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POPULAR REGULATION? STATE CONSTITUTIONAL AMENDMENT AND THE ADMINISTRATIVE STATE

JONATHAN L. MARSHFIELD*

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INTRODUCTION

When we think about administrative law, we tend to dwell on issues related to federal agencies and the federal laws and institutions that govern those agencies.¹ But the federal government is only one part of a

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1. See Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95, 95 (1982) (“While administrative law professors would generally acknowledge that state law should be a part of their subject, few actually consider state administrative law issues or

much larger regulatory structure in the United States. State agencies are a significant and crucial component of the contemporary regulatory regime.² State boards of agriculture, for example, influence international trade policy, food safety rules, emerging crops regulation, and the implementation of multi-billion dollar federal farming programs.³ State departments of education likewise have wide-ranging impacts on education policy,⁴ while state health and human services departments regulate healthcare and intimate family relationships.⁵ In short, state agencies are pervasive and powerful, and they deserve more focused scholarly attention.

This is especially true because although state agencies perform functions analogous to federal agencies (i.e., they promulgate rules, adjudicate disputes, and monitor private actors),⁶ they perform those functions in a very different institutional environment.⁷ John Devlin has argued, for example, that federal administrative law is ill suited to the states because of a variety of structural differences between state and federal government.⁸ Aaron Saiger has similarly argued that the federal *Chevron* doctrine “is a poor candidate” for adoption by state courts.⁹ And important recent work by Miriam Seifter has demonstrated that state agency independence does not fit cleanly within the federal archetype¹⁰ and that federal models of civil society oversight may be weaker in the states.¹¹

materials in their courses.”).

2. See generally GARY F. MONCRIEF & PEVERILL SQUIRE, *WHY STATES MATTER: AN INTRODUCTION TO STATE POLITICS* 77–143 (2d. ed. 2017) (discussing state government policymaking capacity).

3. The National Association of State Departments of Agriculture provides a helpful overview of the role of state agriculture departments in the states. See NASDA, *Policy Statements* (Sept. 14, 2020), <https://www.nasda.org/policy/nasda-policy-statements> [<https://perma.cc/EE9M-9HKH>] (last visited Dec. 2, 2020).

4. See Edmund T. Hamann & Brett Lane, *The Roles of State Departments of Education as Policy Intermediaries: Two Cases*, 18 EDUC. POL’Y 426 (2004).

5. See, e.g., New Jersey Department of Children and Families Act, S. 2069 (2006) (codified at N.J. STAT. ANN. §§ 9:3A-1–9:3A-18 (West 2006)) (endowing New Jersey Department of Children and Families with responsibility to monitor well-being of children and intervene in family affairs when necessary).

6. See Katherine Shaw, *State Administrative Constitutionalism*, 69 ARK. L. REV. 527, 532 (2016).

7. See *Parcell v. Kansas*, 468 F. Supp. 1274, 1277 (D. Kan. 1979) (holding that federal and state separation of powers cases cannot be used interchangeably), *aff’d sub nom. Parcell v. Governmental Ethics Comm’n*, 639 F.2d 628 (10th Cir. 1980).

8. See generally John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1220 (1993) (discussing separation of powers principles).

9. Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 557 (2014).

10. See Miriam Seifter, *Understanding State Agency Independence*, 117

In this Article, I argue that there is a more fundamental difference between state and federal regulatory environments that has been largely overlooked in the study of state administrative law. My core claim is that state constitutional amendments affect state agencies in significant but underappreciated ways that have no reliable analog in the federal context. This in turn suggests that we should be especially cautious when using federal theories and doctrines to evaluate or conceptualize state agencies.

I advance two main arguments in support of this claim. First, state constitutional theory differs significantly from federal constitutional theory, and creates the expectation that constitutional amendment plays a unique and important role in monitoring state agencies. Federal agencies operate within the context of the Federal Constitution's deep commitment to representative democracy and the separation of powers as strategies for promoting government accountability.¹² Within this structure, federal agencies present a puzzle because of their distance from elections, their unusual independence from other branches of government, and their authority to perform legislative, executive, and judicial functions.¹³ Federal administrative law and theory is largely dedicated to explaining agency legitimacy and accountability within this constitutional structure.¹⁴

State constitutional theory, however, is grounded in a very different set of assumptions regarding government accountability.¹⁵ State constitutions reflect a pervasive fear that government officials and institutions are prone towards capture and recalcitrance, and demonstrate a deep skepticism of representative government and the separation of powers as accountability solutions.¹⁶ Consequently, state constitutions have been

MICH. L. REV. 1537 (2019).

11. Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018).

12. See *infra* Section I.A; see also Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 518–20 (2015) (noting that the separation of powers strategy persists, albeit in different forms, within the federal government in order to protect against the consolidation of power and the undermining of democracy).

13. See Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 305–07 (2010).

14. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984); see also Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 227–30 (2016).

15. Two classic works demonstrating the alternative assumptions and strategies underlying state constitutions are GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (Univ. of N.C. Press 1998), and DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* (1980).

16. See G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 78 (1998); G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional*

constructed around alternative mechanisms for promoting government accountability; most notably, various forms of direct democracy that allow the public to intervene in government.¹⁷

The states have institutionalized direct democracy in a variety of ways, but contemporary state constitutionalism is deeply tied to frequent formal amendment of constitutional text through popular political processes as a key mechanism for promoting government accountability.¹⁸ Indeed, the states have steadily and universally liberalized amendment procedures to encourage frequently popular input and control over government policies and decisions.¹⁹ As a result, state constitutions contain myriad provisions addressing almost every aspect of contemporary society, often with statutory-like detail. Although these provisions can appear chaotic and disconnected, they accurately reflect the deep structure of state constitutionalism, which encourages popular entrenchment of detailed policy as a mechanism for promoting government accountability.²⁰

It is within this broader theoretical context that state agencies should be evaluated and conceptualized. Unlike their federal counterparts, state agencies do not operate within a constitutional framework that relies primarily on representative democracy and the separation of powers to ensure accountability. Instead, they sit within a constitutional structure where frequent popular intervention in policymaking and administration is a dominant accountability device. Thus, if we assume that state constitutional “amendomania” reflects an effort by the public to control and

