 (cataloging instances in which both state attorneys general and governors sought to speak for the state in litigation connected to the Affordable Care Act); Letter from Susan Herman, Me. Deputy Att'y Gen., to Karen Mitchell, Clerk, U.S. Dist. Ct for the N. Dist. of Tex. (Nov. 15, 2018) (on file with the *Columbia Law Review*) (clarifying that Governor Paul LePage, who joined an ACA lawsuit as a plaintiff, did not have authority to do so because the Attorney General "represent[s]" Maine's interests in litigation).

209. Devins & Prakash, supra note 66, at 513–20.

210. See, e.g., Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2202 (2022) (interpreting Fed. R. Civ. P. 24(a)(2)).

require state agents to certify that they have the authority to represent the interests of the state in the filing.[211]

In confronting similar issues in the federal system, the Court would—at the very least—see as highly significant the question of who lawfully speaks for the government. In *United States v. Providence Journal Co.*, the Court considered whether a special prosecutor of a judicial contempt order could petition the Supreme Court for certiorari when the Solicitor General declined to give that prosecutor permission to do so.[212] The United States Solicitor General is, after all, the individual vested with authority to represent the interests of the United States before the Supreme Court.[213] But the Solicitor General claimed that this case—involving judicial power—was not one in which the United States had an "interest" and so it disclaimed a responsibility to represent.[214] In a protracted opinion, the Court parsed whether the judicial power of the United States was something different from the "United States" for purposes of representation in federal court.[215] Ultimately, the Court concluded that the judicial power was one of the interests of the United States that the Solicitor General is charged with representing, so the special prosecutor could not petition for certiorari without the Solicitor General's authority.[216] Although the Court's conclusion is telling, it is the Court's rigor in examining this federal representation issue that is most important here. When faced with analogous state-level questions, the Court does not apply an approach of parity.

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This Part has shown that in many more cases than previously recognized, federal courts have read the Constitution to regulate state institutional design. These rules of state structure are the outgrowth of an eclectic set of indirect and often inconspicuous constitutional references: of spare mentions of "the states"; of unelaborated invocations of state "legislatures," "executives," and "judges"; of provisions governing generic topics like Article III standing that seem little connected to federalism or state structure; and of common law constitutional rules with accreted assumptions about how states govern. Taking this body of law seriously

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211. This is a technique sometimes used by Congress in accepting "consent" to cooperative programs from state agents. See Fahey, Consent Procedures, supra note 30, at 1621. A variation on this theme is to require the certification to cite relevant legal authority, a technique also used in the cooperative context. Id. at 1566.

212. 485 U.S. 693, 694–95 (1988). For more on the Solicitor General's role in defining the United States' interests in federal court, see generally Z. Payvand Ahdout, "Neutral" Gray Briefs, 43 Fordham Int'l L.J. 1285 (2020).

213. 28 U.S.C. § 518(a) (2018).

214. *Providence J.*, 485 U.S. at 700.

215. Id. at 700–03.

216. Id. at 701.

suggests that state structure is a significant federal constitutional concern, one that courses through constitutional provisions governing a range of subjects and areas. And it requires the conclusion that the Constitution has not one but many different understandings of what a state is and what structures it must act through for different purposes.

Those conclusions are in tension with the conventional assumption that the states have broad structural self-determination.[217] They are in tension, as the next Part shows, with traditional federalism values. They are also, perhaps more surprisingly, in tension with updated and more persuasive accounts of federalism and its objectives, which are friendly in many other ways to blurring the lines between the federal government and the states.[218] And they are in tension with the Court's commitments and institutional sensitivities in analogous areas. To name just one, they suggest that although Congress must speak clearly when it disrupts the federal–state balance of power,[219] the Constitution itself pursues a course of state structural regulation in cryptic and convoluted ways. The next Part explores those tensions and suggests ways to minimize them.

III. MAKING SENSE OF FEDERAL CONSTITUTIONAL REGULATION OF STATE STRUCTURE

This Part begins to make sense of the cases discussed above. It first suggests a vocabulary—the terms *layered constitutionalism* and *structural interdependency*—to clarify just what is happening in these cases, and what the Court is saying about the federal Constitution when it introduces new constraints on state structural discretion. Next, it considers how structural interdependencies fit with both classic and modern federalism values and how they relate to the Court's institutional role.

A. *Layered Constitutionalism and Structural Interdependency*

This section begins by suggesting a conceptual vocabulary for understanding what aspects of our federalist system are implicated in these cases—one that clarifies why the federal regulation of state structure raises questions that are central, not just peripheral or incidental, to our system of federalism.

Federalism is a varied form of government that can be fine-tuned across a range of design dimensions. Three design choices—related to boundaries, policy jurisdiction, and rules of engagement—get the lion's

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217. See sources cited supra note 3.

218. This tension is discussed at greater length below. See infra section III.B.

219. See Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (alteration in original) (internal quotation marks omitted) (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989))).

share of attention in American federalism. Federalist systems must, of course, decide where to draw territorial boundaries between units of government, disputes which once crowded the Supreme Court's federalism docket, and continue (if in less imposing number) today.[220] Federalist systems must also decide how to allocate policy jurisdiction among those units of government, the meaning of the Tenth Amendment, and the scope of preemption under the Supremacy Clause.[221] A federalist system must also author rules that govern how power and jurisdiction can be renegotiated, combined, and exchanged: the "rules of engagement" for domestic governments.[222]

Given the Supreme Court's overriding focus on those three features of our federalism, it is not surprising that it has failed to see the cases collected here as reflecting significant federalism stakes. These cases concern a different federalism design feature—namely, how to legally organize state governments within a federalist system. It would be difficult to understand this case law—or, for that matter, how our federalism works, what its benefits are, and how those benefits can be secured—without appreciating the choices that our constitutional system has made about how state governments should be structured.

On this design dimension, federalist systems have a range of options. States (or "subsidiary governments," as they are often called in

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220. Felix Frankfurter & James M. Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L.J. 685, 692, 705 n.87 (1925) (cataloguing the "enormous drain on the [Supreme] Court's time and energy involved in . . . intricate interstate boundary disputes" during the nineteenth and early twentieth centuries). Boundary disputes continue to be highly salient for Native nations, see, e.g., McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (holding much of Oklahoma is Native land), and although state boundaries today may seem to be etched in stone, boundary problems still arise. See Joseph Blocher, Selling State Borders, 162 U. Pa. L. Rev. 241, 243 nn.2–4 (2014) (documenting ongoing state boundary disputes).

