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INTRODUCTION

Of the American Constitution's three most distinctive features—federalism, judicial protection of individual rights and separation of powers[1]—only the last has been held inapplicable to the states. First, federalism is, by its terms, a doctrine of power-sharing between the national and state governments. The distribution of authority between nation and states was the chief point of contention during the period of the Constitution's framing and ratification, and in recent years, the United States Supreme Court has vigorously enforced federalism norms.[2] Second, although the original Constitution contained relatively few individual rights provisions applicable to the states,[3] during the last half-century, the Supreme Court has interpreted the Due Process and Equal Protection Clauses of the Fourteenth Amendments as providing extensive protection for individual rights against state interference. Yet

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1. Throughout this article I use the term "separation of powers" somewhat imprecisely to refer to the general principle of division of government authority into three branches, including the principle of "checks and balances." These concepts are sometimes seen as opposing because the branches can only check one another if their work overlaps to some degree. *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976); Wallace Mendelson, *Separation of Powers, in* The Oxford Companion to the Supreme Court of the United States 774 (Kermit L. Hall et al. eds., 1992); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism,* 1989 Duke L.J. 561, 645-46. For my purposes here, it will not be necessary to distinguish between separation of powers and checks and balances, and thus for simplicity I subsume the latter category within the former.

2. *See, e.g.*, City of Boerne v. Flores, 117 S. Ct. 2157 (1997); Printz v. United States, 117 S. Ct. 2365 (1997); United States v. Lopez, 514 U.S. 549 (1995).

3. *See* U.S. Const. art. I, § 10; Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243, 249-50 (1833).

separation of powers remains aloof. Despite the Supreme Court's willingness to impose sometimes rigid formal rules on the branches of the federal government,[4] the Court has not found justiciable limits on the states' choice of governmental structures.

This article uses Rhode Island's current controversy surrounding legislative appointments to executive commissions as a vehicle for (re-)examining the role of the federal Constitution in state separation-of-powers disputes. Part I examines the United States Supreme Court's frequent claim that the separation-of-powers principle does not apply to the states. It shows that several provisions of the federal Constitution assume a significant difference between the branches of state government, and concludes that some measure of separation of powers in state government is therefore a structural requirement of the federal Constitution.

Part II addresses the question whether the Guaranty Clause of the federal Constitution[5]—arguably the best textual source for a general separation-of-powers requirement that applies to the states—is justiciable in state court. Notwithstanding a recent and otherwise thoughtful opinion of the Oregon Supreme Court concluding that the Clause is not justiciable under existing precedent, Part II argues that the issue is open, and finds that there are sound arguments on each side.

Yet even if the Constitution contains some justiciable separation-of-powers requirement applicable to the states, that requirement is likely satisfied by a wide range of arrangements. Part III suggests a method for determining what specific state practices are permitted under the federal Constitution. The method is drawn by comparing and contrasting separation-of-powers norms with the provisions of the Bill of Rights that the United States Supreme Court has held are "incorporated" against the states via the Fourteenth Amendment. Part III concludes that legislative appointments to executive commissions satisfy the proper test.

Part IV briefly addresses the question of how the Rhode Island Supreme Court and other state high courts should go about interpreting the separation-of-powers provisions of their respective state constitutions. It draws some lessons from the federal com-

4. *See, e.g.*, Clinton v. City of New York, 118 S. Ct. 2091 (1998); Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991); INS v. Chadha, 462 U.S. 919 (1983).

5. U.S. Const. art. IV, § 4.

parison and then suggests that at least under some circumstances, legislative appointments to executive commissions could be understood as an attempt to restore the balance upset by the emergence of administrative agencies. These agencies combine functions in a way that itself seems inconsistent with separation of powers. Although such a functional justification would be inadequate to override a clear textual command such as the Incompatibility Clause of the federal Constitution,[6] it might be sufficient to satisfy the more general language of the Rhode Island Constitution. Under a functional approach, the question would not turn on a conceptual analysis of the terms "executive" and "legislative," but on the efficacy of legislative appointments. Although this article expresses no opinion about the lessons to be drawn from the Rhode Island experience, it concludes by noting that experience elsewhere indicates that there may be more effective means of responding to the administrative state that do not pose a corresponding threat to the values underlying separation of powers.

I. Federal Requirements of State Separation of Powers

The United States Supreme Court has repeatedly stated that the doctrine of separation of powers does not apply to the states.[7] The claim is plausible enough. The principle of separation of powers is nowhere expressly stated in the federal Constitution, but is instead an inference from specific provisions such as the Incompatibility Clause and the architecture of the Constitution itself. Article One vests "All legislative Powers" listed in Congress;[8] Article Two vests "The executive Power" in the President;[9] and Article Three vests "the judicial Power" in the Supreme Court and whatever lower federal courts Congress should choose to create.[10] This structure, especially when read in light of the Framers' high regard for the concept of separation of powers,[11] strongly suggests

6. *Id.* art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

7. *See* Mayor of Philadelphia v. Educational Equal. League, 415 U.S. 605, 615 (1974); Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957); Dreyer v. Illinois, 187 U.S. 71, 84 (1902).

8. U.S. Const. art. I, § 1.

9. *Id.* art. II, § 1.

10. *Id.* art. III, § 1.

11. *See* The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the

a limit on the inter-branch mixing of functions, even beyond specific prohibitions like the Incompatibility Clause. Plainly, however, this limit applies to the federal government rather than the states, for the first three articles of the federal Constitution set forth the overall structure of the federal government rather than the states. Furthermore, principles of federalism also imply that, within broad limits, the states should be permitted to adopt governmental structures that suit them.

Still, it is something of an overstatement to say that the principle of separation of powers has *no* application to the states. Several constitutional provisions indicate that the federal Constitution implicitly assumes that state governments will be structured along lines broadly similar to the federal government.

First, consider the amendment procedure of Article V. It provides for the calling of a Constitutional Convention "on the Application of the Legislatures of two thirds of the several States," and requires ratification (of proposed amendments emerging from such a convention or from Congress) by "the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress."[12] Both the provision for the calling of a convention and the ratification procedure depend upon the existence of bodies called state "legislatures." If a state had no legislature independent of the state executive, it could not participate in ratification (unless Congress took the unusual step of calling for ratification by state Conventions). Although it would be somewhat far-fetched to read Article Five as mandating separate state legislative and executive bodies, the Article does evince an underlying assumption that such separate bodies will exist.