Tradition, in DEMOCRACY: HOW DIRECT? VIEWS FROM THE FOUNDING ERA AND THE POLLING ERA 87, 89–90 (Elliot Abrams ed. 2002) [hereinafter Tarr, *For the People*]. This fear is prolific in state constitutional convention debates regarding a variety of topics. *See, e.g.*, INDIANA CONSTITUTIONAL CONVENTION 1850–51, 683 (Delegate John Morrison: “It is a notorious fact, mortifying as it may be to our pride, that hitherto the agents of corporations have been able . . . to carry through the Legislature almost any measure which their principals deemed of sufficient importance to spend money enough to carry.”); MASSACHUSETTS CONVENTION 1917–19, 2:946–47 (“We have found that in our legislative bodies these organized human selfish forces were very powerful and, indeed, at times were able to thwart the will and judgment of the majority.”).

17. *See* Tarr, *For the People*, *supra* note 16, at 89–90.

18. *See* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES (2018); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 164, 1641 (2014); Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L. Q. 287, 351 (1997).

19. *See* JOHN DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 29–63 (2d ed. 2009).

20. *See* Mila Versteeg & Emily Zackin, *Constitutions Un-Entrenched: Toward an Alternative Theory of Constitutional Design*, VA. PUB. L. & LEGAL THEORY RSCH. PAPER SERIES 1, 2–8 (2016).

guide state government *in toto*, we might expect those amendments to affect all departments of state government, including state agencies.

My second argument is that careful review of state constitutional amendments supports the expectation that they significantly impact state agencies. The impacts of some amendments are obvious because they explicitly address agency rules and decisions, or change administrative structures and procedures.²¹ However, an overlooked impact on state agencies comes from the myriad policy amendments that indirectly affect agency work. For example, many amendments change statewide policies that agencies are responsible for implementing, earmark funds for agency-run programs, or prohibit state government (as a whole) from pursuing a particular agenda.²² In these ways (and others) amendment actors are exerting frequent and significant influence on both state agencies and legislatures through political processes that are unique to the states. To demonstrate and further explore this claim, I catalogue at least five ways that amendments affect state agencies. This catalogue is an important contribution because it begins the process of placing state agencies within their true constitutional structure.

Finally, placing state agencies in their native environment enables a more authentic assessment of their role and performance, as well as a more nuanced evaluation of state constitutional theory and design. On the one hand, this perspective reveals that state agencies are unlikely to be as independent as their federal cousins. Popular intervention in state government is too pervasive and frequent to afford agencies a truly independent space. Indeed, it is not hyperbolic to suggest that no institution in state government is as independent and entrenched as some federal agencies appear to be. On the other hand, state agency business is vast and most of it probably lacks the political salience or significance necessary to trigger a constitutional amendment. This may create a degree of *de facto* independence for state agencies, which perhaps illustrates the limits of state constitutional theory and design. Direct democracy is likely too cumbersome to effectively monitor the vast technical work of state agencies. Thus, to the extent state agencies perform increasingly important roles, state constitutional design may be ill-suited to monitoring that expansion.

This essay proceeds in three Parts. Part I argues that state agencies are differently situated than federal agencies because they operate within a constitutional structure where frequent popular intervention is a dominant accountability device. Part II surveys recent state constitutional amendments and argues that they confirm that constitutional amendments impact state agencies in a variety of under-appreciated and creative ways.

21. See *infra* Sections II.A–C (discussing various examples).

22. See *infra* Sections II.D–E (discussing various examples).

Finally, Part III explores the implications of studying state agencies with greater sensitivity to their authentic constitutional environment.

I. CONSTITUTIONAL DESIGN AND GOVERNMENT ACCOUNTABILITY

Although there was early uncertainty regarding the constitutionality of federal agencies, federal administrative law has generally coalesced around a rather stable and enduring set of rules, norms, and practices. This is, of course, a complex area of law, policy, and government that I cannot fully describe here. My limited purpose is to show that oversight of federal agencies is primarily oriented around a constellation of highly mediated and rivalrous political processes that reflect the Federal Constitution's commitment to representative democracy and the separation of powers. To be sure, the public has steadily assumed a more direct role in monitoring federal agencies, but that monitoring is channeled back into representative institutions, litigation, or informal pressure on agency officials through the press. This stands in contrast to the states where agencies operate in an environment that is subject to frequent popular lawmaking through constitutional amendment. More importantly, state constitutional theory has generally coalesced around the expectation that wayward government officials and institutions will be corralled through constitutional amendments.

In this section, I first provide a very general overview of the forms of federal agency oversight. I then argue that state agencies should be understood within the context of a different constitutional structure that prioritizes frequent popular lawmaking through constitutional amendment as an accountability mechanism, which has no analog at the federal level.

A. Federal Mechanisms of Agency Accountability

The Federal Constitution has a deep commitment to representative democracy and the separation of powers as strategies for promoting good governance, accountability, and liberty.²³ James Madison is most often attributed with these aspects of Federal Constitutional design. He viewed majority tyranny as the greatest threat to liberty and good governance, and he sought to arrange the federal government in ways that would mitigate this risk. His first design idea was to reject direct democracy, which he

23. The founders intentionally (and emphatically) rejected direct democracy in the Federal Constitution in favor of representative government and the separation of powers. See James Madison, *The Federalist Nos. 10, 49, 51, 53*, LIBR. CONG., <https://guides.loc.gov/federalist-papers/full-text> [<https://perma.cc/ZM W6-P5T7>] (last visited Jan. 2, 2021) [hereinafter LIBR. CONG.]; JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (1994); Tarr, *For the People*, *supra* note 16, at 88.

believed was too easily manipulated by majority faction, in favor of representative democracy.²⁴ Representative democracy, according to Madison, harmonized popular sovereignty with limitations on majority rule by ensuring that popular preferences would be honored but mediated through “wise” and “trustworthy” representatives who would consider a plurality of interests and priorities.²⁵ Madison also insisted on a careful separation of powers that matched each power with a “counter-power.”²⁶ The idea was that government accountability would be best served by turning government on itself by incentivizing officials within government to compete for power and therefore monitor each other’s behavior.²⁷

Madison’s ideas about representative government and separation of powers are at the core of how the Federal Constitution is designed, and they frame the basic structure of how federal agencies are monitored. To be sure, federal agency oversight is the object of a vast and complex literature that spans disciplines.²⁸ My discussion here will surely fall short of capturing the nuance and richness of that literature. For present purposes, however, my only observation regarding the many forms of federal agency oversight is that they mostly funnel back into the Federal Constitution’s commitment to representative democracy and the separation of powers.