221. See, e.g., Arizona v. United States, 567 U.S. 387, 398–400 (2012) (finding certain sections of an Arizona immigration statute were preempted by federal law); Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 584 (2011) ("The Arizona licensing law is not impliedly preempted by federal law."); United States v. Morrison, 529 U.S. 598, 617–18 (2000) (finding the Violence Against Women Act interfered with the "regulation and punishment of intrastate violence"); United States v. Lopez, 514 U.S. 549, 559–62 (1995) (striking down a federal criminal statute because it "has nothing to do with 'commerce'").

222. See Fahey, Federalism by Contract, supra note 20, at 2408 n.351 (arguing that the Court has created "rules of engagement" in its commandeering, coercion, and clear-statement cases, even if it has not understood them in those terms); see also NFIB v. Sebelius, 567 U.S. 519, 588 (2012) (establishing the rule that the federal government many not coerce state participation in joint programs); Printz v. United States, 521 U.S. 898, 935 (1997) (establishing the rule that the federal government must negotiate for state participation in joint programs rather than commandeer it); New York v. United States, 505 U.S. 144, 166 (1992) (same); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (establishing the rule that the federal government may not use ambiguity to induce the states into agreeing to joint programs). For an early scholarly treatment of this doctrine, see Robert A. Schapiro, Toward a Theory of Interactive Federalism, 91 Iowa L. Rev. 243, 285 (2005) (first suggesting the phrasing "rules of engagement").

comparative literatures)[223] can be structured as administrative organs of the federal government, with institutions chartered and amendable by the national legislature through statute.[224] They can be structured through text in the federal Constitution itself, as are the Canadian provinces.[225] They can be organized using corporate charters extended by the central government.[226] They can opt for a blend of differently ordered internal governments.[227] And most familiar to the United States, a federalist system's internal governments can be ordered through written constitutions—each subsidiary government memorializing a distinct governmental structure and portfolio of rights in a written document.

That is, of course, the form our constitutional system took at its founding—and has repeatedly renewed since. In 1776, the Continental Congress recommended that its constituent governments adopt written constitutions suitable to independent governance. By the time the federal Constitution was ratified in 1789, each had either written a new constitution, or in the cases of Rhode Island and Connecticut, determined that their existing charters, shorn of monarchical authority, would adequately perform that role.[228] The text of the federal Constitution

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223. See, e.g., Daniel Halberstam & Roderick M. Hills, Jr., State Autonomy in Germany and the United States, 574 Annals Am. Acad. Pol. & Soc. Sci. 173, 174 (2001); Mogens Herman Hansen, The Mixed Constitution Versus the Separation of Powers: Monarchical and Aristocratic Aspects of Modern Democracy, 31 Hist. Pol. Thought 509, 515 (2010); see also Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (using the term with reference to the governments of the European Union, Germany, and Switzerland).

224. The District of Columbia is structured this way, see District of Columbia Home Rule Act of 1973, Pub. L. No. 93-198, 87 Stat. 774 (codified at D.C. Code § 1-201.01 (2024)) (articulating the governmental structure of the District of Columbia). As is the Australian Capital Territory, see Australian Capital Territory (Self-Government) Act 1988 (Cth) (Austl.) (federal statute structuring government of the Australian Capital Territory).

225. See, e.g., Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.) Part V (national constitutional provisions enumerating the structure of the provincial governments).

226. Many of the smaller scale federalist systems that exist within each of the American states—connecting a state government to its towns, cities, and other municipalities—use this approach. See 2A McQuillin Mun. Corp. § 9:1 (3d ed. 2023) (describing municipal corporations and their charters).

227. Australia has a combination of differently structured subsidiary governments with six states that each has its own constitution and two territories that are administrative organs of the federal government. See, e.g., Australian Constitution s 106 (constitutions of the states); id. at s 122 (establishing central control of government of the territories). Reaching further back, Imperial Germany was composed of a particularly eclectic mix of monarchies, city-states, and territories. See Alon Confino, Federalism and the Heimat Idea in Imperial Germany, *in* German Federalism: Past, Present, Future 70, 72–73 (Maiken Umbach ed., 2002).

228. 4 Journals of the Continental Congress (1774–1789), at 342 (Worthington Chauncey Ford ed., 1906). As Gordon Wood has explained, Connecticut and Rhode Island had "corporate colonies" that "even before the Revolution were republics in fact," so they "simply confined themselves to the elimination of all mention of royal authority in their existing charters." Gordon S. Wood, The Creation of the American Republic 1776–1787, at 133 (1998).

reflects this constitutional ordering in the states by contemplating the *a priori* existence of state constitutions in the Supremacy Clause, which provides that federal law shall be supreme, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[229] The long process of state admission over the next century and a half repeatedly reenacted our commitment to layered constitutionalism. The standard template for Congress's enabling acts, which set forth admissions criteria for new states, made a written constitution a precondition of statehood.[230] The Reconstruction Act of 1867 likewise conditioned readmission on the formation of a new "constitution of government in conformity with the Constitution of the United States."[231]

State constitutions, like the federal Constitution, articulate rights. But constitutions also organize the exercise of governmental power: They charter institutions and offices, invest them with authorities, burden them with boundaries, specify agency relationships, and establish the processes and mechanisms of governance. State structures vary from one another and from the federal government. Some states bundle their executive branch with the governor at the helm, generally mirroring the federal government's unitary executive; others unbundle the executive branch, electing posts ranging from attorney general to state treasurer and vesting them with the autonomy that follows.[232] Some states appoint, and others elect, the judges on their high court.[233] Many but not all states depart from the federal government in permitting a form of legislative veto,[234] the states vary their governors' involvement in the lawmaking process,[235] they

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229. U.S. Const. art. VI, cl. 2.

230. A representative example is the Enabling Act of 1802, which set forth the conditions of Ohio's entry into the Union and formed a template for future admissions. See Enabling Act of 1802, ch. 40, § 5, 2. Stat. 173, 174 (conditioning Ohio's entry on a constitutional convention accepting Congress's invitation to "form a constitution and state government"); see also, e.g., Act of 1889, ch. 180, § 4, 25 Stat. 676, 676 (same for North Dakota, South Dakota, Montana, and Washington); Nevada Admission Act, ch. 36, § 4, 13 Stat. 30, 31 (1864) (same).

231. The Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429.

232. Council of State Gov'ts, supra note 40, at 160, 169, 174, 184 (describing states that variously appoint and elect functions ranging from the attorney general and secretary of state to state auditor and state comptroller).

