State Courts and Democratic Theory: Toward A Theory of State Constitutional Judicial Review

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STATE COURTS AND DEMOCRATIC THEORY:
TOWARD A THEORY OF STATE CONSTITUTIONAL JUDICIAL REVIEW

David Schultz†

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I. INTRODUCTION

Under what conditions, if any, are state courts justified in making policy decisions that affect the political process? We live in increasingly politically polarized times.1 Congress and the President are unable work together.2 We now see a similar pattern at the state level.3 Paralleling what

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2. See generally SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2003) (reviewing over fifty years of legislative history and deadlock as well as the evolution of congressional response to such deadlock).
has happened at the federal level, state judiciaries are compelled to resolve disputes, often involving clashes between the other branches of government, or addressing other salient and controversial policy issues. Perhaps such a tendency confirms Alexis de Tocqueville’s observation, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one. Consequently, the language of everyday party-political controversy has to be borrowed from legal phraseology and conceptions.”

At the federal level, the U.S. Supreme Court has famously waded into the “political thicket” over time—even addressing contentious issues such as abortion, marriage equality, immigration, the constitutionality of the Affordable Care Act, presidential appointment power, and the division of powers between the federal government and states.

States, too, have stepped in to resolve similar issues. For example, nationally, state courts led the way when it came to legalization of same-sex marriage, addressing issues of voter fraud and identification, or partisan gerrymandering—even where the Supreme Court demurred or got involved later. Over time, scholars have questioned both the legitimacy of the federal courts and their capacity to intervene in these types of policy or political disputes.

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5. Colegrove v. Green, 328 U.S. 549, 556 (1946) (holding as to malapportionment that “[t]he courts ought not to enter this political thicket.”).
13. See Weinschenk v. State, 203 S.W.3d 201, 204 (Mo. 2006).
16. Although it is not always clear exactly what types of disputes critics declare should be off limits to judicial intervention or dispute, for the purposes of this article, the scope
In Minnesota, the courts have been asked to address contentious issues, as the governor and other members of the executive branch have clashed with the legislature. There have been judicial requests to fund state government functions when no budget has been reached, to define the scope of the governor’s unallotment, and line-item veto powers.

There have also been demands to address separation of powers issues demarcating the power of the legislature versus the state auditor, questions invoking the single-subject rule, whether the lieutenant governor can simultaneously serve in the Minnesota Senate, or even regarding the adequacy of funding and segregation in schools. Each of these cases endeavor to bring the judicial branch into the middle of political-legal controversies. In some situations, courts have waded into the political thicket; in others they have not, employing a variety of “passive virtues,” such as standing or jurisdiction, to avoid the question.

will be the types of disputes included in inter-or-intra-branch conflicts (e.g., disagreements between the legislature and the governor), or policy matters that look like they require discretionary or political decisions to be made by branches that are subject to electoral accountability. For a general discussion of the criticism of what it means for courts to make policy or intrude into the political process, see: David Schultz, Courts and Law in American Society, in LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE, 1, 23 (David A. Schultz ed., 1998).


18. See Brayton v. Pawlenty, 781 N.W.2d 357, 368 (Minn. 2010).

19. Compare Ninetieth Minn. State Senate v. Dayton, 903 N.W.2d 609 (2017) (holding that the Governor’s exercise of his line-item veto power on appropriations to the Legislature complied with the plain language provision of the state constitution; that the Governor’s line-item veto power does not violate separation of powers by effectively abolishing the Legislature; and that judicial restraint prevented the court from deciding whether the Governor’s exercise of the line-item veto power violated separation of powers by unconstitutionally coercing the Legislature), with Legislative Council v. Martinez, No. S-1-SC-36422 (N.M. S. Ct. May 11, 2017) (dismissing the case on ripeness grounds, effectively allowing the Governor’s use of a line-item veto).

20. See Otto v. Wright Cty., 910 N.W.2d 446, 446 (Minn. 2018).


23. See Cruz-Guzman v. State, 916 N.W.2d 1, 2 (Minn. 2018); Skeen v. State, 505 N.W.2d 299, 299 (Minn. 1993).
Nevertheless, lurking behind these legal controversies is a democratic theory question: Should state courts make policy, or otherwise render decisions, that appear as though they should be entrusted to other branches of state government?

In effect, how legitimate is it for state courts to resolve these types of controversies? Examining this issue will be the subject of this article, demonstrating that problems potentially limiting federal courts do not apply to state courts. As a result, the latter may have more legitimacy and perhaps capacity to address political or policy issues than the former. However, state judiciaries face unique problems that the federal courts do not, specifically when they involve elected judges.

In order to examine the legitimacy of state judicial policy making, this article will do several things. First, it will provide an overview of American democratic-constitutional theory as it applies at the federal level, seeking to clarify the problem that courts at this level face when they issue opinions that might be characterized as policy making. Specifically, it addresses both a normative issue—what has been called the counter-majoritarian problem—and a capacity issue—whether the federal courts have the ability or skills to make policy. After defining the lines of debate at the federal level, this article turns to state courts and constitutional theory, arguing that they are in a different situation than federal courts, both by virtue of the nature of their own constitutions and, in the case of thirty-eight states, having an elected judiciary. Elected judiciaries, however, generate a different problem—the majoritarian dilemma—a source of both legitimacy and illegitimacy.

The majoritarian problem is a vexing and perhaps unsolvable problem for some state courts, but that problem does not take away from a democratic theory of state courts to intervene in political disputes in ways that depart from the federal courts. This article concludes that there needs to be either a general or state-specific theory of judicial review that describes when it is appropriate for state courts to intervene in political disputes.24

II. AMERICAN DEMOCRATIC-CONSTITUTIONAL THEORY

Democracies have their own unique value structures. Each democratic society defines itself, including “its object of inquiry, the critical components of what makes a political system work, and what forces,
structures, and assumptions are core to its conception of governance."25 The ontology of a democracy is what distinguishes it from other types of political regimes. Democracy defines not only the basic structure of how institutions are supposed to operate, but the political theory or set of values behind them that describe what these institutions are supposed to do. Theory, or at least democratic theory, defines institutions and their functions. This is the essence of what a constitution is and does, thereby connecting political theory to constitutional law. There are five “criteria” for a democracy: (1) voting equality; (2) effective participation; (3) opportunity for enlightened understanding; (4) control of the decision-making agenda; and (5) intrinsic equality.26 To understand American constitutional theory, especially at the national level, a brief discussion of American democratic theory is necessary.27

A. The Americanization of American Democratic Theory

There are two democratic theory traditions in the United States. The first is known as Madisonian democracy (named after James Madison), and the other is the pluralist tradition, originating in post-World War II political science.28 Both can be credited to American history, particularly the disputes between the American colonies and England. They also both share a common concern with the issue of how to limit abuses of power. However, the focus on Madisonian democracy’s core assumptions is most relevant to the arguments here. At root, the American Revolution involved a dispute over three political terms: representation, constitutionalism, and sovereignty. The real revolution was over the meaning of these terms and how they affected American political perceptions and democratic participation.