Traditional accounts of federal agency oversight focus on the role that constitutional actors (Congress, the President, and the courts) can play in monitoring and controlling agencies.²⁹ Congress, for example, has a variety of options for overseeing and controlling agencies. It can eliminate, restructure, redefine, or consolidate agencies by statute.³⁰ Congress may also enact statutes that override or effectively alter specific agency regulations.³¹ Congressional oversight also occurs through confirmation and impeachment powers, and through a variety of indirect methods such as oversight investigations and funding decisions.³² Regardless of the method of Congressional oversight, the core idea underlying traditional theories is that Congress will have incentives to monitor and control agencies because voters demand it or because Congress inherently aspires to grow its power.³³

24. This account comes primarily from Federalist 10, 49, 51, 53, 63. See LIBR. CONG., *supra* note 23.

25. See KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 19–21 (2009).

26. *Id.* at 21.

27. *Id.*

28. See Michaels, *supra* note 14, at 232.

29. See Seifter, *supra* note 11, at 108.

30. See Seifter, *supra* note 10, at 1548–51.

31. See *id.*

32. See *id.* at 1548–50.

33. See Michaels, *supra* note 14, at 248 (describing Congressional incentives to monitor agencies).

The President can also exert control over agencies. The President's authority over federal agencies largely turns on the degree of independence that Congress gives to the agency.³⁴ Under existing law, the President may not formally direct the decisions of "independent agencies."³⁵ But the President nevertheless has the power to appoint the leaders of those agencies and remove them "for cause."³⁶ The President can extract more loyalty from the leaders of executive (non-independent) agencies because they serve at the pleasure of the President.³⁷ Indeed, there is generally close alignment between the President and these officials.³⁸ Moreover, scholars have noted a variety of informal influences that the President exerts over agencies.³⁹ Like Congress, the President is presumably motivated to exert these forms of control over agencies because voters demand it or because the President inherently aspires to consolidate power.⁴⁰

The federal judiciary can also play a role in controlling agencies. Although existing jurisprudence gives great deference to agencies, federal courts nevertheless play an important role in enforcing legal limits on agencies. By enforcing the Administrative Procedure Act and basic constitutional norms, courts ensure that agencies comply with the law. While the courts provide a forum for private parties to challenge certain agency actions, the role of the courts remains squarely within the Federal Constitution's commitment to representative government and the separation of powers. Private parties may raise objections to agency action, but the validity of agency conduct is ultimately determined by the substance of laws adopted by Congress or the Supreme Court's construction of the constitution. Indeed, the federal courts' primary role is not to determine regulatory substance, but to referee the administrative process and protect against overreach.

Importantly, administrative law scholars have observed that a variety of "subconstitutional" actors also contribute to monitoring and controlling federal agencies.⁴¹ Various scholars have noted, for example, that administrative agencies are not monolithic and that checks on agency power can come from within those agencies – especially from career civil servants who, unlike agency heads, are insulated from political influence and have their own incentives to perform their duties in compliance with

34. See Seifter, *supra* note 10, at 1548–49.

35. See *id.* at 1549.

36. *Id.* at 1548–49.

37. See Michaels, *supra* note 14, at 245.

38. See *id.* at 245 n.60.

39. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 590–91 (1984).

40. See Michaels, *supra* note 14, at 245–46 (describing political incentives for President to monitor agencies).

41. See Seifter, *supra* note 11, at 108.

law and professional norms.⁴² Other scholars have emphasized that “civil society” plays an increasingly important role in monitoring federal agencies.⁴³ Members of the public can, for example, demand agency information, petition agencies to adopt or modify rules, comment on proposed rules, and sue to challenge agency decisions.⁴⁴ And, there are strong incentives for civil society to monitor agencies because “invariably some segment of the vast and diverse public will be adversely affected by any change (or non-change) in administrative policy – and thus will” seek to change that policy.⁴⁵

Although these theories of agency accountability vary from traditional accounts, it is important to recognize that they are still tied to the Federal Constitution’s commitment to representative democracy and separation of powers. The idea that federal agencies contain their own internal checks and balances is compelling, but it ultimately rests on the notion that “employing rivalrous institutional counterweights” can “promote good governance, political accountability, and compliance with the rule of law.”⁴⁶ This, of course, is the core logic of the traditional tripartite separation of powers embedded within the federal constitutional structure. As a matter of constitutional design, it is nothing more than Madison’s original belief that democracy and liberty are best protected by pitting ambition against ambition within government.⁴⁷

Similarly, the idea that civil society helps monitor federal agencies should not be understood as an analog to direct public lawmaking. Indeed, the tactics of civil society derive primary from the Federal Constitution’s commitment to representative democracy. Citizens and interest groups who seek administrative changes resort to lobbying government officials, mobilizing fellow voters to interact with representatives, and notifying the press in the hope of obtaining a change in agency policy.⁴⁸ The public

42. See Michaels, *supra* note 14, at 237–38.

43. See Seifter, *supra* note 11, at 114–27 (describing literature on civil society oversight of federal agencies).

44. See Michaels, *supra* note 14, at 239–41 (describing ways that the public can engage with federal agencies).

45. *Id.* at 240.