233. Id. at 203–05. States like Alabama, Georgia, Oregon, Pennsylvania, Texas, and many others elect their supreme courts. Others appoint justices in a variety of ways: by the governor with legislative consent, by the governor with advice from a nominating commission, and by the governor alone. Id.

234. Compare id. at 99–101 (comparing fifty state systems of "legislative review of administrative rules"), with Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (barring legislative veto in the federal system).

235. Council of State Gov'ts, supra note 40, at 114 (comparing gubernatorial powers across fifty states).

distribute powers between their state and local governments differently, and much more.[236]

The states also take note of intellectual developments in institutional design, and they structurally experiment. Indeed, they were America's original structural innovators: Although the federal government is often credited with the structural innovations in its Constitution, the historian Gordon Wood notes that the "office of our governors, the bicameral legislatures, [and] tripartite separation of powers . . . were all born during the state constitution-making period between 1775 and the early 1780s."[237] Unlike the federal Constitution, state constitutions are frequently amended and they have continued to structurally evolve. Following theories of popular democracy in the early part of the twentieth century, a wave of states constitutionalized popular referenda and initiatives.[238] And in the early part of this century, joining nations around the world, another wave of state constitutional amendments chartered nonpartisan redistricting commissions—part of an experimental category of "guarantor institutions" or the "fourth branch."[239]

American federalism, in short, is a system of layered constitutionalism—one in which not only the central government but also the subsidiary governments operate according to constitutional frameworks.

For decades, scholars and judges have plumbed the implications of our layered constitutionalism for individual rights. Supreme Court Justice William Brennan spawned a generation of interest in the interplay between federal and state constitutional rights when he proclaimed one of the great "strengths of our federal system" is its "double source of protection for the rights of our citizens."[240] More recently, interest in how

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236. For a small sampling of the growing body of comparative work on state structure, see, e.g., Jeffrey S. Sutton, Who Decides? States as Laboratories of Constitutional Experimentation (2021); Robert F. Williams, The Law of American State Constitutions (2009); see also sources cited infra 240–243.

237. Gordon S. Wood, Foreword: State Constitution-Making in the American Revolution, 24 Rutgers L.J. 911, 911 (1993); see also id. ("Not only did the formation of the new state constitutions in 1776 establish the basic structures of our political institution, their creation also brought forth the primary conceptions of America's political and constitutional culture that have persisted to the present.").

238. Bulman-Pozen & Seifter, supra note 86, at 888.

239. See Tarunabh Khaitan, Guarantor Institutions, 16 Asian J. Compar. L. S40, S41 (2021); Mark Tushnet, Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries, 70 U. Toronto L.J. 95, 96 (2020) (calling them "institutions protecting constitutional democracy"). Many states now have redistricting commissions, see, e.g., Ariz. Const. art. IV, pt. 2, § I; Cal. Const. art. V, §§ 1–3; Colo. Const. art. V, § 44; Idaho Const. art. III, § 2; Mich. Const. art. IV, § 6; Mont. Const. art. V, § 14; Wash. Const. art. II, § 43.

240. See Brennan, State Constitutions, supra note 16, at 503; see also William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535 (1986). For a sampling of the large body of more recent literature, see, e.g., Jeffrey S. Sutton, 51 Imperfect Solutions: States and

state constitutions layer additional rights on top of the federal floor has surged again in the aftermath of *Dobbs v. Jackson Women's Health Organization*.[241] But constitutions do not just enumerate rights. They also elaborate structures.[242] Making sense of the cases collected in this Article requires an understanding of the less-scrutinized structural facets of layered constitutionalism.[243]

One way of layering constitutional governments is to sharply separate them, to carefully distribute power between layers, then let each decide how to internally manage its allocated power. This is the idea in the much-cited passage from Federalist 51 describing how power is distributed in our "compound republic." James Madison explains: "[T]he power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among

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the Making of American Constitutional Law (2018); Emily Zackin, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights (2013); Robert F. Williams, State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?, 46 Wm. & Mary L. Rev. 1499, 1502 (2005).

241. 142 S. Ct. 2228 (2022); Becky Sullivan, With *Roe* Overturned, State Constitutions Are Now at the Center of the Abortion Fight, NPR (June 29, 2022), https://www.npr.org/2022/06/29/1108251712/roe-v-wade-abortion-ruling-state-constitutions [https://perma.cc/YMU9-EK2S] (cataloging judicial strategies focused on state constitutional rights).

242. One of us has recently extended similar insights about federal constitutional rights into federal structural constitutional law. See Ahdout, Separation-of-Powers Avoidance, supra note 187, at 2413–18.

243. Two existing scholarly conversations about state constitutionalism bear on structural questions related to layered constitutionalism. First, some state courts have used federal analogies (and federal doctrine) to interpret state structural provisions—a migration of so-called "lockstepping" into questions of structure. Scholars have generally been critical of that practice because of the many nuanced differences between state and federal institutions of government. See, e.g., John Devlin, Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions, 66 Temp. L. Rev. 1205, 1224 (1993) ("[D]ivergences between federal and state governments and constitutions . . . [make the] relevance of federal models to issues of state constitutional law . . . questionable . . . ."); Robert A. Schapiro, Contingency and Universalism in State Separation of Powers Discourse, 4 Roger Williams U. L. Rev. 79, 81 (1998) ("[F]ollowing federal separation of powers doctrine leads to distorted and unsatisfying efforts at state constitutional interpretation."). Second, in a growing comparative literature on "subnational constitutionalism" or "subconstitutionalism," comparative scholars have theorized that the structure of the central government may, by performing certain functions for substate governments, alter the structural design incentives for substates. See, e.g., Tom Ginsburg & Eric A. Posner, Subconstitutionalism, 62 Stan. L. Rev. 1583, 1602 (2010) (noting that subsconstitutionalism in the United States led to "greater majoritarianism, weaker rights, and more frequent amendment" of state constitutions); see also Constitutional Dynamics in Federal Systems: Sub-national Perspectives 20–32 (Michael Burgess & G. Alan Tarr eds., 2012) (noting "the variety of constitutional sub-national experience"); Federalism, Subnational Constitutions, and Minority Rights (G. Alan Tarr, Robert F. Williams & Josef Marko eds., 2004) (collecting essays on this topic); Jonathan L. Marshfield, Models of Subnational Constitutionalism, 115 Penn. St. L. Rev. 1151, 1160–61, 1166–67 (2011) (observing that subnational units have varying forms and degrees of discretion when compared across systems).