Other federal constitutional provisions similarly assume the existence of distinct branches of state government. State *legislatures* may fix the times, places and manner of holding Congressional elections.[13] Similarly, "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous

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same hands . . . may justly be pronounced the very definition of tyranny."); Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 446-53 (1969).

12. U.S. Const. art. V.

13. *See id.* art. I, § 4. Congress may override most of these decisions, however. *See id.*

Branch of the State Legislature."[14] Even more significantly, the Seventeenth Amendment clearly distinguishes between a state legislature and a state executive. It provides:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.[15]

The above examples illustrate that the federal Constitution assumes that state governments will have distinct legislative and executive branches. It also assumes a distinct state judicial branch. Consider first the Madisonian Compromise embodied in Article III, which creates a Supreme Court and leaves to Congress the option of deciding whether to create lower federal courts.[16] By vesting appellate jurisdiction in the Supreme Court, and leaving open the possibility that there would be no lower federal courts, Article III necessarily assumes that the appellate jurisdiction could be exercised over judgments of state *courts*,[17] for it is in the nature of the federal "judicial Power" that appellate courts review judicial, as opposed to legislative or executive judgments.

Indeed, the Supremacy Clause treats state courts as distinct from other organs of state government.[18] After declaring the supremacy of federal law, it states that "the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."[19] One should not make too much of this language, because state executive and legislative officials are also obligated to respect the supremacy of federal law.

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14. *Id.* art. I, § 2, cl. 1.

15. *Id.* amend. XVII, cl. 2. The predecessor provision to the quoted text in the original Constitution also distinguished among the branches of state government. It provided that "if [Senate] 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." *Id.* art. I, § 3, cl. 2.

16. *See id.* art. III, § 1.

17. The Supreme Court made just this point early in our nation's history. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 342 (1816). Similarly, Herbert Wechsler relied on the vesting of appellate jurisdiction in defending judicial review in response to Judge Learned Hand. *See* Herbert Wechsler, *Toward Neutral Principals of Constitutional Law*, 73 Harv. L. Rev. 1, 3-4 (1959).

18. *See* U.S. Const. art. VI, cl. 2.

19. *Id.*

But neither should one make too little of the specific admonition to state judges. As a couple of recent cases indicate, the Supremacy Clause does suggest a distinct role for state courts as opposed to state legislatures.

In *Printz v. United States*,[20] the Supreme Court held that Congress may not issue directives to state executive officials on the ground that doing so violates a principle of federalism that prohibits Congress from "commandeering" them.[21] Five years earlier, the Court held in *New York v. United States*,[22] that Congress may not "commandeer" a state legislature by requiring it to enact a law.[23] Yet, in *Testa v. Katt*,[24] the Court, invoking the Supremacy Clause, had held that state courts must be open to the assertion of federal rights on an equal footing with the assertion of state rights.[25] In attempting to distinguish *Testa* in both *Printz* and *New York*, the Court asserted that it was not distinguishing between judicial obligations on the one hand and executive or legislative obligations on the other; in each case, the Court claimed that *Testa* merely requires that all branches of state government recognize the supremacy of federal law.[26] However, the distinction seems unconvincing, for in *Testa*, federal law imposes affirmative obligations on state courts—where they are open to state claims they must open their doors to the assertion of federal causes of action equally—just as the provisions invalidated in *Printz* and *New York* imposed affirmative obligations on the state executive and legislative branches, respectively.[27] Reconciling *Printz* and *New York* with *Testa* would seem to require an argument that state courts, as opposed to state executive and legislative bodies, have a distinctive role in enforcing federal law. Such an argument would draw strength from the text of the Supremacy Clause and from the general proposition that the federal Constitution assumes that state

20. 117 S. Ct. 2365 (1997).

21. *Id.* at 2379-83.

22. 505 U.S. 144 (1992).

23. *Id.* at 145.

24. 330 U.S. 386 (1947).

25. *See id.* at 392-93.

26. *See Printz*, 117 S. Ct. at 2381; *New York*, 505 U.S. at 144, 178-79.

27. *See* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1029-30 (1995).

governments will be structured along lines broadly similar to those of the federal government.

It must be acknowledged, however, that the United States Supreme Court has not been fully attentive to the degree to which the federal Constitution assumes separation of powers in state government. Consider, for example, the Supreme Court's view about the proper method by which federal courts should discern the content of state law on questions as to which the state high court has not spoken. Under these circumstances, a federal court exercising diversity or supplemental jurisdiction (or required to decide a state law issue as a preliminary step in resolving a federal one), should attempt to predict how the state high court would rule on the question.[28] Although I believe it misleading to call this process "prediction,"[29] I have no quarrel with the proposition that under many circumstances it will be appropriate for a federal court to derive principles of state law from emergent trends in the jurisprudence of state high courts.[30]

However, the same cannot be true for state legislatures. Suppose that a bill pending in the state legislature would change the state's law on some question at issue in a case pending before a federal court. If there is no way for the federal court to postpone its decision, would it not be wholly illegitimate for the court to "predict" that the bill will pass, and thus apply its provisions? The very idea seems profoundly misguided, notwithstanding the fact that the Supreme Court has often stated that as far as the federal courts are concerned, state courts are just like state legislatures.[31]

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28. *See* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. Rev. 651, 695 n.151 (1995) (collecting cases).

29. *See id.* at 661-89 (arguing that viewing law as simply "predictions" of how courts will rule is inconsistent with the impersonal ideal of the rule of law); *id.* at 695-715 (applying this argument to diversity and similar cases).

30. Indeed, I would go further than the United States Supreme Court—which has stated that in matters of federal law, state courts and lower federal courts should wait for the Supreme Court to deliver the coup de grace to Supreme Court cases that have been undermined but not formally overruled. *See id.* at 676-77 n.87 (discussing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)); *see also* Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997) (acknowledging that the lower federal courts must leave to the Supreme Court "the perogative of overriding its own decision" (quoting *Rodriquez de Quijas*, 490 U.S. at 484)).

31. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (equating the "authority" of state courts with the authority of state legislatures); *see also* Dorf, *supra* note 28, at 707-08 (discussing the conception of legal positivism that underlies the Supreme Court's equating state courts with state legislatures).