46. Michaels, *supra* note 12, at 520.

47. See LIBR. CONG., *supra* note 23, at 51.

48. See Seifter, *supra* note 11, at 120–21 (describing how civil society activities tap into executive official incentives). Of course, citizens can comment on proposed rules and even petition an agency for a new rule. See Administrative Procedure Act, 5 U.S.C. § 553(c), (e) (2012). But agencies seem to pay little regard to these public interventions, and they certainly have no legal obligation to do anything more than rationally consider the public’s input. See Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1823–24 (2015) (“There is nothing akin to direct democracy on the [federal] rulemaking side. . . . [Public] comments are not binding in the same way as a vote, of course, and many agencies simply dismiss them as not being materially cogent

surely plays an important role in monitoring federal agencies, but its role is to enhance the performance of representative institutions by gathering information, identifying public priorities, and orchestrating the agenda. In a sense, Congress and the President have constructed a system that outsources essential work to private groups that are most incentivized to perform that work well.⁴⁹

In short, the theory and practice of federal agency oversight has developed around the Federal Constitution's commitment to two core accountability mechanisms: representative democracy and the separation of powers. Regarding representative democracy, a variety of different tactics and actors work to increase the political salience for Congress and the President of agency decisions with the hope of changing agency policy or performance. Regarding the separation of powers, both traditional theories and new perspectives on agency accountability build on the basic notion that government accountability can be enhanced by dividing government into rivalrous institutions.

B. State Constitutional Amendment as an Accountability Mechanism

It is often presumed that Madison's vision for the Federal Constitution represents the authoritative perspective on American constitutionalism.⁵⁰ In truth, the states have purposefully diverged from federal constitutional design in various respects. One of the most fundamental points of divergence relates to Madison's faith in representative democracy and the separation of powers as effective mechanisms for good governance.⁵¹ To be sure, state constitutions incorporate representation and the tripartite separation of powers into their constitutional structure. But they have designed those institutions around various forms of direct democracy that reflect a deep distrust in "government by elected representatives."⁵² If there is a single thread that connects state constitutions across jurisdictions and time, it is a populist fear that government officials are prone towards capture and recalcitrance, and that government accountability requires opportunities for the public to vote on measures, not just candidates.

This idea is deeply embedded in state constitutional history and theory. Alan Tarr has explained, for example, that the earliest state constitutions went to great lengths to construct legislative power in ways

and thus not requiring a response.”).

49. See Michaels, *supra* note 14, at 248–50.

50. See Tarr, *For the People*, *supra* note 16, at 89.

51. *Id.* at 88–90.

52. See *id.* at 90; Elizabeth Garrett, *Crypto-Initiatives in Hybrid Democracy*, 78 S. CAL. L. REV. 985, 985 (2005) (arguing that states have created “hybrid” democracies that are “neither wholly representative nor wholly direct, but a complex combination of both.”).

that approximated direct democracy.⁵³ State legislators in both houses were subject to annual elections, the lower houses was incredibly large in order to reduce the size of elector districts and tighten the alignment between constituent preference and their representatives, and the states widely endorsed the practice of constituents formally instructing representatives on how to vote on certain issues.⁵⁴ The idea was that “representation was a necessary evil” and that it should be structured to “replicate direct democracy insofar as possible” with elected officials executing “the views of the populace faithfully, rather than (as Madison recommended) refining and enlarging those views.”⁵⁵

In addition to the design of state legislatures, the grand American invention of the constitutional convention came from the belief that direct democracy processes were necessary to promote government accountability.⁵⁶ The convention was designed as a way for the people to act directly and independently of government for the purpose of creating constitutional law.⁵⁷ Thus, the convention had very specific qualities. It was called directly by the people, populated by delegates selected solely for the temporary purpose of making constitutional law, and its work was subject to a popular referendum.⁵⁸ In state constitutional theory, the convention is the purest institutional embodiment of popular sovereignty because of its connection to the public without the mediation of existing government.⁵⁹ By the end of the eighteenth century, the convention was well established as a workable form of direct democracy for the creation of government, and it was fast becoming a vehicle for regular popular intervention in existing government.⁶⁰

53. See Tarr, *For the People*, *supra* note 16, at 90–92.

54. See *id.* at 91–92.

55. See *id.*

56. See generally Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. L. REV. 65 (2019) (discussing state constitutional amendment procedures).

57. See *id.* at 88–105.

58. See Tarr, *For the People*, *supra* note 16, at 95–96; Marshfield, *supra* note 56, at 94–105.

59. See Marshfield, *supra* note 56, at 94–95. Delegates from many different state constitutional conventions validate this understanding of the convention. See, e.g., DEBATES IN THE CONVENTION FOR THE REVISION AND AMENDMENT OF THE CONSTITUTION OF THE STATE OF LOUISIANA 104 (1864) (“[I]t is for the purpose of sustaining the sovereign power in the hands of the people that this Convention is assembled.”).

60. By the 1780s, a specially elected convention “had become such a firmly established way of creating . . . a constitution that governments formed by other means actually seemed to have no constitution at all.” WOOD, *supra* note 15, at 342. On the use of the convention to make constitutional amendments during much of the nineteenth century, see TARR, *supra* note 16, at 136.

The states' alternative approach to constitutionalism was brought into sharp relief during the economic crisis of 1837-39.⁶¹ Following that collapse, many states were unable to meet their substantial debt obligations,⁶² and it became clear to the public that state government had adopted bad fiscal policies and programs that benefited a privileged minority.⁶³ In response, citizens in many states called constitutional conventions and adopted detailed constitutional amendments that limited state fiscal authority, especially the state's ability to issue public debt.⁶⁴ The convention debates from this period make clear that the amendments reflected the public's belief that direct popular intervention was necessary to correct a failure by state government.⁶⁵ By placing detailed instructions and limitations in the constitution regarding fiscal policy, the public hoped to better direct and control their representatives going forward.⁶⁶

For present purposes, it is important to note that when scholars tell the story of these provisions, they tend to empathize the popular backlash against state legislatures and describe these provisions as responsive to legislative failures.⁶⁷ Legislatures were certainly to blame: they authorized imprudent financing schemes that benefited wealthy private interests at the public's expense.⁶⁸ However, what is often overlooked is that governors, agency-like boards, and appointed state commissioners were also actively involved in these failures.⁶⁹ The state bureaucracy that administered public finance during this period often failed in ways that legislatures had anticipated and tried to control by statute.⁷⁰ In many instances, the public

61. For a general discussion of how the economic crisis developed under state constitutions and the amendments in response, see TARR, *supra* note 16, at 111–12, and Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L. J. 907, 911–12 (2003).