Begin with the concept of representation. One of the primary objections the American colonists had with British rule was the taxation of tea and other goods. Through this, the famous saying “No taxation without

27. For a more detailed discussion of the elements of an American democratic theory of election law, see DAVID SCHULTZ, ELECTION LAW AND DEMOCRATIC THEORY ch. 2 (Burlington, VT: Ashgate, 2014).
representation!" was born. In making this assertion, Americans argued that they did not elect anyone in the British Parliament—the body that voted on taxes and other policies affecting America—thus, they had no representation. The British did not understand this argument and asserted that the interests of the American colonies were virtually represented in the Parliament. In one of the first political conflicts between the Colonies and England, the two sides used the same word—representation—but meant very different things. Americans demanded a direct and real voice in Parliament over their own affairs. The British, however, refused to allow such a change.

A second debated concept was that of political sovereignty, which refers to the ultimate administrator in charge of a state or nation. For the British, sovereignty resided in Parliament. American colonists, however, took a different view: ultimate sovereignty resided with the people. Relying on this perspective, the colonists believed they were entitled to influence over taxation, the control of their own representatives, the selection of their governors and judges, and other affairs that affected their lives. On July 4, 1776, it became clear that the thirteen states in North America were sovereign; they were their own country and entitled to rule themselves.

31. See John P. Reid, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 58 (1989) (“Edmund Burke got carried away. ‘This is virtual representation,’ he exclaimed of the representation of interests. ‘Such a representation I think to be in many cases even better than actual . . . .’”).
32. Id. at 43
33. See generally Richard Ashcraft, REVOLUTIONARY POLITICS & LOCKE’S TWO TREATISES OF GOVERNMENT (1980); James Tully, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES (1980). British thinkers such as John Locke had argued against claims by the King that sovereignty was lodged in the monarchy. This was essentially the argument between Sir Robert Filmer and John Locke. Ashcraft, supra.
34. See, e.g, James Madison, Essay on Sovereignty (1835), https://rotunda.upress.virginia.edu/founders/default.asp?keys=FOEA-print-02-02-02-3188 [https://perma.cc/65NF-MK27].
35. The Declaration of Independence para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just Powers from the consent of the governed . . . .”)
36. Id.
Finally, constitutionalism is an ancient term, originally describing the idea that a particular ruler or regime’s actions could be illegitimate according to ancient laws or norms. Over time, constitutionalism came to be defined as “a government of limited powers, one which often must adhere to rule of law, procedural due process or regularity, and eventually to a commitment to the protection of individual rights.” During this time, the British equated the Parliament with the Constitution, meaning that Parliament defined what was constitutional. Unlike the British, Americans believed a constitution should be distinct from the government and define the powers to which a government was entitled.

Familiar with the abuses of a monarchy, Americans took it upon themselves to define terms, such as representation, that would reflect their new country’s values. Defining these terms would affect American democratic theory for centuries to come. As one example, those opposing female suffrage had a difficult time asserting that virtual representation was adequate when direct representation is such a fundamental principle of the American Constitution.

This experience with the British was not the only factor that defined the ideologies that would eventually be incorporated into the Constitution of 1787. Other factors included a Lockean tradition favoring equality, individual rights, and a secular, limited government; a religious Pilgrim-
Puritan tradition favoring religious liberty and human fallibility, and a republican tradition emphasizing a commitment to popular government, support for a belief in a public good, and a fear of corruption rooted in concern about how wealth affected political power. Finally, there was a legal tradition credited to William Blackstone, which endorsed a commitment to rule of law. These values played a significant role in the development of the governing documents of the United States, including the 1781 Articles of Confederation. The Articles emphasized a decentralized political system. Nevertheless, the Articles should be considered a first draft because they did not fully address the country’s financial needs or the states’ veto powers.

Indeed, the Philadelphia Constitutional Convention took place in 1787 because many felt that the Articles needed revision. However, tension existed; many Americans feared a strong national government, but the Articles had not provided enough authority for government to carry out needed functions. Thus, the framers sought a balance.

B. Madisonian Democracy and the Problem of Politics

It is important to understand what the framers intended to accomplish upon drafting the Constitution. The Federalist Papers provide


44. See generally Blackstone in America: Selected Essays of Kathryn Preyer (Mary Sarah Bilder et al. eds., 2009) (discussing the ways in which American legislators and judges reinterpreted the English common law to work in with the new American republic); Perry Miller, The Legal Mind in America: From Independence to the Civil War (1961) (analyzing the experiences of American intellectuals that went into the establishment of a distinctly American identity).

45. Articles of Confederation of 1781.

46. See The Federalist No. 12 (Alexander Hamilton).
some guidance—they reflect an urgent concern to limit the constraints on
government. In total, eighty-five essays were written to encourage
replacement of the Articles of Confederation with a new, more federally-
focused constitution. The Federalists argued for a centralized government
on grounds that it would meet the needs of a new republic. Specifically,
the new constitution could manage any political factions that would
threaten the separation of the colonies.

Moreover, the Federalist Papers provide the political theory, analysis,
and philosophy behind the Constitution. One scholar suggests that the
Federalist Papers essays written by Madison provide insight into his views
of how the Constitution would operate. While the Federalist Papers
arguably may have been political propaganda for the new constitution,
they still provide a glimpse into what might have been intended for the
Constitution.

The Federalist Papers, importantly, provide thorough analysis of the
intersection between human nature and democratic politics. Alexander
Hamilton noted, “The science of politics, however, like most other
sciences, has received great improvement. The efficacy of various
principles is now well understood, which were either not known at all, or
imperfectly known to the ancients.” Hamilton, along with Madison and
Jay, believed that their analysis was based upon a solid study of politics. In
their work, they sought to describe how best to divide political power,
check political excess, and assure accountability to the people. In short,
they sought to preserve the principles of popular or republican
government and place them on firmer footing.