distinct and separate departments."[244] This produces, he elaborates, a "double security," in which the "different governments will control each other, at the same time that each will be controlled by itself."[245]

After power is divided between the states and federal government, each state's constitution, the idea goes, will further divide its own power internally and so enable the self-control typical of systems of separated powers. Layered constitutionalism, in that frame, is composed of institutionally distinct and self-controlled constitutional republics. Some scholars of state constitutionalism have described states in this way.[246]

But that account is incomplete. The federal Constitution clearly contemplates, and doctrine has long settled, some federal constitutional regulation of state structure. Our system of layered constitutionalism has (and needs) structural interdependencies. For example, as noted at the beginning of Part I, the federal Constitution requires state courts to enforce federal law, thus impressing state courts into federal service; it requires state governments to yield to federal constitutional rights, thus imposing on them structural obligations to carry out those substantive guarantees commensurate with their place in our federal system; and it states—expressly—that those governments must be "republican" in form.[247]

With that vocabulary in mind, consider again the cases discussed in Part II. When the Supreme Court holds that state initiative proponents cannot represent the State in federal court,[248] or when it gives preference to the state legislature's positive-law enactments when determining whether the Eighth Amendment prohibits capital punishment,[249] the Court does not just issue a decision about substantive federal law (that is, about the law of Article III standing or the Eighth Amendment). It also makes a claim about how the federal Constitution views state structure—indeed, it is a claim *that* the federal Constitution has something to say about state structure at all. The cases identified in this Article, in short, expand the Constitution's structural interdependencies beyond those that are textually explicit or structurally obvious by articulating additional federal constitutional regulations that speak to state structure. The commonly expressed intuition that the states generally have broad structural discretion, therefore, needs to be qualified not only by the

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244. The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

245. Id.

246. See, e.g., James A. Gardner, Subnational Constitutionalism in the United States: Powerful States in a Powerful Federation, *in* Routledge Handbook of Subnational Constitutions and Constitutionalism 294, 294 (Patricia Popelier, Giacomo Delledonne & Nicholas Aroney eds., 2022) ("[States have] virtually complete constituent powers of self-organization . . . .").

247. See infra section III.B.4.

248. See supra notes 70–74 and accompanying text.

249. See supra notes 117–126 and accompanying text.

handful of settled exceptions (the Supremacy Clause, rights, and the Guarantee Clause), but by the larger portfolio of implicit structural interdependencies gathered here. What follows begins to make sense of these cases by thinking about what is at stake when courts etch new structural interdependencies into a federalist system committed to layered constitutionalism.

B. *Structural Interdependency and Federalism Values*

The cases identified in Part II implicate a common conceptual question: When should a federal Constitution in a layered system work structural interdependencies? But the answers offered by the Court are plural and balkanized, developed without cross-pollination or comparison. Drawing them together lets us ask whether, as a basic matter, the Court has managed to confront the common problems raised by these cases, whether it has been consistent, and whether any inconsistencies can be justified. We find no coherent set of principles in these cases to orient where and why the federal Constitution regulates state structure—or what theory of federalism, federal–state interaction, or federal and state functions those regulations advance.

This section begins to ask what federalism values (values that get at how much authority should be diffused or centralized) have to say about layered constitutionalism and structural interdependencies. To be clear, these values do not alone resolve any concrete cases. This is a varied body of law, and in each case, there is much more than federalism at stake. Our goal is instead to refute the idea that the omission of serious federalism discussion in these cases is based in principle. Indeed, in our view, there are real federalism costs to recognizing new structural interdependencies that the Court should more directly frame and weigh in state structural cases.

1. *Dual Sovereignty.* — It is the Court's constant refrain that the Constitution embodies a theory of federalism as "dual sovereignty"—one that imagines the states and federal government operating as distinct and insular governments, each exerting a straightforward kind of "tax-raising, law-making, peace-keeping sovereignty" within an exclusive sphere of jurisdiction, that must be actively managed by judicial rules.[250] The federalism values the Court uses to justify that system are not our federalism values (we doubt that separation is as universally valuable as the Court believes and that it is achievable on the ground). But the structural interdependencies identified in this Article are so discordant with the Court's stated commitment to federal–state independence that it is worth discussing.

The Court's conventional portfolio of federalism values develop reasons to value separation, such as preserving state sovereignty (a shape-

250. Fahey, Consent Procedures, supra note 30, at 1570.

shifting value that can be made to justify virtually any deference to the states),[251] localizing governance,[252] promoting experimentation and competition,[253] and preventing the concentration of power in the federal government as a "checking function" against tyranny.[254] Those objectives generally do not delineate between the value of protecting state jurisdiction and the value of protecting state structure; indeed, they only very rarely peer into the states and see them as anything other than unified entities. But it is difficult to see how these values can be achieved without taking seriously a state's structural self-determination.

That idea is elaborated, if briefly, in *Gregory v. Ashcroft*, which concerned the application of the federal Age Discrimination in Employment Act (which prohibits most mandatory retirement rules) to Missouri's constitutional requirement that judges retire at age seventy.[255] Finding a significant federalism value in the state's interest in controlling its own employees, the Court applied a federalism interpretive canon requiring Congress to make regulations applicable to state operations in express terms, and found that the Act did not meet that bar.[256] Explaining the state interest, the Court placed structural autonomy at the heart of "sovereignty": "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."[257] What good is the power to govern if the mechanisms of government are controlled by someone else? As the Court appreciates, at least in heuristic terms, the value of dual jurisdictional sovereignty is difficult to vindicate without dual structural autonomy to complement it.[258]

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251. See, e.g., Alden v. Maine, 527 U.S. 706, 714 (1999) ("[The] Constitution preserves the sovereign status of the States . . . .").

252. NFIB v. Sebelius, 567 U.S. 519, 536 (2012) ("[Federalism ensures] powers which . . . [']concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." (quoting Federalist No. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961))).

253. Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416, 416–24 (1956) (describing the idea that a "mobile" citizenry will seek out membership in the best governed local polities); see also New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (hypothesizing that the states, if left sufficiently to their own devices, will serve as the "laboratories" of democracy).

254. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

255. See id.

256. Id. at 461, 470.

257. See id. at 460.

258. Cf. Printz v. United States, 521 U.S. 898 (1997) (establishing that the federal government may not commandeer state executive apparatuses); New York v. United States, 505 U.S. 144, 166 (1992) (prohibiting the federal government from commandeering state legislative processes).