Were they to give the matter serious consideration, the federal courts would undoubtedly reject the possibility of anticipating legislative changes in state law, while they might well adhere to the practice of anticipating judicial changes—and properly so. Under deeply rooted principles of American jurisprudence, courts make law in a different manner from the way in which legislatures do. If a line of doctrine has seriously undermined the rationale for some old rule of the common law, lawyers and lower court judges may justifiably look to the inapplicability of the old reasons to say that the old rule is no longer good law. By contrast, with a few exceptions, legal actors would characterize legislation based on outdated premises as in need of reform, but they would not say that the legislation is no longer binding—even if new legislation is just around the corner.[32] In other words, some distinction between state courts and state legislatures is a deep principle of federal law.[33]

This Part has argued that the federal Constitution and various doctrines interpreting it assume that state governments will have distinct legislative, executive and judicial branches. Although there is no express principle mandating separation of powers in state government, some such principle can nonetheless be inferred from the Constitution's structure. The idea of inferring constitutional principles from underlying assumptions is a familiar interpretive move.[34] The foregoing does not, of course, demon-

32. For the most prominent exceptions, see Quill v. Vacco, 80 F.3d 716, 738-43 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 117 S. Ct. 2293 (1997); Guido Calabresi, A Common Law for the Age of Statutes (1982); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 67-69 (1997) (urging a constitutional doctrine of desuetude for the criminal law). *See also* Committee on Legal Ethics of the W. Va. State Bar v. Printz, 416 S.E.2d 720, 724-26 (W. Va. 1992) (applying a doctrine of statutory desuetude rooted in the due process requirement of fair notice).

33. *But cf.* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U. Pa. L. Rev. 1459, 1514-17 (1997) (arguing that federal court predictions of state judicial action stand on an equal footing with federal court predictions of state legislative action).

34. For example, the Court infers a broad principle of state sovereign immunity from the Constitution's background assumptions, notwithstanding the limited text of the Eleventh Amendment. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54, 72-73 (1996). Similarly, in recognizing unenumerated rights under the Fifth and Fourteenth Amendments' Due Process Clauses, the Court interpolates and extrapolates from the "rational continuum" marked out by the specific provisions of the Bill of Rights. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting on jurisdictional grounds); *see also* Charles Black, Structure and Relationship in Constitutional Law (1969) (arguing that the Supreme Court often in-

strate that the federal doctrine of separation of powers applies to the states in all of its particulars; surely it does not. But the foregoing does show that the assertion that some specific separation-of-powers principle applies to the states cannot simply be dismissed without serious analysis.

II. JUSTICIABILITY OF THE GUARANTY CLAUSE IN STATE COURT

The most plausible textual home for a federal constitutional requirement of state separation of powers appears to be the Guaranty Clause.[35] It provides: "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."[36] Note that this provision is itself further evidence of the Constitution's tacit assumption that state governments must have distinct legislative and executive branches. However, Supreme Court doctrine is quite clear that challenges brought under the Guaranty Clause are not justiciable because they present political questions.[37]

Much recent scholarship criticizes the Supreme Court's conclusion that the Guaranty Clause is not justiciable.[38] Moreover, the Court has indicated a potential willingness to re-examine that

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fers doctrine from the relations among the institutions established by the Constitution's structure); Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 76-79 (1991) (applauding the approach of Justice Harlan's *Poe* dissent).

35. U.S. Const. art. IV, § 4.

36. *Id.*

37. *See, e.g.*, New York v. United States, 505 U.S. 144, 183-85 (1992); City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980); Pacific States Tel. Co. v. Oregon, 223 U.S. 118, 133 (1912).

38. *See* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849 (1994) (arguing for justiciability); Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L. Rev. 733 (1994) (same); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role For the Guarantee Clause*, 65 U. Colo. L. Rev. 815 (1994) (same). *But see* Ann Althouse, *Time For The Federal Courts to Enforce the Guarantee Clause?—A Response to Professor Chemerinsky*, 65 U. Colo. L. Rev. 881 (1994) (arguing against justiciability); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749 (1994) (same); Jesse H. Choper, *Observations on the Guarantee Clause—As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 U. Colo. L. Rev. 741 (1994) (same).

conclusion.[39] Whatever the eventual outcome of that debate, for now it is clear that the Guaranty Clause is not justiciable in federal court. However, it does not follow from that conclusion that the Clause is not justiciable in state court. This Part argues that the question whether the Guaranty Clause is justiciable in state court is an open and difficult one.

As an initial matter, the justiciability limits applicable in federal court do not invariably apply in state court. For example, the prohibition on the issuance of advisory opinions by federal courts is an interpretation of Article III's case-or-controversy requirement, which applies to the "judicial Power of the United States."[40] Because state courts do not exercise that power—even when deciding federal questions—the federal Constitution's prohibition on advisory opinions does not apply in state court, as the pending Rhode Island case itself clearly illustrates. Similarly, other justiciability doctrines rooted in the case-or-controversy requirement—such as standing, ripeness and mootness—do not apply in state court, although of course states may have parallel doctrines as a matter of state constitutional, statutory, or judge-made law.[41]

What is the textual source of the prohibition on the decision of political questions? One need not fully agree with my colleague Louis Henkin that there is no political question doctrine,[42] to recognize that the doctrine, if it does exist, has multiple sources. Depending on the nature of the case and issue, the conclusion that a question is political will be based on some combination of concerns rooted in Article III, the specific substantive provision of the Constitution invoked, separation of powers, federalism and prudential considerations.

Some matters presenting non-justiciable political questions in federal court will also present non-justiciable political questions in

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39. *See New York*, 505 U.S. at 184-85; Reynolds v. Sims, 377 U.S. 533, 582 (1964).

40. U.S. Const. art. III, § 1.

41. *See, e.g.*, Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 71 Cal. Rptr. 2d 731, 754 (Cal. 1998) (applying statutory standing requirements); Essex County v. Zagata, 695 N.E.2d 232, 234-37 (N.Y. 1998) (determining ripeness of review of agency action); State *ex rel.* Town of Middletown v. Anthony, 713 A.2d 207, 211 (R.I. 1998) (discussing mootness).

42. *See generally* Louis Henkin, *Is there a "Political Question" Doctrine?*, 85 Yale L.J. 597 (1976) (arguing that no general-purpose doctrine exists requiring courts to abstain from reviewing political questions).

state court. As to these questions, the Constitution assigns exclusive authority to the national political branches; the assignment thus excludes state as well as federal courts from an interpretive role. For example, suppose that some case otherwise properly before a court turns on the resolution of a question at the heart of the foreign affairs power, such as which of two groups is the legitimate government of a foreign nation. A federal court would, in deference to the national political branches, typically defer to their resolution of that question, rather than undertake its own analysis.[43] It follows *a fortiori* that a state court would likewise be obligated to defer to the decision of the national political branches, for the state court shares with the federal court the limitations that flow from its status as a court, and in addition, is a state body, thereby disempowered to conduct foreign policy.