47. Letter from James Madison to James K. Paulding (July 23, 1818), reprinted in
THE WRITINGS OF JAMES MADISON 1808–19 (1908),
https://oll.libertyfund.org/titles/madison-the-writings-vol-8-1808-1819
[https://perma.cc/GU93-Q3MF] (“The immediate object of [the Papers] was to vindicate &
recommend the new Constitution to the State of [New York] whose ratification of the
instrument, was doubtful, as well as important.”).
49. THE FEDERALIST NO. 10 (James Madison).
50. See, e.g., Charles M. Yablon, Madison’s Full Faith and Credit Clause: A
Historical Analysis, 33 CARDOZO L. REV. 125, 125–26 (2011).
51. Stephen G. Kurtz, Rereading The Federalist Papers, WASH. POST (Jan. 25,
g-the-federalist-papers/047762d8-25a7-4d16-807a-c5ba306bda4d/[https://perma.cc/5ZRY-
FWKP].
52. THE FEDERALIST NO. 9 (Alexander Hamilton).
53. THE FEDERALIST NOS. 48, 49 (James Madison).
54. Id.
When examining public opinion, Madison claimed, “all governments rest on opinion.”Democratic government does this, as it should aim to derive consent from its people. As Abraham Lincoln famously concluded, the government should be “of the people, by the people, for the people.” However, while public opinion is often seen as an asset to democracy, it also can weaken the institution. Madison wrote that a government should not often make appeals to popular sentiment to resolve political issues. He reasoned that groups of people can turn reasonable opinions into restless sentiment and unruly passion, and that public opinion can be unstable.

Hamilton similarly pronounced, “[M]en are ambitious, vindictive, and rapacious.” These feelings should not rule the government; instead, some mechanism is needed to calm individual sentiments before making public choices. Individuals are generally motivated by reason or virtues of something larger than themselves. Likewise, Madison wrote, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” As these passages illustrate, the Federalist Papers are based on human psychology—specifically, the notion that humans are self-interested. Because humans cannot always be expected to be fair or selfless, a sound government is crucial.

The solution—arguably the genius—of American politics may be in encouraging diversity. At one point, the country, like Madison, seemed to believe that the power of majority rule should control threats posed by minority groups. Yet, the real issue was how to prevent majoritarian opinions and factions from dominating.

55. The Federalist No. 49 (James Madison).
56. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).
58. The Federalist No. 49 (James Madison).
59. The Federalist No. 6 (Alexander Hamilton).
61. The Federalist No. 51 (James Madison).
62. The Federalist No. 57 (James Madison).
According to Madison, the political society needs to address three competing goals: the preservation of a republican form of government, individual liberty, and limitation on the threat of factions to both republican government and individual liberty.§ Facts, if composed of a numeric minority, can be handled by majority rule and elections. In other words, the majority will continue to rule based on popular vote. The actual issue, though, is what to do with a faction that constitutes a majority. Madison argued that the issue is how to control their actions:

When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.

Phrased otherwise, the question, as Alexis de Tocqueville would later ask, is how can the American republic deal with the threats of the tyranny of the majority?§ Or, in other words, how can majority rule be balanced with minority rights? How does one allow for majority opinion to rule, as it should in a popular government, but not let it become destructive, acting impulsively or rashly when threatened? Madison believed the solution was three-fold: “(1) direct citizen control for representatives; (2) political homogeneity for diversity; and (3) a small democracy for a large republic.”

The first change from classical republicanism identified by Madison is limiting direct access to the political system. This allows level-headed individuals to represent the masses and avoid irrational action.§ For Madison, such a government would provide a balanced assessment of public opinion, and thus could improve the public good. The second and third changes Madison suggested are closely related, as it would be impossible to combine or rid factions, inequalities, or diversities without obstructing liberty. These groups and differences will always exist. Size and diversity must increase in the government itself. Put another way, the

§§ 63. The Federalist No. 10 (James Madison).
64. Id.
65. De Tocqueville, supra note 4, at 250–53.
67. The Federalist No. 10 (James Madison).
68. Id.
smaller a democracy, the easier it would be for a faction to dominate. In Madison’s words:

   Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.  

   This technique involved not just allowing a thousand factions to bloom, but using these factions to counteract one another—letting ambition counteract ambition and faction check faction can control the threat of factions.  

   The solution to constraining the distortion of faction and tyranny of majoritarian opinions lies in limiting the access of these groups to all the tools they need to oppress others. It lies in complicating the processes by which these groups form without ever restricting liberty or denying their right to form associations.  

   Madison and the other authors of the Federalist Papers describe additional mechanisms to address the threat of majority factions. All are directed toward making it harder for majority factions to form, or if they do form, to make it difficult for them to gather and exercise political power in a destructive fashion. There are numerous pieces to the puzzle directed at breaking up political power and frustrating a majority from taking political control. In Federalist no. 51, Madison connects self-interest to government, arguing that if one can link constitutional power or duties with institutional and individual self-interest, the competition among the three branches of government will serve to check them against one another, and thus “balance” their relative power. For example, Congress generally is unable to pass laws on its own without approval from the President. Likewise, the President cannot bring the country to war without Congress’s permission, and the judicial branch is presumably unable to pass laws. No one branch exclusively possesses all the power necessary to run the country.

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69. Id.  
70. Id.  
71. The Federalist No. 51 (James Madison).  
73. U.S. Const. art II, § 2 (providing that the President is the Commander-in-Chief of the armed forces); see also id. art. I, § 8 (empowering Congress to declare war); id. at art. III, § 1–2 (providing that there is no enumerated power of the judiciary to pass laws).
Furthermore, none of the branches were intended to be dominant.\textsuperscript{74} To this end, a bicameral Congress was created to balance legislative power. The election timelines for the House and Senate, two versus six years respectively, also were intended to prevent any single faction from taking control. Each of the above-mentioned measures were taken to prevent a majority faction from taking power over the government.

Federalism further checks political power. In a way, it serves as a fence or border to control factions. A group of citizens may exert great influence or control over a state government, but the federal government would be yet another hurdle for that faction to conquer. Federalism ultimately breaks up political power. Thus, the \textit{Federalist Papers} provide insight regarding how to abate the problems that majority factions present without violating individual liberties.

The Constitution provides a possible mechanism for controlling the power of majority factions. Instead of seeking to suppress groups, it uses certain techniques to disperse political power, including: interest competition in a heterogeneous and enlarged political society, representation, bicameralism, checks and balances, separation of powers, and federalism. In sum, the goal is that political power will check itself and that no group will have the power to rapidly change the system.\textsuperscript{75}

The goal of Madisonian democracy is to avoid tyranny—to avoid potential situations where power is concentrated and can threaten individual liberty. Ultimately, it is premised on the idea that a real substantive public good does exist. The constitutional machinery that Madison proposed is meant, in part, to clear away those forces that threaten representatives and the political process from articulating the public good. The legislative process, so to speak, is polluted when factions or special interest groups exercise adverse political pressure. Thus, checks and balances, separation of powers, and federalism, among other values, are all aimed at solving the problems of politics and creating a republic that can pursue or discover the public good.