2. *Federal Supremacy*. — A second value worth considering as a justification for some structural interdependencies is the value of federal supremacy. The basic structure of that claim is straightforward: The federal Constitution confers a right or duty on the federal government; that federal function cannot be performed without assistance from the states; state assistance must therefore take a particular structural form. Indeed, this is the justification for one of the Constitution's overt structural interdependencies: the Supremacy Clause's requirement that state courts enforce federal law.

The Supremacy Clause makes federal law "the supreme Law of the Land."[259] But it also expresses an enforcement mechanism: The "*Judges* in every State shall be bound thereby."[260] State judges cannot deny federal supremacy simply by declining to enforce federal law. At the same time, the Court has recognized that the states must have "great latitude to establish the structure and jurisdiction of their own courts."[261] The reason is easy to appreciate in layered constitutionalism terms: As the great debates internal to the federal system show so clearly, how a constitution confers and restricts judicial jurisdiction can profoundly shape the government's capabilities, accountability, and the rule of law.

But layered constitutionalism must also yield when a state's constitutional structure presents an obstacle to the supremacy of federal law. States cannot, for instance, permit their courts to deny federal rights in proceedings "properly before them,"[262] or strip their courts of jurisdiction because of policy disagreements with federal law,[263] or deny causes of action to effectively immunize a class of defendants from federal law.[264]

But that justification is not aired in the cases collected here. Consider the Elections Clause. State "legislatures" undoubtedly perform federal functions when they regulate and administer federal elections. That state legislatures perform those regulatory functions for federal elections is of potential significance to the federal government's ability to function. If a state disclaimed the interior authority to regulate elections, that structural choice might well undermine the cause of federal supremacy.[265] But how a state legislature regulates elections—with or without gubernatorial veto,

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259. See U.S. Const. art. VI, cl. 2.

260. See id. (emphasis added).

261. Howlett v. Rose, 496 U.S. 356, 372 (1990).

262. Douglas v. N.Y., New Haven & Hartford R.R., 279 U.S. 377, 387–88 (1929).

263. Mondou v. N.Y., New Haven & Hartford R.R., 223 U.S. 1, 57 (1912).

264. Haywood v. Drown, 556 U.S. 729, 742 (2009) (calling an invalidated state jurisdictional statute "effectively an immunity statute cloaked in jurisdictional garb").

265. Or it might not: The Elections Clause authorizes Congress to "make or alter" state elections codes. U.S. Const. art. I, § 4, cl. 1. So it would also be plausible for a court to hold that if a state disclaims its Elections Clause powers, the federal government can simply regulate in its stead.

with or without an independent redistricting commission, or with or without involvement from popular referenda—is of far less relevance to the cause of federal supremacy. So too in the Eighth Amendment context: The federal government may have an interest in measuring popular preferences as expressed through institutional mechanisms (rather than as expressed in opinion polls). But that interest is no less vindicated when the Court uses the institutions as the state has itself structured them, rather than as the Court would see (or simplify) them.

3. *Uniformity.* — It is an uncontroversial observation that federal law should, for the most part, be uniform. It should not mean something different in each of the fifty states. In the adjacent area of diversity suits, for instance, *Erie* requires federal courts sitting in diversity to apply state common law rather than their own interpretation of "general law."[266] But the *Erie* principle must yield in cases that implicate a significant interest of the federal government—the law that applies to its contracts, for instance—and where state law would "subject the rights and duties of the United States to exceptional uncertainty."[267]

Perhaps, then, structural interdependencies can be justified not by the need to guide the states toward a *particular* governmental structure, but by the need to guide the states toward a *uniform* governmental structure. The justification could be formal: like the view that the word "legislature" must mean the same thing in each state or else be so indeterminant as to mean nothing. Or it could be functional: the view that understanding and accommodating state differences imposes an intolerable burden or uncertainty on the federal government.

But our system of layered constitutionalism helps answer the formal case for uniformity. For embedded in the Constitution is state structural disuniformity. The states could have been assigned standard frameworks for government in the text of the federal Constitution, but they were not. Theirs, instead, was diffuse, organic, and self-structuring. When the Constitution references the states and their institutions, it references the constitutionally organized republics that preexisted the Constitution and that were admitted by Congress into its league of states only after adopting a constitution. Context suggests, in short, that those references are means of incorporating the states in that form, not means of furtively redefining and standardizing them.

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266. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938). *Erie* does not, to be clear, apply to the state structural questions gathered in this Article—for it expressly exempts "matters governed by the Federal Constitution" and these cases clearly arise from that document. See id. at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

267. Clearfield Tr. Co. v. United States, 318 U.S. 363, 367 (1943). See also Boyle v. United Techs. Corp., 487 U.S. 500, 517 (1988) (Brennan, J., dissenting) ("Thus, *Erie* was deeply rooted in notions of federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal common law.").

The functional motivation for uniformity is likewise easy to overcome. That claim is perhaps strongest in a context like Article III standing, in which rules of standing apply to a wide range of individuals and institutions. Specialized rules for different entities are not costless. But in *Hollingsworth*, the Court did not need to guess who the state authorized to represent itself in Court. The Ninth Circuit certified that question to the California Supreme Court and the Court returned an answer in its own voice.[268] Because of *Erie*, moreover, federal courts are well practiced at ascertaining state law on particular questions. So it seems unlikely that uniformity could be justified on the ground that it imposes too great a burden on federal courts.

4. *Republicanism.* — From the perspective of institutional design, there is a straightforward reason to authorize a central constitutional court to intervene in state structuring choices: The states, like the federal government, sometimes make poor structural choices. It could make sense to empower the central government to review and, subject to guidelines, override those choices. Perhaps, then, structural interdependencies may serve a republicanism- or democracy-reinforcing character. Maybe the assignment of duties to state legislatures is an invitation for the Court to imagine the features of an ideal American legislature and constrain states—at least when performing the federal constitutional roles assigned to those bodies—to act in that institutionally preferred form.

That is a plausible understanding of the purpose of the Guarantee Clause, which instructs the federal government to "guarantee to every State in this Union a Republican Form of Government."[269] If the Union is to be republican, the idea goes, there must be a way of ensuring the republican character of each of its constituent parts. But it is notable that when confronted with a constitutional provision that speaks expressly and directly to the character and structure of state government—text much more inviting than the bare mention of "states" or state "legislatures," "executives," or "judges,"—the Court has stepped gingerly, and resisted arrogating to itself the power to sift through state structural choices and assess their republican character.

There are many good reasons for that restraint. One is embedded in the value of republicanism itself: A people's structural self-determination is a basic feature of its republican character.[270] Each state is republican in form at least in part because it constitutionally charters its own institutions

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268. See supra notes 68–74 and accompanying text.