However, if a case presents a political question in federal court because of concerns rooted primarily in Article III or federalism (or both), then it may well be appropriate for resolution in state court. At least for some purposes, the conclusion that the Guaranty Clause is not justiciable appears to fall into that category. Were a federal court to declare that the structure of state government did not constitute a Republican Form of Government, it would intrude deeply into the state's internal affairs and potentially commit the national political organs to taking sides in a dangerous conflict. As far as the Guaranty Clause is concerned, that may be the primary lesson to be drawn from the Dorr Rebellion, which casts such a long shadow over the present controversy.[44] Yet such federalism concerns are absent when the edict comes from a state court. To be sure, there may be prudential reasons for a state court to stay its hand, especially if bloody conflict may result. That does not appear to be a federal limit, however, and thankfully, the present Rhode Island litigation poses no such risk.

Still, there is a textual difficulty with finding that the Guaranty Clause is justiciable in state but not federal court. The Clause states that the *United States* is the guarantor of a "Republican Form of Government."[45] There is at least some irony in con-

43. *See* Goldwater v. Carter, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., joined by Burger, C.J., Stewart, J., and Stevens, J., concurring in the judgment).

44. *See* Luther v. Borden, 48 U.S. (7 Wall.) 1, 42-43 (1849).

45. U.S. Const. art. IV, § 4.

cluding that a federal organ may not enforce the Clause but a state one may.[46]

The irony may be preferable to the alternative. Suppose some rogue governor were to cancel elections and declare himself the monarch of a state. Certainly, Congress and the President would be obliged to declare the monarchy unconstitutional and restore representative government, but is that the end of the matter? Even before the national political branches act, would we not want to say that the self-proclaimed monarch and his supporters have violated the Constitution? In other words, the textual reference to the United States should not be read to exclude a duty on state officials themselves to maintain a republican form of government, and indeed, the Supreme Court has recognized such a duty.[47] Whether that duty extends to state judges or only to state political actors may be a difficult question,[48] but the textual reference to the United States does not bear on that question.

Moreover, even if we thought the Guaranty Clause applied exclusively to the (political branches of the) federal government, recall that Part I found support for the application of separation-of-powers norms to state government *throughout the Constitution*. Thus, we might conclude that the Guaranty Clause by itself does not provide justiciable separation-of-powers norms, but that such norms derive from the Guaranty Clause in combination with tacit postulates of the Constitution's overall structure.

On the other hand, the precedents holding the Guaranty Clause non-justiciable in federal court might be thought relevant to an assessment of the justiciability of state separation-of-powers claims rooted in other provisions, insofar as reliance on these other provisions appears to circumvent the most directly relevant provision. And indeed, it is principally for that reason that this Part

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46. *See* Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. Chi. L. Rev. 208, 208 (1987) (labeling "anomalous" the possibility "that a duty entrusted to 'the United States' is exercised in large part by state courts"); Walter F. Dodd, *Judicially Non-Enforceable Provisions of Constitutions*, 80 U. Pa. L. Rev. 54, 86 (1931) (claiming that non-justiciability of the Guaranty Clause in state court follows *a fortiori* from non-justiciability in federal court).

47. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874) (stating that "[t]he guaranty necessarily implies a duty on the part of the States themselves to provide . . . a [republican form of] government").

48. *See* Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. Colo. L. Rev. 887, 943 n.202 (1994).

has addressed the question whether the Guaranty Clause is justiciable in state court. However, whatever the answer to that question, the Clause's reference to the United States would not appear to add very much. Were the Guaranty Clause the only textual basis for an argument that the federal Constitution imposes some separation-of-powers requirement on the states, it is conceivable that its reference to the "United States" could be seen as a "textual commitment" to federal as opposed to state organs.[49] But given the wealth of other sources, the language hardly seems dispositive.

The precedents holding the Guaranty Clause non-justiciable in federal court would thus appear to have little to say about the question whether the Clause is justiciable in state court. Nevertheless, in *State ex rel. Huddleston v. Sawyer*,[50] the Oregon Supreme Court interpreted existing Supreme Court precedent as rendering Guaranty Clause claims non-justiciable in state as well as federal court.[51] Some of the arguments given by the *Sawyer* Court were repeated during the live portion of this symposium by Jay Goodman, who has also filed an *amicus curiae* brief with the Rhode Island Supreme Court.[52] Therefore, I will consider in turn the three reasons the Oregon Supreme Court gave for its conclusion.

First, the court observed that the leading United States Supreme Court case, *Pacific Telephone Co. v. Oregon*,[53] holds that enforcement of the Guaranty Clause is exclusively committed to Congress, without distinguishing between state and federal courts.[54] It is true that the language of *Pacific Telephone Co.* is broad, and read out of context, could be thought to apply to the power of state as well as federal courts. However, the better reading acknowledges that the Supreme Court was speaking of its own power as one of the "courts of the United States."[55] Throughout

49. *Cf.* Nixon v. United States, 506 U.S. 224, 228 (1993) (holding that a textual commitment to another branch is a basis for finding that an issue presents a non-justiciable political question (citing Baker v. Carr, 369 U.S. 186, 217 (1962))).

50. 932 P.2d 1145 (Or. 1997).

51. *See id.* at 1157-62.

52. *See* Brief of Jay Goodman in Support of the Legislature's Right to Appoint at 5-8, *In re* Advisory Opinion to the Governor (Separation of Powers) (No. 97-572-M.P.).

53. 223 U.S. 118 (1912).

54. *See Sawyer*, 932 P.2d at 1159-60 (citing *Pacific Tel. Co.*, 223 U.S. at 137, 151).

55. *Pacific Tel. Co.*, 223 U.S. at 142, 151.

the *Pacific Telephone Co.* opinion, the Supreme Court inquired into the limits of the "judicial power."[56] Decided in an era when the lines between federal and state judicial authority were less clear than they are today,[57] it is conceivable that the Court was speaking about courts generally, but to make sense of this language today, we do better to read the "judicial power" as a reference to the power exercised by *federal* courts in virtue of Article III.