A faction-ridden political process is a threat to individual rights and the public good. Nonetheless, it is important to note that this model of protecting rights relied upon the political process. The Constitution’s logic

\textsuperscript{74} See id. art. I–III (establishing a bicameral legislature, executive branch, and separate judiciary). See generally John F. Manning, \textit{Separation of Powers as Ordinary Interpretation}, 121 HARV. L. REV. 1939 (2011) (arguing that because the constitution does not adopt freestanding separation of powers, interpreters should “determine the allocation of power by asking how it is effectuated by particular clauses.”).

\textsuperscript{75} The \textit{Federalist} No. 10 (James Madison).
almost transformed the political process into a big machine.\textsuperscript{76} Each
c constituent—such as Congress or the courts—had a particular role in it. The
original constitutional solution was to use the political process to police
itself against majority factions.

Despite its rationale, the Madisonian model has flaws, such as
assuming that a larger political system might prevent larger factions from
forming. While at one point that may have held steady, in an era of
cellphones, the internet, and social media, factions are easily formed.
Another problem with the Madisonian model is the premise that minority
factions cannot constitute a threat. Majority rule was intended to address
the problem of these smaller factions. But small, well-organized groups
can be powerful. These groups can play an outsized role in politics.\textsuperscript{77}
Organizations such as the National Rifle Association, the American
Association of Retired Persons, and others exercise disproportionate
influence in the American political process. While they may be minority
groups in numbers, they use lobbyists and political contributions to
exercise significant influence. Moreover, as Carolene Products illustrates,
there are various forces that can cause the political process to close down.\textsuperscript{78}
Nonetheless, the point here is that the political process does not always
operate properly, and it may malfunction. What to do? Enter James
Madison.

The Founders anticipated this problem and grappled with it when
they met in 1787. Federalists, such as Alexander Hamilton and James
Madison, favored replacing the Articles of Confederation with a new
constitution that would strengthen the central government.\textsuperscript{79} They
reasoned that replacement would provide a more effective method for
regulating commerce, supporting the union, and uniting a common

\textsuperscript{77} \textit{See generally} Benjamim G. Bishen, Tyranny of the Minority: The Subconstituency Politics Theory of Representation (2009) (discussing how the desires of subconstituencies often outweigh the desires of the majority); Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965) (explaining how a large group with a common interest does not automatically give rise to collective action without individual incentive).
\textsuperscript{78} \textit{See United States v. Carolene Products Co., 304 U.S. 144, n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”); see also John Hart Ely, Democracy and Distrust 103–104 (1980).}
\textsuperscript{79} \textbf{The Federalist Nos. 16, 17 (Alexander Hamilton), Nos. 18, 19, 20 (Alexander Hamilton & James Madison).}
defense. However, not everyone agreed that the Articles of Confederation-based government was bad or that the new constitution amounted to an improvement. In particular, the Anti-Federalists feared that the new government would become too powerful and that it would threaten individual rights. As a result, they insisted there be a bill of rights.

In *Federalist* no. 84, Hamilton dismissed the need for a bill of rights, arguing that to include one would be to assert that there were some powers that the national government did not possess. Hamilton’s arguments were unsuccessful. Many state legislatures adopted calls for bills of rights as they ratified the new constitution. Eventually, James Madison relented, promising to introduce a bill of rights in Congress if the new constitution was adopted. The states ratified the Constitution, and Madison kept his promise. He offered seventeen amendments in the House of Representatives in 1789. Ten of these amendments became the Bill of Rights upon ratification in December 1791.

Adoption of the Bill of Rights was not only a triumph for the Anti-Federalists, but also a conceptual and perhaps de facto recognition that the political process alone cannot police itself to protect rights. The adoption of the Bill of Rights represented a significant shift in how the national government was to operate. As originally envisioned in the *Federalist Papers*, the political process would be governed through a system of checks and balances, separation of powers, and other constitutional mechanisms. Although this process defended individual rights and the public good, the Anti-Federalists still believed individual rights needed specification. As Supreme Court Justice Robert Jackson stated in *West Virginia v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place


82. U.S. CONST. amends. I–X.


84. NCC Staff, *On This Day: James Madison Introduces the Bill of Rights*, CONST. DAILY (June 8, 2018), https://constitutioncenter.org/blog/on-this-day-james-madison-introduces-the-bill-of-rights [http://perma.cc/N8X5-U7YW].

85. Id.

86. See generally *The Anti-Federalist Papers and the Constitutional Convention Debates* (Ralph Ketcham ed., 1986) (providing a historical context for constitutional debates as well as criticisms of a centralized government with implications on the broad expanse of such power).
them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.\footnote{319 U.S. 624, 638 (1943).}

The adoption of the Bill of Rights was a major change in how American democracy and the judicial branch operated. It addressed the majority faction problem very differently from the original Constitution. Neither elections nor politics should be potential threats to individual rights; the latter are not protected by the political process; rather, they are protected from it. If by some chance laws are adopted that threaten such rights, it would be the federal courts—made up of individuals not directly elected by the people—who would enforce and protect rights. Thus, protection of rights shifted from the regular political process described in the \textit{Federalist Papers}, to a clear statement of individual protections defended and defined by the judiciary.

C. A Madisonian Theory of Judicial Review

Madisonian democracy, then, is premised upon a substantive belief that a public good exists which needs to be protected from the tyranny of the majority. It develops a twofold distinction which says that in most situations, majorities get their way, but in some, they do not. When minority rights are threatened, the courts step in to protect them. Of course, there are debates regarding who constitutes a minority deserving protection and under what circumstances protection should be granted, depending on, for example, what types of rights are affected.\footnote{Owen M. Fiss, \textit{Groups and the Equal Protection Clause}, 5 Phil. \& Pub. Aff. 107, 147 (1976).}

Legal scholars debate whether the constitutional framers sought to protect economic rights and property interests or the civil rights of “discrete and insular” minorities, as understood in a post-footnote-number-four-\textit{Caroleone-Products} constitutional order.\footnote{ELY, supra note 78, at 100–105.} Moreover, some have argued that Madisonian democracy has been replaced by pluralism as the dominant theory of American democracy.\footnote{See, e.g., Edwin L. Rubin, \textit{Getting Past Democracy}, 149 U. Pa. L.R. 711, 781 (2001).} The latter placed greater emphasis upon the role of group competition and bargaining as a mechanism to limit and distribute political power,\footnote{Id. at 741.} but it fundamentally
agreed with the Madisonian concern of addressing abuses of power by groups.

Whether it be Madisonian democracy or pluralism, it is fundamental to American democratic-constitutional theory that policy decisions should be made by electorally accountable institutions such as Congress and the President, reserving to the federal judiciary the protection of individual rights. American democratic-constitutional theory balances majority rule with minority rights.