269. U.S. Const. art. IV, § 4.

270. See Duncan v. McCall, 139 U.S. 449, 461 (1891) ("By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration . . . ."); see also Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 23 (1988) (elaborating that argument).

of government. Even as it positions the federal government as "guarant[or]" of the states' character, the Clause also encumbers the federal government not to disregard their legitimate republican choices, lest it become the instrument of their republican dissolution, rather than protector of their republican character.[271] So too each state is republican in form at least in part because it uses systems of institutional accountability—like the separation of powers among coordinate branches, processes like bicameralism and gubernatorial presentment that stitch separate institutional actions together, and calibrated forms of intergovernmental interaction like judicial review or the legislative veto. Republicanism, as amply indicated by the federal system, cannot be guaranteed through simple voter control over a single institution. Institutions exist—and represent—within rich contexts. Reaching into a state and restructuring one of its branches (or federalizing one of its branches and removing it from those forms of systemic control) will inevitably alter that institution's representative character. The task of understanding how a federal decision might reinforce or detract from a state's system of representative government is a perilously difficult one. And there is little evidence that the Supreme Court recognizes and thinks critically about how to productively manage those effects in Part II's structural interdependency cases.

Another cause for restraint, of course, is the Court's institutional competency to decide what constitutes "republican" government. Indeed, questions of institutional competency have prompted the Court to reject the Guarantee Clause's invitation to elaborate constitutional rules of state republicanism and instead to find issues related to the Clause are nonjusticiable political questions.[272]

To the extent that the Court thinks of itself as nudging states toward better, more democratic, governing structures—as the generic republic analogy perhaps gestures at—it is perhaps no accident that the Court has expressed skepticism of state institutional innovations that depart from a conception of republicanism in vogue in 1789. In *Hawke v. Smith*, for instance, the Court resisted the broad trend in the states to subject highly salient action by popular assemblies—like the ratification of a constitutional amendment—to popular referenda.[273] In *Hollingsworth*, likewise, the agency relationship that triggered the Court's scrutiny—which deputized the civilian proponents of California's citizen initiative to defend the law on the state's behalf—was a design feature that fortified the (to some, controversial) institutional innovation of popular

271. U.S. Const. art. IV, § 4.

272. See Baker v. Carr, 369 U.S. 186, 218 (1962) ("Guaranty Clause claims . . . are nonjusticiable [political questions]."); Luther v. Borden, 48 U.S. 1, 42 (1849) (reasoning that the Guaranty Clause is binding on all departments of the government and not questionable in a judicial tribunal).

273. 253 U.S. 221, 231 (1920); see also supra note 90 and corresponding text.

referenda.[274] For referenda are valuable precisely when elected representatives lack incentive to enact a popularly preferred policy—just the circumstance when those same representatives could be expected to pretermit the referenda's success by declining to defend it in court. And in *Arizona Independent Redistricting Commission*,[275] the Court contorted its conception of a legislature still further to avoid putting its firm imprimatur on state structural experiment. There, it directly contradicted the claim in *Hawke* that referenda are not legislative, and upheld the state's redistricting commission as a "legislative" body. The Court did not issue this ruling because the voters had amended their constitution to include the commission within its legislative branch (as the voters had, in fact, done) but because they had done so through a referenda that exercised legislative power.

5. *Federal Rights.* — A significant federal justification for structural interdependency is the vindication of federal rights. Indeed, as noted above, states must structure their governments to comply with nearly every right enumerated in the federal Constitution.[276] The cases collected here, however, generally exist outside the rights context—illustrating how many state structural questions remain even when (as we do) we take a capacious view of federal rights protections and their capacity to limit state structural discretion.

One exception is the Eighth Amendment context, which connects federal rights and state structure in an unusual way. In the standard case, states must organize their governments to respect federal rights. In the Eighth Amendment context, the structural interdependency does not facilitate state compliance with the Constitution's ban on cruel and unusual punishment. It facilitates the Court's measurement of the voter preferences that render a punishment cruel or unusual in the first place. There is, simply put, no rights interest in the structural assumptions embedded in the Court's measurement process, so the Court's preference for legislatures—the structural interdependency embedded in the Eighth Amendment—cannot be justified by reference to securing federal rights.

6. *Integration.* — A final group of federalism values have not gained expression in judicial opinions but have been energetically pressed by scholars. Those scholars (ourselves among them) begin with a more realistic view of how federalism operates on the ground. Contrary to the Court's assumption that the states and federal government function separately, virtually every policy area—from education and land use to national security and immigration—has become the terrain of all levels of

274. See supra notes 66–77 and accompanying text.

275. 576 U.S. 787 (2015).

276. For an exception, see Roger A. Fairfax, Jr., Interrogating the Nonincorporation of the Grand Jury Clause, 43 Cardozo L. Rev. 855, 881 (2022).

government.[277] The states and federal government exchange and pool governmental powers, create legal spaces for joint governance, and devise increasingly creative forms of joint lawmaking, joint rulemaking, and joint enforcement.[278] American federalism is on a relentless drive toward intergovernmental integration, not separation.

As the states and federal government increasingly work together, some of the potential value of separation is lost: The states cease to look like the "sovereigns" that so many federalism doctrines are concerned with protecting; power moves between governments and is pooled in joint programs, casting doubt on some of the "anti-tyranny" functions of diffusing power in the first place; and policy areas once reserved for the local governments, who could operate closer to the people, become intertwined with federal, top-down policymaking.

But in this increasing federal–state integration, there are new opportunities for the kind of intergovernmental friction, negotiation, and accommodation that yields institutional vitality. The federal government and states can devise new modes of governance by drawing together and reorganizing their respective institutional capacities.[279] States can serve as "dissenter, rival, and challenger" within coordinated programs combatting the stasis common in bureaucracy.[280] Within those integrated spaces can arise the "discursive benefits of structure" by enlarging the opportunity for the kinds of interactions through which federal and state officials "tee up national debates, accommodate political competition, and work through normative conflict."[281] When federal and state governmental structure is so often static, their flexibility in structuring cooperative programs is a source of adaptation and resilience.

Structural-interdependence cases pose a kind of puzzle for these scholars. Most are, on the one hand, broadly skeptical of judicially crafted federalism rules that try to overlay abstract formalism onto messy and adaptive institutions. But they are, on the other hand, broadly in favor of

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277. While also acknowledging, of course, the historical practice of coordination between the federal government and the states. See generally Daniel J. Elazar, The American Partnership (1962) (documenting the nineteenth-century history of intergovernmental coordination).