62. The authoritative record on these defaults and the structure of these debts is BENJAMIN U. RATCHFORD, *AMERICAN STATE DEBTS* 73–104 (1941).

63. See John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST. 211 (2005); TARR, *supra* note 16, at 112.

64. See Wallis, *supra* note 63, at 234.

65. See DINAN, *supra* note 18, at 164–71 (describing convention debates).

66. See *id.*; see also Versteeg & Zackin, *supra* note 20, at 3–7.

67. See, e.g., TARR, *supra* note 16, at 112 (“In its aftermath, state constitutions were revised or amended to curtail legislative promotion of economic development”); DINAN, *supra* note 18, at 164 (“The panic of 1837 also prompted reconsideration of the wisdom of permitting unfettered legislative discretion” regarding infrastructure development).

68. See Wallis, *supra* note 63, at 214.

69. See REGINALD C. MCGRANE, *FOREIGN BONDHOLDERS AND AMERICAN STATE DEBTS* 8 (1935).

70. See *id.* at 8, 130; RATCHFORD, *supra* note 62, at 30, 88–92.

was fully aware of these failures and outraged at the agencies as much as the legislature.⁷¹

Indiana's experience is illustrative. In 1836, the Legislature adopted an internal improvement scheme.⁷² The Legislation created a nine-member Board of Internal Improvements with the mandate to "locate" and "superintend" construction of various projects, including the Wabash and Erie Canal, railroads, and turnpikes.⁷³ The Statute gave the Board the power to issue up to \$10 million in state debt to finance the projects.⁷⁴ The statute required the board to document its expenditures and debt issuance and to report to the legislature regarding its business.⁷⁵ The statute also included various provisions designed to protect against conflicts of interest on the board and to ensure transparency and accountability by the board.⁷⁶ The board was appointed by the governor and confirmed by the Senate.⁷⁷ Board members could be removed by impeachment or joint resolution of the legislature.⁷⁸

Notwithstanding the statute's protective measures, the board was a disaster that drove the state to an unprecedented default on its debt.⁷⁹ The failures came largely from the misconduct of board members who acted in clear violation of the law.⁸⁰ Among other things, the board members "sold" state bonds to banks in which they had a personal interest (often receiving a personal commission from the bank).⁸¹ The sales were often closed at a discount, meaning that the state incurred a larger debt than the cash it obtained from the bond purchasers.⁸² Board members also used the proceeds from the debt to finance lucrative construction contracts with family and friends.⁸³ An 1842 legislative investigation of the board described one member's conduct as "too grossly wrong to admit of palliation, and too palpably indefensible to invite attack."⁸⁴ The committee estimated that the state lost roughly 40% of the debt issued by the board.⁸⁵

71. *See, e.g.*, MCGRANE, *supra* note 69, at 132.

72. *See id.* at 130 (the so-called Mammoth Bill of 1836).

73. *See* 1836 Ind. Acts 6; *see also* MCGRANE, *supra* note 69, at 130.

74. *See* 1836 Ind. Acts 10.

75. *See id.* at 12.

76. *See id.* at 11, 20.

77. *See id.* at 6.

78. *See id.*

79. *See* MCGRANE, *supra* note 69, at 130 ("The prosecution of the public works program brought the state to bankruptcy. The mismanagement and dishonest of some of the state officials made this inevitable.").

80. *See id.* at 130–32.

81. *See id.* at 131–32 (itemizing commissions received by one board member).

82. *See id.*

83. *See id.*

84. *See id.* at 132 (quoting the report).

85. *See id.* (stating that there was \$15 million total debt and only \$859,300 in proceeds received).

The board's misconduct was the source of great public outrage, and the public called a convention in 1850 primarily to address public finance issues.⁸⁶ The convention ultimately adopted a provision that categorically banned all state debt.⁸⁷ The convention debates make clear that the debt amendments were aimed at controlling state legislatures as well as state agencies because both had contributed to the problem.⁸⁸ The dominant attitude at the convention was that the people needed to adopt specific constitutional limitations that would tighten control over government because errors and misconduct by legislatures, governors, and agencies were likely to recur without those controls.⁸⁹

The states' response to the 1839 financial crisis was not an outlier. Since then, states have used constitutional amendment more and more frequently to address more and more specific issues.⁹⁰ As of 2017, there were more than 7,500 amendments to existing state constitutions, an average of 150 amendments per state constitution.⁹¹ A recent empirical study of these amendments found that they have significantly increased the number of topics addressed in state constitutions as well as the degree of specificity with which those topics are covered.⁹² Indeed, state constitutions address issues from pregnant pigs and the width of ski slopes,⁹³ to the death penalty, environmental regulation, tobacco use, lotteries, marijuana, and more.⁹⁴

Underlying the growth of amendment practice is the theoretical assumption that direct popular involvement is necessary to promote government accountability.⁹⁵ Indeed, state constitutional convention debates are littered with this sentiment. As early as 1892, Amasa Eaton wrote (disapprovingly) in the *Harvard Law Review* regarding state constitutions that "the theory underlying them [is] that the agents of the people, whether legislative, executive, or judicial, are not to be trusted, so that it is necessary to enter into the most minute particulars as to what they

86. See Wallis, *supra* note 63, at 235.

87. See *id.* at 232.

88. See REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA, vol. 1 at 687–89 (1850).

89. There were also arguments that the people were to blame and that representation or a more entrenched constitution would have stopped the hasty impulse. See *id.* at 917.