In performing this task, federal courts perform a crucial role. As Chief Justice John Marshall said in Marbury v. Madison, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” Under Marbury, the power of judicial review is in determining whether laws are valid under the Constitution. Or, as Alexander Hamilton declared in Federalist no. 78, the power of the judiciary extends to “neither FORCE nor WILL, but merely judgment.” The dilemma for the federal courts is a delicate one. They must render judgments regarding the constitutionality or meaning of laws, while not crossing a line into actually making policy. Crossing this line implicates two issues: capacity and legitimacy.

Capacity raises questions regarding the institutional ability of the courts to make policy. There is a long-running debate addressing this issue, raising questions over whether the federal courts have affected social or political change, or managed it correctly when it comes to issues such as desegregation and abortion. Whatever questions there are regarding the capacity of the courts to affect and oversee policy change, there is a more fundamental question regarding the legitimacy to do so. This raises what Alexander Bickel labels as the “counter-majoritarian” problem.

Alexander Bickel declared, “judicial review is undemocratic” because “it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but

93. Id. at 180.
94. THE FEDERALIST NO. 78 (Alexander Hamilton).
against it."97 The thought Bickel conceived here is that judicial review as employed by the federal courts is “counter-majoritarian.”98 Specifically, the problem is that judicial review can be undemocratic because it gives unelected judges the authority to make decisions that nullify or thwart the choices made by those electorally accountable and picked by the people. If democracy is about majority rule as represented by policies made by those who are elected by the people, then to let the federal courts prevent the expression of that will seems undemocratic.99

Bickel’s claim has formed a conundrum for legal scholars.100 There are many ways to unravel it. One is to contend, as Kenneth Arrow101 and Robert Dahl102 have done, that there is no way to aggregate majority preferences in a democracy, that it really consists of “minorities rule,” or that Madisonian democracy has been overlaid with a pluralist structure such that majority rule does not exist. Another way is to assert that the class and economic nature of American capitalism renders majority rule but an illusion.103 Additionally, Bickel may have simply misunderstood the nature of American democracy. Contrary to Bickel’s claim, American democracy is a constitutional one, expressing liberal values, and set up from the start to balance majority rule with minority rights.

Bickel’s argument is an institutional design claim. It seems to rely upon a classic formal distinction—and a false dichotomy—between policy and rights. Policy is the job of the elected political branches, and courts are supposed to protect rights. This approach assumes that federal courts are not political because they are not elected and supposedly above politics. As a result, courts should not render decisions that second-guess the will of the majority. The approach also supports an argument that since the federal courts are not elected, they do not represent the people in the way that the elected branches do.104

97. Id.
98. Id. at 16-17.
102. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); ROBERT A DAHL, WHO GOVERN? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961).
104. BICKEL, supra note 96, at 16.
Again, there are many problems with these formulations. It is possible the federal government was never designed to be a pure majoritarian government. The existence of the Electoral College and the fact that the President is not directly elected by the people supports this argument. The great compromise of the Constitutional Convention of 1787 is another example; it created a two-house Congress resulting in a Senate that was not elected, and which was not apportioned on the basis of population. Further, there is a vast body of administrative law literature that questions the politics-administration dichotomy and argues that in reality, unelected government administrators make law and policy. Thus, judicial review constitutes policy making no matter how refined or narrow.

The overall claim here is that one can assert that judicial review in any form is counter-majoritarian while simultaneously asserting that it is not, and that in some cases, as John Hart Ely contends, it reinforces majority rule. Even Bickel, referencing Charles Black, pointed to how it could legitimize majority rule. Another argument is that it is not intuitively clear in a formalistic or realistic sense what it means to be counter-majoritarian. But having said all that, many consider it illegitimate for federal courts to employ judicial review, except in the narrowest of situations, because unelected judges are making decisions that negate choices made by elected officials.

Bickel urges restraint when federal courts employ judicial review. He advocates for them to employ a host of “passive virtues,” such as the political question doctrine, standing, and jurisdictional tests to

105. Evenwel v. Abbott, 136 S. Ct. 1120, 1138 (2016) (Thomas, J., concurring) (“Because of the Framers’ concerns about placing unchecked power in political majorities, the Constitution’s majoritarian provisions were only part of a complex republican structure.”).


107. Ely, supra note 78.

108. See Bickel, supra note 96, at 29.

institutionally limit their actions. He, along with Herbert Wechsler and Robert Bork, also advocated for the use of neutral principles to constrain judicial review and policy making. However, there also is a problem in taking a position that the federal courts should stay out of the political thicket. Failure to address legal claims arising out of malapportionment, for example, undermined democracy and majority rule, which required the Court in Baker v. Carr to reformulate the political question doctrine, rethink justiciability, and take action. Thus, when the political process seems incapable of functioning properly, there is a rationale for judicial intervention.

D. The Institutional Legitimacy of Federal Judicial Review

To sum it up, there is arguably an institutional legitimacy issue when unelected federal judges use judicial review in ways that nullify decisions rendered by the other coordinate branches of the federal government: the branches are electorally accountable; unelected judges are not. Policy, and the resolution of policy and political issues, are supposed to be solved by the latter, not the former. This is the federal judiciary’s counter-majoritarian problem. This problem is rooted in the U.S. Constitution’s structure, which constrains the federal courts through concepts of checks and balances and separation of powers to question if and when they are ever permitted to render decisions that ought to be made instead by electorally accountable institutions.

III. State Courts Are Unbound by the Federal Model of Constraints

State judiciaries are both similar and different from the federal courts. Institutionally, federal courts derive their authority from Article III of the

110. See Bickel, supra note 96, at 11–199.
113. See Bickel, supra note 96, at 49–64.
114. Jack L. Landau, State Constitutionalism and the Limits of Judicial Power, 69 RUTGERS U. L. REV. 1309, 1310 (2017) (stating that the federal justiciability doctrine has developed over the last century under the Article III “case or controversy” requirement).
115. 369 U.S. 186, 216–18 (1962). However, even as expanded in Baker, the Supreme Court did not lift all bars to justiciability but instead expanded somewhat the limited power of the federal courts to get involved in some matters that Colgrove suggested were beyond the scope of federal judicial authority.
Constitution. They are subject to the limits of this Article and the overall Constitution as it imposes limits on the federal government, including setting up the formal institutional division of labor that places the responsibility of making policy in the hands of the electorally-accountable institutions of Congress and the presidency.117