278. See Bridget A. Fahey, Data Federalism, 135 Harv. L. Rev. 1007, 1045–54 (2002) [hereinafter Fahey, Data Federalism] (describing institutional innovation in the cross-governmental bureaucracies that oversee federal–state data pools); see also Bridget A. Fahey, Coordinated Rulemaking and Cooperative Federalism's Administrative Law, 132 Yale L.J. 1320, 1324 (2023) (describing the unorthodox cross-governmental rulemaking used to implement cooperative programs).

279. See Abbe R. Gluck, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale L.J. 534, 584–88 (2011) (canvasing a range of federalism models embedded in the Affordable Care Act).

280. Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 Yale L.J. 1256, 1258 (2009).

281. Heather K. Gerken, Federalism as the New Nationalism: An Overview, 123 Yale L.J. 1889, 1894 (2014).

intergovernmental integration, and these cases draw the Court—for once—into the project of facilitating it.

In our view, even those federalism scholars who have celebrated organic and voluntary federal–state integration on the ground should be skeptical of the judicially mandated federal–state interdependence in these cases. Integration that elides each government's democratic self-control threatens the rest of the integrative project. When the federal government and the states set up programs, processes, and administrative structures to pursue a joint project, those apparatuses gain legitimacy, and are subjected to democratic control, only independently: Each participating government must exert independent control over the officials and resources it contributes to the shared effort.[282] State constitutions provide the legitimating framework for the state agents that inhabit what one of us has called federalism's "interstitial spaces."[283] They supply the distinctions between those who act for the federal government and those who act for the state within the joint ecosystems that contemporary federalism scholarship celebrates. Perhaps most fundamentally, state constitutions—if structured by the state itself—permit a kind of genealogy of these democratically precarious coordinated programs: They let us trace the use of state resources—whether state personnel, state authority, or state assets—to a decision by someone who can claim authorization through a state-crafted decisionmaking process proscribed in a state-crafted constitutional framework.

C. *Structural Interdependency and Judicial Competency*

The last section argued that federalism values generally counsel in favor of constitutional separation. This section approaches the federal law of state structure from a different perspective. It considers the institutional sensitivities the Court confronts when it crafts federal constitutional rules of state structure. This section highlights three areas of institutional sensitivity that further counsel in favor of (federal) judicial restraint in this area: courts' institutional competency to make the kind of structural judgments these rules require, the incentives created by the social sensitivity present in these cases, and the distortions of the dispute-resolution posture in which these rules have arisen.

First, the Supreme Court should confront its institutional competency to make judgments about state structure. Does it have an informed intuition about the political valence of its judgments? Does it understand the effects of its rulings on state institutions? Even if it does, can it effectively devise rules to meet its objectives?

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282. Our governments, moreover, use treaty-like instruments to set up their joint projects precisely so that they can retain their independence even in partnership. Fahey, Federalism by Contract, supra note 20, at 2411–16.

283. Fahey, Data Federalism, supra note 278, at 1077.

Structural interdependencies sit at the intersection of two institutionally sensitive areas: federalism and the separation of powers. In both areas, the Court has expressed reasonable concerns about inserting itself into the political fray and doubts about its capacity to understand the institutional effects of its decisions. In the most analogous federalism context, one of the few contexts in which the Court was likewise in a position to make structural judgments about the states, the Court famously and almost jarringly conceded defeat. In *National League of Cities v. Usery*, the Court sustained a constitutional challenge to the application of the federal Fair Labor Standards Act to some state employees, reasoning that the Constitution restricted Congress from interfering with the states' "traditional governmental functions."[284] But in less than a decade, it reversed course, finding no judicially "manageable" standard with which to delineate traditional from nontraditional state governmental functions.[285] When it confronts questions of state structure head-on, in short, the Court has yet to realize an institutional competency to craft nuanced rules for state structural arrangements.

The cases identified here present a task still more complicated than crafting rules for fifty separate state systems. That is because these cases are also separation-of-powers cases. Not in the sense that they position the court to adjudicate disputes between the President and Congress, but because they so often arise as intramural state disputes between state governors and legislatures, attorneys general and initiative proponents, commissioners and administrators. These cases, in short, also raise familiar separation-of-powers sensitivities by positioning the Court to hand a win to one or another state political actor. They have many of the same rule-of-law sensitivities that inform the Court's thinking about its insertion into federal intramural disputes, but on an intersystemic axis that only magnifies those concerns.

The Court, therefore, needs not only to be assured of its competency to evaluate state-level institutional arrangements, it also needs to be aware of something like the intersystemic rule-of-law consequences of a national court making structural judgments for state systems. We might hypothesize, for instance, that state-level institutional actors—governors, legislatures, commissions, and the like—resort to federal courts not *ex ante* to establish clear rules of structural design before elections, appointments, and other power changeovers, but *ex post*, when the selection process has run its course and the litigious official has failed to prevail. In examples ranging from *Hollingsworth v. Perry*[286] to *Moore v. Texas*,[287] state officials try to disrupt the institutional design choices of their states through litigation.

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284. 426 U.S. 833, 852 (1976).

285. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 543 (1985).

286. 570 U.S. 693 (2013).

287. See Moore v. Texas (*Moore II*), 139 S. Ct. 666 (2019) (per curiam); Moore v. Texas (*Moore I*), 137 S. Ct. 1039 (2017).

When intervening in structural disputes, the Supreme Court thinks of its own role, often using language to lower the political temperature of its decision.[288] Indeed, federal separation-of-powers suits can set the president of one party against the legislature of another, which risks creating the appearance that the Court is choosing political winners and losers.[289] When the Court intervenes in state-level structural questions that have consequences for many or all of the states—as do most Elections Clause cases—those risks are multiplied across the many states. Now the Court is in a position not to choose one political winner, but as many as there are states affected by the rule. The political aftermath of federal judicial intervention in state political battles warrants greater research. The goal here is just to suggest that the institutional sensitives in this area are heightened and potentially novel.