Similarly, the *Pacific Telephone Co.* Court's statement that Guaranty Clause claims are "solely committed by the Constitution to the judgment of Congress,"[58] must be read in the context of a struggle between Congress and a federal rather than a state court. Consider, by way of analogy, the state of the law after *Powell v. McCormack*,[59] in which the Court ruled that the Qualifications Clause[60] sets forth the exclusive qualifications for members of Congress, so that Congress could not exclude from its membership a representative who, it was conceded, had the requisite qualifications.[61] The *Powell* Court understood its decision as resting on the "Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution."[62] Nevertheless, in *Thornton v. U.S. Term Limits Inc.*,[63] four dissenting justices thought *Powell* silent on the question whether a state, as opposed to Congress, may impose additional qualifications on members of Congress.[64] Moreover, although the majority in *Term Limits* claimed that *Powell* was controlling by its terms,[65] the majority set forth a lengthy argument that the historical and policy grounds for *Powell*'s rule applied in cases involving state-imposed as well as Congressionally imposed qualifications,[66] thereby confirming the dissent's view that a rule of constitutional law announced in a case

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56. *Id.* at 141, 148, 150.

57. Under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), federal courts decided most questions of state common law on their own, without deferring to state court authority. *See id.* at 18-19. *Swift* was not overruled until 1938. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79-80 (1938).

58. *Pacific Tel. Co.*, 223 U.S. at 133.

59. 395 U.S. 486 (1969).

60. U.S. Const. art. I, § 2.

61. *See Powell*, 395 U.S. at 550.

62. *Id.* at 540.

63. 514 U.S. 779 (1995).

64. *See id.* at 847-48 (Thomas, J., dissenting).

65. *See id.* at 796 & n.12.

66. *See id.* at 788-98, 816-22, 827.

involving a limit on federal power does not *automatically* apply to state power. Similarly, there may be reasons to conclude that Guaranty Clause claims are not justiciable in state court, but that conclusion does not follow *automatically* from the fact that they are not justiciable in federal court.

The Oregon Supreme Court also believed that two United States Supreme Court decisions—*Cochran v. Louisiana State Board of Education*,[67] and *Mountain Timber Co. v. Washington*,[68]—expressly held that Guaranty Clause claims are non-justiciable in state court.[69] In fact, the cases held no such thing. In both cases, the state high court had rejected a Guaranty Clause challenge, which was renewed in the United States Supreme Court.[70] The Court necessarily held that the challenges were not justiciable *in the United States Supreme Court*.[71] It did not rule on the question whether the federal Constitution precludes a state court finding of justiciability. To be sure, in *Mountain Timber Co.*, the Supreme Court of Washington had itself relied on cases holding Guaranty Clause claims non-justiciable in federal court for the conclusion that they are not justiciable in state court,[72] but in affirming the judgment, the United State Supreme Court did not decide whether that conclusion was proper. The United States Supreme Court has never decided whether the Guaranty Clause is justiciable in state court, and while a substantial number of state high courts have said it is not,[73] most of them simply assume without analysis that the precedents involving federal courts apply to cases brought in state court.[74]

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67. 281 U.S. 370 (1930).

68. 243 U.S. 219 (1917).

69. *See* State *ex rel.* Huddleston v. Sawyer, 932 P.2d 1145, 1160 (Or. 1997).

70. *See Cochran*, 281 U.S. at 373-74; *Mountain Timber*, 243 U.S. at 228, 237.

71. *See Cochran*, 281 U.S. at 374; *Mountain Timber*, 243 U.S. at 234, 246.

72. *See* State v. Mountain Timber Co., 135 P. 645, 649 (Wash. 1913).

73. *See, e.g.*, Maryland Comm. for Fair Representation v. Tawes, 180 A.2d 656, 663-64 (Md. 1962), *rev'd on other grounds*, 377 U.S. 656 (1964); Baum v. Newbry, 267 P.2d 220, 224 (Or. 1954). *But see, e.g., In re* Interrogatories, 536 P.2d 308 (Colo. 1975) (treating the Guaranty Clause as justiciable in state court, although rejecting the claim on the merits); Van Sickle v. Shanahan, 511 P.2d 223 (Kan. 1973) (same).

74. *See generally* Edward A. Stelzer, Note, *Bearing the Judicial Mantle: State Court Enforcement of the Guarantee Clause*, 68 N.Y.U. L. Rev. 870 (1993) (presuming that federal court precedents pertain to adjudication in state courts).

The third reason given by the Oregon Supreme Court for its conclusion that Guaranty Clause claims are not justiciable is a concern that if state courts can resolve such claims while federal courts cannot, the Supreme Court will be unable to ensure the uniformity of federal law.[75] If different state courts interpret the Guaranty Clause differently, the Court will be unable to resolve the conflict.[76] This is a legitimate concern, but if taken seriously it would mean that every issue that presents a political question in federal court would, *ipso facto*, present a political question in state court. Yet that result seems perverse at least in those instances where federalism concerns underlie the determination that an issue presents a political question in federal court.

Thus, the concern about uniformity has not led the Supreme Court to apply all of its justiciability doctrines to the state courts. If the Rhode Island Supreme Court issues an advisory opinion on a question of federal law that conflicts with an advisory opinion of the Massachusetts Supreme Judicial Court on the same question, the United States Supreme Court cannot resolve the conflict; yet that fact does not render the federal prohibition on advisory opinions applicable in state court.

Political questions may, however, present a more serious uniformity problem than other justiciability doctrines. If a state court issues an advisory opinion or decides a case in which a party would lack standing were the case in federal court, the United States Supreme Court may not be able to review the decision, but eventually, if the issue is sufficiently important, it will arise in a context that presents a justiciable case or controversy. Indeed, in some cases in which the plaintiff originally lacks standing, the very decision of the state court—if accompanied by an order of suitable relief—will create standing for purposes of appeal.[77] By contrast, a political question may be thought to be *inherently* non-justiciable,

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75. *See* State *ex rel.* Huddleston v. Sawyer, 932 P.2d 1145, 1160-61 (Or. 1997).

76. *See id.*

77. *See* Asarco, Inc. v. Kadish, 490 U.S. 605, 623-24 (1989):

> When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.

so that a conflict among state courts would never be resolvable by the United States Supreme Court.

The Oregon Supreme Court is therefore right to be concerned about the uniformity of federal law. But it does not follow that holding Guaranty Clause claims non-justiciable in state court furthers uniformity. Recall that absent Congressional or state judicial resolution of Guaranty Clause claims, such issues will be decided in the first instance by the political branches of the states. State courts typically look to the decisions of their sister states in resolving common questions; state legislatures and executive branch officials may be less inclined to do so, principally because they do not typically provide reasons for their decisions in the way that courts do. Relegating Guaranty Clause issues to state legislatures and state executives to the exclusion of state courts will thus result in very little inter-state harmonization. In short, allowing state courts to adjudicate Guaranty Clause claims may lead to a more *visible* lack of uniformity than would be apparent if such claims were deemed non-justiciable in state court, but state court adjudication would nonetheless likely increase the actual uniformity of federal law. Indeed, the visibility of disuniformity might spur Congress or the President to take action.