90. See Versteeg & Zackin, *supra* note 20, at 13–15.

91. DINAN, *supra* note 18, at 23.

92. See Versteeg & Zackin, *supra* note 20, at 13–15.

93. See FLA. CONST. art. X, § 21 (pregnant pigs); N.Y. CONST. art. XIV, § 1 (ski slopes).

94. See generally EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 18–35 (2013).

95. Versteeg & Zackin, *supra* note 20, at 13–17.

shall not do.”⁹⁶ Several recent qualitative studies have also confirmed that state constitutional detail and length reflect a coherent theoretical approach to constitutionalism that relies on popular involvement in governance to promote accountability. Emily Zackin, for example, has found that positive rights made their way into state constitutions because existing government was non-responsive to popular labor, education, and environmental policies.⁹⁷ And, in the most extensive study of state constitutional amendments to-date, John Dinan concludes that the states are essentially “governed by amendment” as part of a strategy to, among other things, compensate for and correct government failures.⁹⁸

A few points of clarification are important here. First, the states have become increasingly reluctant to call constitutional conventions.⁹⁹ The dominant approach to amendment now is by legislative referral and the initiative.¹⁰⁰ Although the convention may have played a significant role in monitoring and checking agencies in the past, it does not perform that role in contemporary state constitutionalism. Second, there is variation among the states regarding the processes and practice of extra-conventional amendment.¹⁰¹ Eighteen states have some form of citizen-initiated amendment process.¹⁰² The initiative provides the public with the most direct access to the constitution as an accountability device. Citizens can mostly bypass government by drafting their own amendments and qualifying them for a statewide referendum. In all other states, constitutional amendments originate in the legislature, but are subject to a statewide referendum (except Delaware where amendments pass to the public in the form of an intervening legislative election).¹⁰³ Thus, the legislature has influence over the amendment process in many states, which can limit its effectiveness as an accountability device (at least as compared to a well-functioning initiative process).¹⁰⁴

96. Amasa M. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 109, 121 (1892) (referenced in Versteeg & Zackin, *supra* note 20, at 16); *see also* William F. Swinder, *Missouri Constitutions: History, Theory and Practice*, 23 MO. L. REV. 32 (1958) (explaining that state constitutions reflect attempts to control government through detailed provisions and contrasting this to the “higher law” theory adopted at the federal level).

97. *See* EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 1–17 (2013).

98. DINAN, *supra* note 18, at 270.

99. *See id.* at 30–31.

100. *See id.*

101. *See id.* at 11–34.

102. *See id.* at 17.

103. *See id.* at 14.

104. This is an important point that is often overlooked in studies addressing state constitutionalism. It is not entirely clear whether frequent amendment reflects popular involvement in constitutional politics or offensive activity by the government to control politics. The answer to this is probably highly contextual.

That said, the politics of legislature-referred amendments are complex, and the process often empowers the public. For example, in at least nine states, the legislature can propose amendments by a majority vote.¹⁰⁵ Thus, in those states, the legislature's choice to act by statute or amendment is based on considerations other than the number of votes required for each. From a practical standpoint, the main difference is whether the legislative action should be confirmed by the governor or by the public in a referendum. A legislature might prefer to send a policy to the public rather than the governor for various reasons. If the same political party controls the legislature and the governorship, for example, that party may want to avoid making a final decision on a politically contentious issue. Constitutional amendment then becomes attractive as a method for allowing the public to decide for itself. Alternatively, if the governor is from a different party and she is likely to veto a contentious bill, then the legislature may want to evade the veto by sending the issue directly to the public. In either scenario, the system creates incentives for government to send difficult issues to the public. These same dynamics exist even in states with higher legislative thresholds for amendment.¹⁰⁶ Indeed, various state legislatures have pursued constitutional amendments as a strategy for evading the governor's veto.¹⁰⁷

Moreover, once a state constitution begins to include specific details relevant to policy and government administration, it forces the legislature to pursue more and more amendments when new circumstances, ideas, or values warrant a different approach. In other words, once a constitution begins to include specifics, government officials will more frequently need to seek voter permission to adjust those specifics in the form of proposed amendments. Officials are likely to seek this permission if popular preferences have changed and the public is now expecting government to pursue a new course. In this way, even in states without the initiative, governance is shifted (to some degree) to voters because officials experience pressure to meet evolving public preferences in the face of many detailed pre-existing constitutional constraints.

My limited point here is that, as compared to federal constitutional design, the states have incorporated direct democracy into the amendment process as a way to facilitate more popular involvement in government oversight. Moreover, as described above, the public retains a great deal of influence over the legislative-referral process.

105. DINAN, *supra* note 18, at 14.

106. For example, in some states the legislative thresholds for overriding a governor's veto are higher than super-majority thresholds for proposing an amendment.

107. See, e.g., John Dinan, *State Constitutional Developments in 2011*, in THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 3, 7–8 (2012) (describing Missouri amendment regarding voter IDs that was proposed “as a way of overcoming a 2011 gubernatorial veto”).

In sum, state government has been designed around a commitment to frequent popular intervention as a core accountability strategy. Thus, to the extent state agencies stray from popular preferences and expectations, we would expect to see state constitutional amendments that address that misalignment. In other words, we would expect to see a degree of popular regulation through constitutional amendment.

II. STATE AGENCIES AND AMENDMENT

In this section, I survey state constitutional amendments with an eye towards understanding how they might affect state agencies.¹⁰⁸ I find that some amendments address state agencies and state administrative law explicitly, but many amendments affect agencies indirectly in ways that are often overlooked. I identify at least five different ways that the frequent amendment of state constitutions has affected state agencies. Cataloguing these impacts is a helpful first step in studying state agencies with due regard for their unique institutional environment.

A. Amendments Explicitly Altering Administrative Procedure

The states have used constitutional amendment to make various explicit changes to state administrative law.¹⁰⁹ Indeed, on certain issues, the states have been relatively active in reforming administrative law through constitutional amendment in order to monitor and control agencies.¹¹⁰ Of course, this is a phenomenon with no analog under the Federal Constitution because federal administrative law is principally a product of legislation and court rulings.

Since at least 1939, several states have adopted amendments that allow legislatures to nullify or modify agency regulations by joint resolution (the so-called legislative veto).¹¹¹ At the federal level, Congress also adopted the legislative veto, but in 1983 the Supreme Court held that it was unconstitutional.¹¹² In response to similar state supreme court rulings, various states adopted constitutional amendments that secured or reinstated

108. For this survey, I draw primarily on the annual amendment reports published by the Council of State Governments in the *BOOK OF THE STATES*. Those reports include detailed descriptions of amendments proposed and adopted in the states. I also rely on John Dinan's exhaustive account of constitutional amendments in the states contained in his two books. *See* DINAN, *supra* note 19; DINAN, *supra* note 18. I further draw on Alan Tarr's seminal work on the development of state constitutional law. *See* Tarr, *For the People*, *supra* note 16. Other anecdotal sources are mentioned in the notes as well.