Second, many structural interdependency cases have arisen incidentally in disputes over significant social or political issues—like presidential elections, marriage equality, and reproductive freedom.[290] Social salience influences the arguments that lawyers make concerning the merits and justiciability, and also about state structure.[291] Structural constitutional law, including intersystemic structural constitutional law, is not free from partisanship. Although views on executive power may correlate with and be influenced by social politics, one might think that the ground rules for layered constitutionalism ought to be settled free from—or at least further from—divisive social issues. A dispute about reproductive freedom, religious liberty, or gun rights, put differently, may not be the place to hash out whether states have autonomy over their own system of governance in a structural sense. Litigants (and judges) are understandably fixated on the socially salient issue before them. But because litigants are the engines of litigation and, indeed, courts are generally bound by the arguments parties make,[292] the merits influence the arguments about the non-merits. Yet some of the structural interdependencies this Article uncovers have arisen precisely in these socially charged contexts.[293]

But there is a deeper way that social salience may shape judicial decisionmaking. In the federal system, there is a well-known dynamic in

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288. See Ahdout, Enforcement Lawmaking and Judicial Review, supra note 189, at 982.

289. Ahdout, Separation-of-Powers Avoidance, supra note 187, at 2366 ("When federal judges opine on the separation of powers, they are not neutral arbiters of the separation of powers.").

290. See supra Part II.

291. See, e.g., Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95 (1974) (exploring the role and advantages of repeat players in litigation).

292. See June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2118 (2020) (declining to consider arguments that the State did not brief until its certiorari stage reply).

293. See supra notes 59–60 and accompanying text (discussing *Hollingsworth v. Perry*); notes 116–128 (discussing capital punishment); notes 104–112 (discussing *Bush v. Gore*).

which courts circumvent the socially significant issue by deciding cases on jurisdictional or quasi-jurisdictional grounds. Scholars and observers sometimes celebrate this behavior as an appealing judicial minimalism or a vindication of the "passive virtues."[294] The Court seems to use structural interdependencies as an escape hatch—to avoid other substantive questions—in the same way it uses jurisdictional doctrines like standing as tools of evasion. *Hollingsworth*,[295] for example, was framed as a case with high, politically salient stakes for marriage equality. The Court avoided the political fray by dismissing the case on standing grounds that were inflected with judgments about state structure. But the Court did not foreground—or even meaningfully discuss—those federalism concerns, even as its primary effect was to bound direct democracy in the states. State structure, that is to say, has come to serve as a hydraulic for the "passive virtues": Courts can avoid socially salient questions by ruling on justiciability or, as in some of cases discussed in Part II, on state structure. The worry, of course, is that evading a hard federal question by imposing structural constraints (and concomitant burdens) on the states is hardly passive or virtuous. The consequences of doing so are just less visible to federal judges concerned primarily with the federal system.

Third, when federal courts articulate legal rules, they do so through a system of dispute resolution: case-by-case and conflict-by-conflict. There are long-debated benefits and drawbacks of legal ordering through dispute resolution.[296] Scholars have long dissected and critiqued the federal courts' institutional role in adjudicating federal constitutional rights in a dispute resolution posture and, more recently, federal constitutional structure as well.[297] Those same concerns apply to

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294. See Alexander M. Bickel, The Supreme Court—1960 Term, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 47–58 (1961).

295. Hollingsworth v. Perry, 570 U.S. 693 (2013).

296. These debates take many forms. One wave is about dispute resolution and institutional advantage. E.g., Richard H. Fallon, Jr., The Core of an Uneasy Case for Judicial Review, 121 Harv. L. Rev. 1693 (2008); Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978); Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346 (2006). A second wave centered on public law litigation's initial form. E.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Owen M. Fiss, The Social and Political Foundations of Adjudication, 6 Law & Hum. Behav. 121 (1982); Susan P. Sturm, A Normative Theory of Public Law Remedies, 79 Geo. L.J. 1355 (1991). A more recent form extends into the new wave of public law litigation. E.g., Ahdout, Enforcement Lawmaking and Judicial Review, supra note 189; Davis, supra note 45; Tara Leigh Grove, Government Standing and the Fallacy of Institutional Injury, 167 U. Pa. L. Rev. 611 (2019).

297. E.g., Ahdout, Separation-of-Powers Avoidance, supra note 187 (arguing that federal adjudication of disputes between coordinate branches yields systemic distortions to federal separation-of-powers doctrine); Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731 (1991); Kermit Roosevelt III, Constitutional Calcification: How the Law Becomes What the Court Does, 91 Va. L. Rev. 1649 (2005); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978).

intersystemic structural disputes. Indeed, dispute resolution and conflict can be overexposed to opportunistic framing by litigants and a source of legal uncertainty as judges strain not to predetermine the answer to the next dispute.[298] Why has federal regulation of state structure developed in such a haphazard manner? At least in part because of a dispute resolution posture. Unlike other areas of federalism or separation-of-powers doctrine, there is no push-and-pull between judicial rules and legislative rules of the type that can have a salutary effect on dispute resolution by introducing courts to the broader-scale, prospective reasoning that is characteristic of legislative acts. The more pressing question is whether unaltered dispute resolution offers the best way forward or whether the Court should use techniques of restraint that it has used in other contexts to minimize its role relative to other federal and state actors. This Article cannot offer a satisfying answer to that richly important question here, but can instead flag it as a future area ripe for further development and debate.

CONCLUSION

American federalism is characterized by its layered constitutionalism. The structures of our governments are defined by fifty-one interconnected constitutions, each purporting to define its jurisdiction's separation of powers. But there is more to the story than this. In a system of layered constitutionalism, there are bound to be structural interdependencies to navigate the friction between constitutional governments. And indeed, the federal Constitution contemplates some of these in its text: The Guarantee Clause, the Supremacy Clause, the Bill of Rights, and the Reconstruction Amendments all bound state structure textually, and for good reason.

But this Article has shown that the common belief that states are free to structure themselves so long as they comport with these constitutional provisions must be updated. In a broader set of circumstances than previously believed, the Supreme Court has determined that the federal Constitution does circumscribe the structural autonomy that states possess. From Article III to the Eleventh Amendment and beyond, there is a rich landscape of intersystemic structural constitutional law that has been developed under our noses.

Once the legal architecture of structural interdependency is brought into view, it unlocks deep questions for both federalism and federal separation of powers. How and who should create structural interdependencies? What justifies limiting state structural autonomy? What does it mean to have structural interdependencies that are created in dispute resolution? How do these structural interdependencies affect

298. Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. 883, 883 (2006) ("It is the merit of the common law . . . that it decides the case first and determines the principle afterwards." (internal quotation marks omitted) (quoting Oliver Wendell Holmes, Codes, and the Arrangement of the Law, 5 Am. L. Rev. 1, 1 (1870))).

state institutional design, and therefore substantive outcomes? This Article has sought to both begin this conversation and develop a vocabulary to move it forward.