Thus, existing doctrine leaves open the question whether Guaranty Clause claims are justiciable in state court. This Part has offered some reasons to conclude that they ought to be. Whether and when those claims ought to prevail, however, is a separate question. For even if Guaranty Clause or related claims are justiciable in state court, as the Rhode Island Supreme Court appears to believe,[78] a wide range of arrangements will probably satisfy the Clause. Similarly, even if the federal Constitution imposes some requirement of separation of powers on the states, that requirement too will likely be satisfied by a variety of systems. The next Part turns to these questions directly.

III. THE INCORPORATION ANALOGY

Thus far this Article has addressed the general question of whether the federal Constitution imposes *any* judicially enforceable obligations on the shape of state government. It has tenta-

78. *See In re* Advisory Opinion to the Governor (Ethics Comm'n), 612 A.2d 1, 16-17 (R.I. 1992).

tively suggested an affirmative answer. For example, if a state were to abolish its legislative and judicial branches, and consolidate all power in an executive—even an elected one—neither the Constitution's text nor the precedents of the United States Supreme Court should be read to preclude a state court's invalidation of that scheme.

Fortunately, reality does not present such stark violations of the republican principle. More typically, principles of republican government and separation of powers are invoked to question the validity of such supplemental institutions as popular referenda[79] or independent administrative agencies.[80] Similarly, in the pending Rhode Island litigation, the issue concerns a second-order principle: in a state which clearly has distinct legislative, executive and judicial branches, to what extent may legislators serve on or appoint members to commissions within the executive branch?

If that question concerned the federal government, the answer would be clear: not at all. The express text of the Incompatibility Clause forbids any "Person holding any Office under the United States [from being] a Member of either House during his Continuance in Office,"[81] and the United States Supreme Court has relied on this provision to invalidate service on executive boards by individual members of Congress.[82] In addition, the express text of the Appointments Clause prescribes that the Senate may confirm

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79. *See, e.g.*, William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 Ohio St. L.J. 583, 608-10 (1994); Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 Or. L. Rev. 19 (1993); Marc Slonim & James H. Lowe, Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 Wash. L. Rev. 175, 192-94 (1979). *But see, e.g.*, Louis J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 Iowa L. Rev. 637, 644 (1980).

80. *See, e.g.*, Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1936) (rejecting claim that agency's exercise of delegated authority is inconsistent with republican government); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 Ann. Surv. Am. L. 477, 504; James C. Thomas, *Fifty Years with the Administrative Procedure Act and Judicial Review Remains an Enigma*, 32 Tulsa L.J. 259, 270-71 (1996). Note that the Guaranty Clause has also been invoked as a limitation on the federal government's power to interfere with state autonomy, thereby turning the usual arguments on their head. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 2 (1988).

81. U.S. Const. art. I, § 6 cl. 2.

82. *See, e.g.*, Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991).

Presidential nominees;[83] the Supreme Court has held that this procedure is the exclusive means by which Congress may participate in the selection of executive officers.[84]

However, by their terms, both the Incompatibility Clause and the Appointments Clause apply to the United States, and not the states.[85] Although both clauses no doubt implement the Framers' general conception of separation of powers, it seems implausible that either provision is essential to the very notion of separation of powers. Recall from Part I that some principle of separation of powers in state government appears to be a tacit postulate of the federal Constitution. But the provisions from which we inferred this tacit postulate do no more than identify the *existence* of distinct legislative, executive and judicial branches of state government. They do not appear to mandate strict separation of those branches.

Indeed, it would be very odd to say that the federal Constitution mandates strict separation of powers for state government when it does no such thing for the federal government. In part to facilitate inter-branch cooperation, and in part to enable each branch to check the others, the Constitution gives the President the quasi-legislative power to sign or veto bills[86] and allows Congress and the courts to play a role in the quasi-executive function of appointments.[87] Given that the federal Constitution does not command strict separation of powers even for the federal government, there is no reason to think that the strictest of its provisions specifically applicable to the federal government must also apply to the states. In short, the right answer to the question of how much separation of powers the Constitution requires of the states is: some, but certainly not everything required of the federal government.

The difficult task will be to discern what specific practices are so extreme as to warrant the conclusion that a state lacks a distinct legislative, executive and judicial branch. Suppose that a state were to adopt a parliamentary model in which the chief exec-

83. *See* U.S. Const. art. II, § 2, cl. 2.

84. *See* Buckley v. Valeo, 424 U.S. 1, 140-41 (1976).

85. *See* U.S. Const. art. I, § 6; *id.* art. II, cl. 2.

86. *See id.* art. I, § 7, cl. 2.

87. *See* Morrison v. Olson, 487 U.S. 654, 673, 676 (1988); *see also* U.S. Const. art. 2, § 2, cl. 2 ("[B]ut the Congress may by Law vest the Appointment of such inferior Officers, . . . in the President alone, in the Courts of Law . . . .").

utive is also the leader of the majority party (or coalition) in parliament and her cabinet members are all also members of parliament. If such a system satisfies the Constitution's implicit requirement that states have identifiable legislative, executive and judicial branches, then, *a fortiori*, so does Rhode Island's practice of legislative appointments.

In thinking about this sort of issue, it may be useful to recall the experience of the United States Supreme Court during the period when it was deciding what individual rights applicable to the federal government are also applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment. Writing for the Court in *Palko v. Connecticut*,[88] Justice Cardozo stated that the Due Process Clause includes those principles of justice that are "implicit in the concept of ordered liberty."[89] The *Palko* test appeared to focus on the question whether a fair legal system could be *imagined* that did not include the limitation in question; for that reason, in applying the test, the Court rarely invalidated state laws or practices.[90] The Court eventually rejected the *Palko* formulation, however, and found that most of the protections set forth in the Bill of Rights are "incorporated" against the states by the Fourteenth Amendment.[91] Under the newer approach, articulated most plainly in *Duncan v. Louisiana*,[92] the Court extended protection even to rights that were "not necessarily fundamental to fairness in every [legal] system that might be imagined but [were thought to be] fundamental in the context of the [legal] processes maintained by the American States."[93]

Following an approach based on *Palko*, we might say that because we can imagine a parliamentary system that is consistent with republican government and disperses power sufficiently to prevent tyranny, Rhode Island's use of legislative appointments is an easy case. On the other hand, under an approach based on *Duncan*, a parliamentary system would be unconstitutional as inconsistent with an essentially unbroken tradition in American

88. 302 U.S. 319 (1937).
89. *Id.* at 325.
90. *See* Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968).
91. Laurence H. Tribe, American Constitutional Law 773 (2d ed. 1988).
92. 391 U.S. 145 (1968).
93. *Id.* at 150 n.14. Note, however, that in cases involving unenumerated rights under the Due Process Clause, the Court still sometimes invokes the *Palko* formula. *See, e.g.*, Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997).

state and national government dating to the Founding. Although legislative appointments of the kind practiced in Rhode Island do not diverge from the American pattern so clearly as does a full parliamentary system, they are nonetheless quite out of step with the general practice in the United States, and thus a *Duncan* approach might well invalidate Rhode Island's practice.