109. *See* DINAN, *supra* note 18, at 56–59.

110. *See id.* at 47–48.

111. *See id.* at 58–59.

112. *INS v. Chada*, 462 U.S. 919 (1983).

the legislative veto in some form. Michigan and South Dakota established joint legislative review commissions with the power to suspend agency regulations while the legislature is out of session.¹¹³ A host of other states adopted amendments that allow legislatures to nullify regulations (in whole or in part) by resolution.¹¹⁴ The most recent of these amendments was adopted in Idaho in 2016.¹¹⁵

The states have also adopted a variety of amendments related to judicial review of agency action.¹¹⁶ Some states have amended their constitutions to clearly establish a final judgment rule for review of agency decisions and/or set the scope and standard of judicial review.¹¹⁷ Michigan is unusual in that it amended its Constitution to allow judicial review of certain non-final agency actions,¹¹⁸ although Michigan courts have imposed an exhaustion requirement.¹¹⁹ Interestingly, some amendments have crafted customized review processes based on the agency or substantive right at issue.¹²⁰ In Michigan, for example, decisions by the state Civil Rights Commission must be reviewed *de novo*.¹²¹ A 1967 amendment to the New Mexico Constitution requires that any decision by any state agency that affects water rights must be reviewed by a court *de novo*.¹²² Likewise, a very detailed 1941 amendment to the Oklahoma Constitution creates a right of appeal directly to the Oklahoma Supreme Court for certain decision by the Corporations Commission.¹²³ That amendment also sets the court's scope and standard of review, and divests any other state court of jurisdiction to hear appeals from the Corporation Commission.¹²⁴

113. See DINAN, *supra* note 18, at 58–59.

114. *Id.* at 59. Arkansas's amendment is unusual in that it states that regulations do not become effective until reviewed by a legislative committee. See *id.*

115. See *id.* at 59.

116. See *id.* at 56–58.

117. See MO. CONST. art. V, § 18 (adopted as amendment in 1976); see also OHIO CONST. art. IV, § 3; N.C. CONST. art. IV, § 12.

118. See MICH. CONST. art. VI, § 28. The provision was added by the convention of 1961 and it specifically addresses judicial review of agency actions. See also TEX. CONST. art. V, § 3-b (1940 amendment that allows legislature to create process for direct appeal to supreme court regarding validity of an administrative order).

119. See, e.g., *Judges of 74th Jud. Dist. v. Cnty. of Bay*, 190 N.W.2d 219 (Mich. 1971).

120. See, e.g., VA. CONST. art. IV, § 4 (creating a review rule for decision by the State Corporation Commission).

121. MICH. CONST. art. V, § 29 (review of decisions by civil rights commission are to be reviewed in court “*de novo*”).

122. N.M. CONST. art. XVI, § 5 (amendment adopted in 1967).

123. OKLA. CONST. art. IX, § 20 (amended by Laws 1941, p. 544, § 1).

124. See *id.*

Two other amendments are worth mentioning because they further illustrate the degree to which state amendments have explicitly monitored and reformed state administrative procedure. In 1978, California adopted an amendment that prohibited state agencies from “declaring a statute unenforceable, or refusing to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.”¹²⁵ More recently, a 2018 amendment to the Florida Constitution that prohibits state courts from deferring to agency interpretations of their respective enabling statutes and rules.¹²⁶

In sum, state amendments have explicitly reformed administrative procedure in a variety of ways. These amendments have often been structured to limit agency independence and enhance legislative or judicial review of agencies. In any event, the public in many states have been involved in the monitoring and reform of administrative procedure in ways that are not possible at the federal level.

B. Amendments Creating Agencies and Constitutionalizing Mandates

Amendments also impact state agencies in another way that has no federal analog. Most states have explicitly constitutionalized at least one agency or regulatory commission.¹²⁷ The practice of creating state agencies by constitutional amendment (rather than by statute) seems to have begun in the late nineteenth century in response to concerns about legislative capture by business interests, especially capture by railroads.¹²⁸ However, the practice has now evolved into a generalized strategy for enhancing government accountability. The basic idea is that by stripping the legislature of a discrete regulatory authority and placing that responsibility instead with a specialized agency, regulation in that area will be more visible to the public because of its isolation from other policy decisions and its concentration in an identifiable body.¹²⁹ Importantly, this strategy is not

125. CAL. CONST. art. III, § 3.5 (added by amendment in 1978).

126. FLA. CONST. art. V, § 21 (adopted by amendment in 2018) (“In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency’s interpretation of such statute or rule, and must instead interpret such statute or rule de novo.”).

127. See Miriam Seifter, *Understanding State Agency Independence: Appendices*, SSRN (Apr. 21, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369026 [<https://perma.cc/K5K4-LNTC>].

128. DINAN, *supra* note 18, at 48.

129. To be sure, not all constitutionalized agencies serve this purpose. Some share policy making authority with legislatures. See, e.g., LA. CONST. art. IX, § 7 (creating constitutional Wildlife and Fisheries Commission to “control and supervise[] the wildlife of the state” but stating that the “functions, duties, and responsibilities of the commission, and the compensation of its members, shall be provided by law.”). Additionally, legislatures generally retain fiscal authority,

a nineteenth-century relic. It has been deployed recently in various contexts, including amendments legalizing marijuana and amendments constitutionalizing the right to hunt and fish.