But state courts are different. While states may be subject to the same sociological pressures, such as the factions that Madison warned about in *Federalist* nos. 10 and 51, there may be differences in how federal and state institutions respond to them. The U.S. Constitution, especially the Supremacy Clause, still binds state courts,118 and they are subject to review when they decide on federal questions. However, state courts are subject to different designs that allow them to depart from the federal model in critical ways.120 For example, state constitutions may allow for their courts to issue advisory opinions,121 perform functions not normally given to federal courts,122 or address expanded notions of state action and jurisdiction that contrast with federal courts.123 State courts also have clear

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117. See supra Section C.
119. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1032–33 (1983) (noting that state decisions rendered on adequate and independent state grounds are not subject to federal review unless there are federal questions left unresolved by them); *Michigan v. Mosley*, 423 U.S. 96, 120–121 (1976) (Brennan dissenting and noting that states could impose higher standards than mandated by federal law). See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490–91 (1977) (discussing the paucity of federal questions presented to the Court prior to a “legal revolution” whereby state courts became more involved as “guardians of our liberties.”).
122. Perhaps the most notable difference being that state courts are entrusted to regulate the practice of law including issues of admission to practice, promulgating and enforcing rules of professional conduct, and attorney ethics disciplinary matters. See, e.g., MINN. STAT. § 480.05 (2018).
authority to order funding to maintain their functions. One of the more significant differences between state and federal courts is that in thirty-eight states, judiciaries are elected, while federal judges and justices are nominated by the president, subject to advice and consent (i.e. confirmation) by the Senate. These differences are significant—they speak to the counter-majoritarian issue.

A. State Courts and the Counter-Majoritarian Problem

State courts operating under their own constitutions might not face the same legitimacy issue that the federal judiciary does. For the federal judiciary, the counter-majoritarian problem resides in the fact that judges and justices are appointed under a constitution of limited powers. These jurists run the risk of making policy that displaces or voids majoritarian preferences when they make decisions. There is a fine line between interpreting the Constitution and articulating policy under a separation-of-powers system that delegates policy making to the electorally accountable branches of the government. In a constitutional system of limited and no inherent powers, federal courts run the risk of the counter-majoritarian problem.

State courts are not as likely to face this problem. Depending on the state constitution, state judiciaries may be empowered to do certain things that the federal courts cannot. Simply put, state jurisprudence might dissolve the counter-majoritarian problem for state courts because their institutional designs are different.

Moreover, the election of judges in thirty-eight states might provide additional endorsement for judicial intervention. Electing judges might give them the authority or legitimacy to intervene into the political process in ways that unelected judiciaries cannot. Elections render judges directly accountable to the public, giving the public a check on the judicial branch.

127. See Croley, supra note 125, at 711; see Bickel, supra note 96, at 16–17.
129. See Croley, supra note 125, at 713.
130. Id. at 709, 713.
if they do not like the decisions rendered.\textsuperscript{131} Judges, by virtue of being elected, can claim to represent majorities and can claim their own independent mandate to resolve political or policy disputes. In effect, if majorities elect state judges, it is harder to argue that these jurists are acting in a counter-majoritarian fashion.

Of course, recognizing or acknowledging that judges are majoritarian runs the risk of turning judges into politicians with robes, perhaps especially if they also are endorsed in partisan elections. Maintaining courts as impartial institutions that are above politics is critical to their public support and legitimacy.\textsuperscript{132} Ambivalence over whether elected judges are no different from other elected officials stems, in part, from the dispute over case law seeking to regulate state judicial elections and campaign behavior.\textsuperscript{133} How much do we let judicial candidates do in terms of campaigning or raising funds?

Resolving the state court counter-majoritarian problem by fully endorsing judges as elected policy-making officials certainly poses risks. However, when doing so against the backdrop of a different institutional design with fewer limits on justiciability, it may be enough to say that there is no problem with state courts stepping in to resolve state political disputes. While most state courts do not face the counter-majoritarian problem as acutely as do federal courts, they face a different problem—the majoritarian problem.

B. State Courts and the Majoritarian Problem

Steven Croley declares state courts confront a majoritarian problem when they elect their judges.\textsuperscript{134} Croley explains, “[T]he majoritarian difficulty asks not how unelected/unaccountable judges can be justified in a regime committed to democracy, but rather how elected/accountable judges can be justified in a regime committed to constitutionalism.”\textsuperscript{135} For Croley, the majoritarian problem that elected state judges face is rooted in the concepts of constitutionalism located in Madisonian democracy.

\textsuperscript{131} Id. at 708.
\textsuperscript{132} See, e.g., Republican Party of Minn. v. White, 536 U.S. 765, 775–84 (2002) (discussing maintaining impartiality as an important governmental interest in regulating judicial elections and campaigning).
\textsuperscript{134} Croley, supra note 125, at 694 (“[C]onstitutionalism entails, among other important things, protection of the individual and of minorities from democratic governance over certain spheres.”).
\textsuperscript{135} Id.
In conceptualizing the majoritarian problem, Croley distinguishes democracy from constitutionalism. The former is about majority rule, whereby “[a]ll qualified members of the political community have an equal voice in political decisions made by the community, such that political decisions generating the support of a majority of the community’s members for that reason carry the day.” This contrasts with a concept of constitutionalism that declares: “Majoritarian authority is limited by the constitutional rights individuals hold against the majority, such that policies supported by a majority that contravene those rights, substantively or procedurally, are for that reason without force.” The two are in tension, if not conflict.

These contrasting traditions of democracy and constitutionalism arguably can be reconciled if one simply concludes American or Madisonian democracy is inherently one that declares that majority rule is tempered by minority rights. Even with that acknowledgment, the dilemma of when to intervene in the political process still exists for elected judiciaries. According to Croley:

None of this is to say that constitutionalism cannot be characterized in a way that renders it compatible with majoritarian democracy. One might well describe constitutionalism as the mechanism by which the democratic majority keeps itself faithful to certain important decisions it makes. But this recharacterizes rather than escapes the tension described. For now the conflict is between “the enlightened majority”—the majority in its constitutional robes—and “the impassioned majority”—the majority in its everyday dress. . . . However constitutionalism is characterized, the political authority of some majority, if not “the” majority, is circumscribed. That circumscription is commonly justified in part on the grounds that that majority threatens individual freedom.

Part of the majoritarian problem for elected judges is determining why they should be able to substitute their policy or interpretive preferences for those expressed by a state legislature or governor. Furthermore, replacing the judgment of the coordinate branches is part of the problem with substantive due process. In *Lochner v. New York*, Justice Holmes wrote regarding legislative efforts to regulate the economy:

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136. *Id.* at 701–706.
137. *Id.* at 703.
138. *Id.* at 705.
139. *Id.* at 705–06.
If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.