Nonetheless, the *Palko* approach may be more appropriate in the separation-of-powers context than the *Duncan* approach, because questions about the applicability of separation-of-powers norms to the states arise in a different context from questions about the applicability of the Bill of Rights. Considerable disagreement exists as to whether the Reconstruction Congress intended the Fourteenth Amendment (through the Privileges and Immunities Clause) to make the Bill of Rights applicable to the states.[94] But whatever the answer to that question, there can be little doubt that the impulse behind incorporation—limiting the power of states to infringe individual rights—responds to the principal, transformative concern of the Fourteenth Amendment. By contrast, no historical transformation occurred that would warrant applying the doctrine of separation of powers to the states more strictly now than in earlier times.

Quite the contrary, the one shift (or "constitutional moment"[95]) that bears on the present inquiry is the growth of the administrative state in the twentieth century. To make sense of that shift—discussed at greater length in Part IV—requires that separation-of-powers concepts like the non-delegation doctrine be applied loosely rather than strictly. An era like our own, in which power is moving from federal to state bureaucracies, seems a particularly poor time to apply rigid doctrines rooted in eighteenth century conceptions of how government operates.

Thus, while the federal Constitution may well impose justiciable limits on the structure of state government, the federal doc-

94. *Compare* Adamson v. California, 332 U.S. 46, 71-74 (1947) (Black, J., dissenting) (arguing in favor of incorporation) *and* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992) (same) *with* Raoul Berger, The Fourteenth Amendment and the Bill of Rights 91-92 (1989) (arguing against incorporation) *and* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5, 90 (1949) (same).

95. 1 Bruce Ackerman, We The People: Foundations, *passim* (1990); 2 Bruce Ackerman, We The People: Transformations 409 (1998).

trines applying the Incompatibility Clause and the Appointments Clause probably are not among those limits.

In any event, even if this conclusion is wrong, it would be foolhardy for the Rhode Island Supreme Court (or any state court facing a comparable question) to invalidate legislative appointments on the basis of the federal Constitution rather than the state constitution. For if the court were to base its ruling on federal law exclusively, then in a non-advisory case, the United States Supreme Court could overrule the decision. By contrast, if the court makes clear that its decision is based on the state constitution, then regardless of whether the court believes that the federal Constitution provides an alternative basis for the same holding, there would be no grounds for the United States Supreme Court to review the decision.[96]

IV. FACING THE NORMATIVE QUESTION: INCOMPATIBILITY, AGENCIES, AND DEMOCRACY

Other contributors to this symposium have offered insightful analyses of the merits of the state constitutional claim. Without directly entering that debate, this Part offers some reflections on the lessons that may be drawn by comparing and contrasting the state and federal experiences for purposes of informing an evaluation of the state constitutional claim.

First, the text of the Rhode Island Constitution contains an express separation-of-powers (or to be more precise, *distribution* of powers) principle. It states: "The powers of the government shall be distributed into three departments: the legislative, executive and judicial."[97] By contrast, the federal principle of separation of powers must be inferred from the Constitution's structure. On the other hand, even if the federal Constitution's *overall* commitment to separation of powers is more ambivalent than the Rhode Island Constitution's, the federal Constitution is expressly committed to the particular prohibition of legislative appointments to executive bodies. Thus, in general, textual arguments will support a more robust protection for separation of powers in Rhode Island than at the federal level, but in the particular case under consideration, the opposite is true.

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96. *See* Michigan v. Long, 463 U.S. 1032, 1032-33 (1983).
97. R.I. Const. art. V.

Second, although *Palko* rather than *Duncan* supplies the appropriate test for determining whether a particular structural aspect of federal constitutional law applies of its own force to the states, when a state court looks to federal law as persuasive authority for the interpretation of the state constitution, *Duncan*'s focus on American systems of government makes more sense than *Palko*'s consideration of hypothetical or foreign legal systems. The history of the Rhode Island Constitution is, after all, part of the history of the United States. Rhode Island's conception of separation of powers was born and developed in a context that was influenced by the national experience and the experience of its sister states to a much greater extent than by experience in other nations with quite different government structures. To recognize these commonalities is not (necessarily) to endorse universalism in state constitutional interpretation.[98] Different states would still be entitled to interpret their constitutions differently, even when they contain identical language. The point is simply that in exercising its independent judgment as to the meaning of a state constitution, a state high court need not and should not ignore the most relevant experience of other states.

Third and perhaps most important, any interpretation of the principle of separation of powers in federal or state government must confront the reality of the administrative state. The high school civics picture of a legislature that makes the law, an executive that enforces the law and a judiciary that interprets the law is not only confounded by constitutionally sanctioned instances of power-sharing by the formal branches—such as the role of Presidents and Governors in signing or vetoing legislation—but by administrative agencies that combine law-making, law-enforcing and law-interpreting functions. If we are prepared to accept such entities, why should we worry about such relatively small affronts to separation of powers as legislative appointments to executive commissions?

Commentary on the federal case law conventionally divides cases facing such questions into "formalist" and "functionalist" approaches.[99] Cases falling into the formalist category tend to invali-

98. *See* James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 Roger Williams U. L. Rev. 109 (1998).

99. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and The Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

date efforts by one branch of government to exercise a power formally assigned to another,[100] while functionalist decisions tend to permit novel arrangements.[101] In the interest of full disclosure, I should say that, at least absent the clear violation of an express constitutional provision, I find little to recommend formalism. It is simply insufficient to say "that is not how we have done things here," when the same could be, and has been, said more forcefully with respect to the agencies.