His point was to question the legitimacy of the courts in second-guessing decisions that ought to be rendered by the political process instead. Why should the judiciary “win” when it comes to deciding whose policy views prevail? If the reason is to consistently favor its views over those of the other branches, then the majoritarian problem is also one of conflict of interest. Thus, if an elected court favors its decisions at the expense of other branches, it runs the risk of compromising impartiality and neutrality.

But there is a different aspect of the majoritarian problem even more dangerous: elected judges might sacrifice minority rights in order to get reelected. Accountability to majorities, for Croley, means potentially compromising the independence needed to make tough decisions, as in protecting the rights of criminal defendants, abortion rights in pro-life communities, and defending people of color against racist preferences. Making unpopular decisions runs the risk of judges losing the next election or being investigated by the Senate. Proof of this occurred when the Iowa Supreme Court in Varnum v. Brien struck down a ban on same-sex marriages on state constitutional grounds, only to see three of its judges ousted in the next election. This also was illustrated with the impeachment of the entire West Virginia Supreme Court over charges of corruption. Moreover, similar retaliation at the polls has occurred elsewhere, such as in California.

140. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
141. See Croley, supra note 125, at 726-27.
142. Id. at 727-28; see also Sandra Day O’Connor, Take Justice Off the Ballot, N.Y. TIMES (May 22, 2010), https://www.nytimes.com/2010/05/23/opinion/23oconnor.html [https://perma.cc/C8Y6-JCSZ].
143. 763 N.W.2d 862, 906–907 (Iowa 2009).
In addition, the majoritarian problem is not mere conjecture. Studies have shown that judicial selection mechanisms do affect who is selected as judge. Judicial selection impacts the policy role of state supreme courts. In terms of outputs, elected judges seem less likely to overturn death penalty decisions when state public opinion supports this punishment. Other studies have found that judicial elections or selection processes affect how many opinions partisan or elected judges write or cite, how they rule on abortion in states where public opinion is pro-life, how appellate judges approach criminal matters on appeal, and other aspects of their decisions. The main point is that electing judges changes judicial behavior and decision making, lending powerful support to Croley’s contention that institutional design does lead to the majoritarian problem.

C. A Democratic Theory of State Judicial Review

Can we solve this problem? Are state elected courts inherently majoritarian, and do they face a problem in terms of legitimacy to act?


First, if the above literature is correct, then elected judges seem destined to become majoritarian, and it is unclear if state courts can exercise any passive virtues to mitigate this problem. Being more conscious of institutional design pressures may not be enough to overcome the forces to becoming majoritarian. Second, one could argue that majoritarian preferences are not inherently averse to minority interests, and therefore there is no real risk of judges disfavoring minority rights. Third, one could argue that the very process of being elected and being accountable to the voters places them on par with other elected institutions in terms of checks on policy excess or errors. Fourth, one might argue that if elected courts are majoritarian, the solution is making them appointed, as twelve state judicial systems currently are. But appointed courts may be counter-majoritarian. Thus, are state courts caught in the dilemma of either being majoritarian (if elected) or counter-majoritarian (if not elected)? Not necessarily. Possible resolution of the dilemma resides in crafting an appropriate theory of democracy for state courts, or reliance upon a state-by-state constitutional and institutional analysis.

As discussed above, Madisonian democracy defined a role for the federal courts in American society. It was a vision that eventually saw the federal courts as supposed apolitical institutions, confined by checks and balances and separation of powers, seeking to protect minority rights against majority rule. One resolution of the counter-majoritarian problem as posed by Bickel was to say that American democratic theory and constitutionalism is not simply majority winner-take-all, and that instead, there is a limited but important role for the federal courts to act to protect rights. That role is set by constitutional design and, more importantly, evolving federal precedent. While on occasion one can argue that the federal courts have overstepped their appropriate role, there is an evolved body of law that arguably justifies or legitimizes federal courts in upending majority preferences to protect minority rights.

Parallel logic can be applied to state courts, although with important distinctions. First, a different theory of democracy may be required to justify state judicial intervention in the political process. States, their constitutions, and courts may not necessarily be grounded in a Madisonian democracy.

155. See supra Section II(C) & (D).
156. See supra Section II.
theory of democracy, but instead may reflect different conceptions and constitutional traditions. When states began to abandon the federal model of appointing judges and began using elections in the early nineteenth century, it represented a different theory of how to structure democratic institutions. This is the different ontology referred to at the beginning of this article. It represented a different alignment of separation of powers and checks and balances that contrasts with what is found at the federal level. State constitutions, and the institutional arrangements that come with them, contrast with the federal ones—they are more democratic. State courts, in some cases, were designed to be major policy institutions. They often exercise special state powers and enforce state-specific clauses that mandate specific functions for states to perform, such as providing for social welfare, education, or balanced budgets. Existence of these clauses and positive rights empower state courts to act in ways federal courts may not. Thus, state courts do not need to follow the federal separation of powers model.

The majoritarian criticism of state courts wrongly assumes that they are supposed to operate the same way and under the same theory as federal courts. They do not. State courts generally can be viewed as co-equals to the other branches of state government in terms of their


160. See Williams, supra note 120, at 240.

161. See id. at 31, 299; see also Cubberly, supra note 99, at 426.

162. See Williams, supra note 120, at 283.

163. Id. at 287.

164. Id. at 267–68.


168. See Williams, supra note 120, at 240.
legitimacy to make policy or get involved in the political process. The political question doctrine, or the concept of justiciability as formulated and refined in *Baker v. Carr*, is not necessarily binding on state courts—they are free to consider issues as justiciable in nature. Federal courts, according to Landeau, have a more limited concept of justiciability than do state courts:

Federal justiciability doctrine reflects what is often called a dispute resolution or private rights model of the role of federal courts. According to this view, federal courts exist to resolve disputes and nothing else. Their role is not to articulate legal principles, enforce laws generally, or ensure that the other branches of government behave themselves within the bounds of the authority conferred on them by the Constitution.

Federal justiciability and standing are rooted in the federal case and controversy requirement. State constitutions do not have this case and controversy clause. For example, Article VI of the Minnesota Constitution does not have a case and controversy clause that parallels Article III of the U.S. Constitution, and, perhaps as a result, Minnesota courts have often recognized greater standing to bring cases, especially to protect constitutional rights as they affect the political process. Arguably, Minnesota courts could play a more robust role than federal courts as evidenced by the existence of Article I, section 8, the remedies clause, which guarantees that “[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive . . . .”


170. 369 U.S. 186, 216–218 (1962). For example, while in *Luther v. Borden* (48 U.S. 1 (1849)), the Supreme Court ruled that the federal courts would not rule on matters of what constituted a republican form of government under the Guarantee clause, nothing would prevent a state court in theory from ruling such a matter to be justiciable under their own constitution. See also Landau, supra note 114, at 1311, 1317 (pointing out that the federal judicial power is limited by Article III constraints and that such constraints do not apply to state courts.).