However, I am not a fan of functionalism either, to the extent that functionalism has become synonymous with the application of a deferential or conclusory balancing test.[102] To my mind, functionalism properly conceived asks whether a particular practice has the actual effect of distorting the balance of power between the branches, taking into account the reality of administrative agencies and other conditions of the modern age. Justice White's dissenting opinion in *INS v. Chadha*[103] is a good example of this method. In that case, Justice White would have upheld a unicameral legislative veto on the ground that it simply restored the status quo that existed before Congress delegated its authority to withhold deportation to the Attorney General.[104] Although one can quarrel with Justice White's characterization of the legislative veto as merely restoring the status quo ante rather than working a net increase in Congressional power, if one were to agree with the characterization, I do not think it would be a sufficient defense of the majority's holding to say that Congress could choose simply not to delegate authority.

Administrative agencies exist because we cannot live without them. To be sure, sometimes Congress or a state legislature delegates authority to an agency because it wants to take credit for "solving" some large social problem without having to make the unpopular choices required to implement real solutions on the

100. *See, e.g.*, Clinton v. City of New York, 118 S. Ct. 2091 (1998); Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).

101. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989); Morrison v. Olson, 487 U.S. 654 (1988).

102. *See Morrison*, 487 U.S. at 691 (phrasing the separation-of-powers inquiry as whether the limits on the removal power are "of such a nature that they impede the President's ability to perform his constitutional duty").

103. 462 U.S. 919 (1983).

104. *See id.* at 967 (White, J., dissenting).

ground.[105] But there are also legitimate grounds for delegating power to agencies. Chiefly, neither a state legislature nor Congress has the time or expertise to take all the steps necessary to formulate policy in a complicated and rapidly changing world.

Despite their necessity, administrative agencies can pose two principal kinds of structural constitutional problems. First, when the executive branch closely supervises the agency, there is a risk of concentration of power in the executive branch, upsetting the balance of power. Partly to avoid this risk, and partly to replace politics with expertise in administrative agencies, legislatures sometimes create independent (or quasi-independent) agencies not directly answerable to the executive branch.[106] But in thus solving the balance-of-powers problem, legislatures create the second kind of problem: agencies that are not accountable to the public.[107]

We might therefore want to think of legislative participation in the appointment and removal of executive agency officials as an attempt to solve the first problem without creating the second. The resulting body is accountable because it is answerable to elected officials and does not risk upsetting the balance of powers because those officials have ties to *both* political branches. On this functionalist account, legislative appointments look like the best of all possible worlds.

Whether the practice of legislative appointments in Rhode Island *in fact* solves one of the characteristic problems of our age is, however, a different question. Before concluding, I would offer three reasons to be cautious before embracing legislative appointments as a panacea.

First, one should be careful to distinguish between, on the one hand, individual legislators serving on executive commissions and, on the other, non-legislators appointed by and answerable to the whole legislature serving on such commissions. Delegations by the legislature to its subsets may pose greater problems than delegations to third parties, even if the third parties serve at the pleasure

105. *See* Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law 135-40 (1997); John Hart Ely, *Suppose Congress Wanted A War Powers Act That Worked,* 88 Colum. L. Rev. 1379, 1380 (1988).

106. *See generally* James Landis, The Administrative Process (1938) (treating the quasi-independence of agencies as their principal virtue).

107. *See generally* Cass R. Sunstein, *Constitutionalism After the New Deal,* 101 Harv. L. Rev. 421 (1987) (arguing that New Deal institutions too readily dispensed with checks and balances).

of the legislature. The reason is that in the former case, accountability does not run to the proper democratic body—the legislature as a whole—but to individuals who serve distinct constituencies.[108] Perversely, service on executive agencies by actual legislators may render those agencies *less* accountable than they otherwise would be—a conclusion that finds some support in the fact that the Rhode Island agencies that do not include legislators are subject to greater oversight than those that do.[109]

Second, much depends on experience. Legislative appointments to executive committees do not inherently lead to corruption, nor do they inevitably undermine the ability of the executive to carry out its functions. However, if, over a long period of time, experience with legislative appointments in some state leads to corruption or ossification—and I have insufficient knowledge to reach a judgment on that question in Rhode Island—then the possibility that legislative appointments might, in principle, be a good idea, should yield to a judgment based on the facts as they are.

Third, legislative appointments may not be the best means of democratizing the agencies. The raison d'être of administrative agencies is to respond to deficiencies in the traditional three branches of government. Stocking the agencies with traditional executive or legislative officials responds to an accountability gap by assimilating the agencies to the very institutions whose deficiencies they are meant to correct.

As Charles Sabel and I have recently argued at some length, a centralized mini-legislature or mini-executive or a combination of the two will encounter many of the same difficulties of developing solutions to rapidly changing complex regulatory problems that bedevil the traditional legislature and executive.[110] Consequently, to render administration more effective (and more democratically accountable) requires that agencies be able to act on information not available to the traditional organs of centralized government. And

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108. *Cf.* John F. Manning, *Textualism as a Non-Delegation Doctrine*, 97 Colum. L. Rev. 673 (1997) (justifying textualists' refusal to consult legislative history on the ground that to do so would permit Congress to delegate its lawmaking power to a sub-unit of itself).

109. *See* Brief of Governor Lincoln C. Almond at 50, *In re* Advisory Opinion to the Governor (Separation of Powers) (No. 97-572-M.P.).

110. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, 345-88 (1998).

indeed, in areas such as community policing,[111] the provision of social services to families[112] and environmental regulation,[113] national but especially state government entities have recently been doing just that—by opening themselves up to direct democratic participation. In these and other areas, successful democratization of agency practice from the bottom up will make legislative infiltration of the agencies from the top increasingly indefensible.

CONCLUSION

Contrary to the received wisdom, the federal Constitution speaks to the issue of separation of powers in state government. Yet it does so in a whisper, foreclosing only those arrangements deeply offensive to principles of representative government. Unless we are prepared to say that parliamentary systems of government in existence throughout the free world offend such principles, Rhode Island's practice of legislative appointments to executive commissions would appear to satisfy the federal Constitution's requirements. The practice's validity under the state constitution presents a more difficult question. Resolution of that question should not turn on an abstract analysis of the supposedly inherent features of the branches of government. Instead, where the relevant text is ambiguous, the validity of legislative appointments should be measured against the realistic alternatives, given the complex regulatory problems presented by the modern world.

111. *See id.* at 327-32.
112. *See id.* at 324-27.
113. *See id.* at 373-88.