171. Landau, supra note 114, at 1312.

172. Id. at 1315.

173. See, e.g., McKee v. Likins, 261 N.W.2d 566, 571 (Minn. 1977) (holding that a taxpayer suing as a taxpayer has standing to challenge administrative action).


175. Minn. Const. art. I, § 8. Despite the language used in the remedies clause, Minnesota courts have not always been receptive to an expansive reading. See State v. Lindquist, 869 N.W.2d 863, 873 (Minn. 2015) (Although some of our early cases suggest
In addition to expanded notions of justiciability, state constitutions depart from the federal constitutional model of separation of powers.\textsuperscript{176} In some cases, state courts are partners in governance, not simply private dispute-resolving institutions.\textsuperscript{177} They have affirmative powers to enforce constitutional powers and duties, share in decision making, and ensure that other branches do their job.\textsuperscript{178} Unlike federal courts, state courts have general jurisdiction.\textsuperscript{179} Additionally, state courts are not limited by federal concepts related to justiciability.\textsuperscript{180}

A general democratic theory of state courts would begin by recognizing that all of the precepts of Madisonian democracy do not necessarily apply to state courts in the same way that they apply to the federal courts. State courts, whether elected or appointed, may have the authority to act and render decisions that are majoritarian or counter-majoritarian. They may have a legitimate role in making policy decisions—a majoritarian act—and, at the same time, overturning other elected institutions as part of their role in enforcing state and federal constitutional rights—a counter-majoritarian act. Finally, it is important to keep in mind that part of the problem with federal courts acting in a counter-majoritarian fashion is that the U.S. Constitution is a power-creating document. This means that inherent powers for federal institutions must be clearly stated in the text of the Constitution or necessarily implied.\textsuperscript{181} State constitutions are power-limiting documents, which provide institutions broad authority to act unless otherwise limited.\textsuperscript{182} This difference enhances state courts’ authority to act in ways federal institutions cannot.

A specific democratic theory of state court intervention into the political process would rest on unique constitutional provisions and case law within a state. It would empower individual state judiciaries to act on issues that federal or other state courts might not address because of the

\textsuperscript{176} See Landau, supra note 114, at 1320.
\textsuperscript{177} Id. at 1320–22 (explaining that state constitutions confer much broader judicial power and “go well beyond the private adjudication model power”).
\textsuperscript{178} Id. 1311–12.
\textsuperscript{179} Id. at 1318.
\textsuperscript{180} Id. at 1325–26.
\textsuperscript{181} See, e.g., M’Culloch v. Maryland, 17 U.S. 316, 412-22 (1819) (providing a classic statement on the limits of federal government powers).
\textsuperscript{182} See WILLIAMS, supra note 120, at 27.
expanded notions of justiciability and the different role that a state court has in governance as compared to federal courts. 183 States do not face the same limitations with the political question doctrine as do federal courts, which allows for a different judicial role within a different democratic theory. 184

This theory would look to issues regarding whether there are clear separation of powers clauses in a state constitution, specific mandates that require the government to act, 185 other provisions that uniquely declare the way legislation is supposed to be passed, 186 or mandate duties of the judiciary. These constitutional provisions, as well as case law and precedent, are all important to declaring and empowering what a specific state court can do in that state. This suggests that there may not be an across-the-board theory of democracy or judicial review that guides state courts regarding when it is permissible for them to intervene in the political process. Whether a specific state court is justified in intervening in the political or policy process is dependent on the jurisprudence and constitutional tradition and values of the state in which it is located. 187

Thus, one way of addressing the majoritarian problem is to say that either a general or specific theory of democracy for state courts permits it. This option may resolve one aspect of the majoritarian dilemma that state courts face. Both elected and appointed state courts may be legitimate in getting involved in the political-policy process. But the other aspect of the majoritarian problem is specific when it comes to elected judges and how that institutional design often disfavors minority rights. What do we do then? Assuming the literature on judicial selection is accurate, the greatest majoritarian problem facing state courts is that elected judges are less likely to favor individual rights compared to appointed systems. If that is the case, the obvious answer is to suggest that elected state judges perhaps run

184. Id. at 1862–67.
185. See, e.g., Seattle School Dist. No. 1 of King County v. State, 585 P.2d 71, 95 (Wash. 1978) (ordering the legislature to fulfill its constitutional duty by defining and fully funding “basic education” and a “basic program of education”).
186. MINN. CONST. art. 4, § 17 (“No law shall embrace more than one subject, which shall be expressed in its title.”).
187. See, e.g., L. Harold Levinson, Interpreting State Constitutions by Resort to the Record, 6 Fla. St. U.L. Rev. 567, 574 (1978) (examining factors that affect state constitutional interpretation); Williams, supra note 120, 82–86 (reviewing the role of tradition in state constitutional adjudication and interpretation); Thad B. Zmistowski, City of Portland v. Depaolo: Defining the Role of Stare Decisis in State Constitutional Decisionmaking, 41 Mr. L. Rev. 201, 212–21 (1989) (discussing specific issues on how to treat precedent in state law).
counter to a theory of judicial review that emphasizes protection of minority rights. Simply eliminating elected judges and replacing them with an appointed bench might be the answer, but the reality is that there is probably little support for it.

Croley may be partially correct. While state courts may have greater authority to intervene into political controversies, in some cases they may pose greater risks to individual rights. The solution, if any, lies perhaps in crafting specific state constitutional clauses or mandates that direct state judicial review. The second option is to recognize that state courts may need to be understood within the context of a federal system, where judicial federalism establishes a floor of federal rights that may not be violated by state institutions. This suggests that the federal courts may need to serve as a check on state courts that fail to protect rights. The solution may not be completely satisfactory, but it does ensure that some of the majoritarian tendencies of elected courts are tempered. Finally, there is a need for state courts to directly confront this dilemma by defining limits or strategies regarding how to determine when and how to intervene in the political process. Thus far, at best, state courts seem more ad hoc than general in defining a jurisprudence of intervention into the political process, and further, how such intervention fits into a state theory of democracy.

IV. CONCLUSION

State judicial systems are located in a different political and legal context when compared to the federal courts. They operate under unique state constitutions and traditions that often empower and obligate them to act in ways that contrast to the authority granted to federal courts. Recognizing these legal and institutional differences may equip state courts with authority and competence to act on matters that contrast with federal judicial authority.

State judiciaries may be asked to address difficult political and policy issues as their coordinate branches become as politically deadlocked or divided as the federal government. State constitutional traditions, enabling a general or state-specific theory of democracy or judicial review, may not only permit, but obligate state courts to act to resolve many of these issues.


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