This strategy is powerfully illustrated by California's 1879 provision creating the first constitutional railroad commission.¹³⁰ One of the dominant arguments made in favor of constitutionalizing the commission was that it would enhance government accountability to the public.¹³¹ Because of effective lobbying by railroads, the legislature had frequently worked to undermine statutory commissions to the detriment of the public and the benefit of the railroads.¹³² Moreover, legislatures were often effective in obscuring their malfeasance because legislative work was "too much distributed to secure the rigid scrutiny of the public."¹³³ Thus, convention delegates proposed a constitutional provision that would shift responsibility for regulating railroad rates from the legislature to a three-member commission.¹³⁴ John Wickes, a delegate to the 1878 California convention, argued that the three-member commission should be constitutionalized because "responsibility is so localized in this triumvirate that the light of public scrutiny can be concentrated upon it in an intense form."¹³⁵ Similarly, N.G. Wyatt argued at the same convention: "I []want the Commission above the Legislature, practically speaking. I want the Commission so that they can act responsive to the behests of the people, and not the Legislature."¹³⁶

Another example of constitutional agencies as an accountability strategy is the creation of fish and game commissions. Beginning with Louisiana's 1921 provision constitutionalizing the Department of Conservation, various states opted to constitutionalized agencies with responsibility for managing and regulating the state's wildlife and natural resources.¹³⁷ These amendments (several of which were adopted by the initiative) were in response to public perceptions that legislatures and

which provides them with residual ways to undermine or empower agencies. *See* ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 309–10 (2009). But even here, the idea was to prevent the legislature from completely eliminating the agency or changing its structure. *See* DINAN, *supra* note 18, at 55–56; James W. Fesler, *Independence of State Regulatory Agencies*, 34 *AM. POL. SCI. REV.* 935 (1940).

130. *See* DINAN, *supra* note 18, at 48, 51.

131. *See id.*

132. *See id.* at 51–52 (the statutory commission was sabotaged and eventually eliminated by the legislature).

133. *See id.* at 49, 51.

134. *See id.* at 49–50.

135. *See id.* at 50 (quoting convention debates).

136. *Id.* at 52.

137. *See id.* at 52, 54.

governors had failed to protect natural resources from powerful business interests.¹³⁸

Missouri's amendment creating a Conservation Commission is especially illustrative. In 1935, during the "low point in conservation history," "unregulated hunting, fishing and trapping, and unrestrained timber harvest, had decimated natural resources."¹³⁹ Although many state legislatures had created conservation commissions by statute, "instead of protecting wildlife, laws often served the very interest that were responsible for despoiling wildlife resources."¹⁴⁰ Consequently, a group of Missouri "hunters and anglers" organized and drafted a citizens initiative amendment that created the Conservation Commission with exclusive power to manage, restore, conserve, and regulate the State's wildlife, forestry, and lands used for wildlife preservation.¹⁴¹ The amendment specifically prohibited the Legislature from enacting any laws "inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect."¹⁴² The amendment has been interpreted to grant the Commission "exclusive authority over fish and wildlife."¹⁴³ It was approved by voters in 1936 by the largest margin of any other amendment up to that time.¹⁴⁴

Other examples of this phenomenon abound. For example, Oregon adopted a citizen-initiated amendment in 1984 that created a state lottery and established a commission to regulate the lottery.¹⁴⁵ The Legislature was apparently unwilling to take up the lottery issue, and the amendment requires the Commission to "establish and operate a State Lottery" and grants the Commission rule-making authority.¹⁴⁶ Moreover, various states have constitutionalized education agencies in order to insulate education

138. *See id.* at 54–55.

139. Jim Low, *The Genesis of Conservation in Missouri*, in 66 MO. CONSERVATIONIST 13 (2005).

140. *See id.*

141. MO. CONST. art. XIV, § 16 (1875).

142. *Id.*

143. Low, *supra* note 139, at 14.

144. *Id.*

145. *See* OR. CONST. art. XV, § 4; Norma Paulus, *Or. Voters' Pamphlet* 3, 21 (Oct. 19, 1984).

146. OR. CONST. art. XV, § 4. A similar scenario occurred in 2000 in Oregon. After the legislature failed to adopt a regulatory scheme for in-home care givers, citizens proposed and adopted an amendment that constitutionalized the Home Care Commission. *See* Bill Bradbury, *Or. Voters' Pamphlet* 197 (2000) (explaining that amendment was in response to legislative inaction); *see* OR. CONST. art. XV, § 11. *See also* John Dinan, *State Constitutional Developments in 2009*, in THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 8 (2010) (describing Ohio amendment legalizing casinos and creating the "Ohio Casino Control Commission").

policy and administration from legislative interference.¹⁴⁷ Many states have also used amendments to create legislative ethics commission to respond to a perception that legislatures are ineffective as self-regulation.¹⁴⁸ Finally, when Oklahoma adopted a constitutional amendment to include a right to hunt and fish in 2008, the amendment also adjusted the mandate of the Wildlife and Conservation Commission to ensure that “traditional methods, practices and procedures shall be allowed for taking game and fish” so long as the wildlife is not endangered.¹⁴⁹ This change was adopted out of fear that the legislature or the commission might be inclined to overregulate hunting and fishing.¹⁵⁰

One further example is helpful because it illustrates the continuing relevance of this approach. The use of constitutional amendments to legalize marijuana have occurred primarily because legislatures have not independently responded to public preferences.¹⁵¹ In order to ensure that legislatures do not undermine these amendments, some states have included within the amendments the agencies and regulatory framework necessary to legalize marijuana. The 2016 Arkansas amendment, for example, created

147. See CAL. CONST. art. IX, § 9 (creating The Regents of the University of California and declaring that it “shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs”); ANN M. LOUSIN, THE ILLINOIS STATE CONSTITUTION 235–36 (2011) (noting that Illinois State Board of Education was constitutionalized for this purpose); WILLIAMS, *supra* note 129, at 310 (describing this phenomenon for the regulation of higher education through constitutional boards of regents).

148. See John Dinan, *State Constitutional Developments in 2010*, in THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 3, 8 (2011) (describing 2011 Utah amendment creating legislative ethics commission); see also DINAN, *supra* note 18, at 253–55 (describing these commissions as responsive to legislative failures).

149. OKLA. CONST. art. II, § 36 (right to hunt and fish); OKLA. CONST. art. XXVI, § 1–2 (constitutionalizing Wildlife Commission).

150. See Jeffrey Omar Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 83 (2009) (quoting prominent supporter of amendment who describe the amendment as “a preemptive strike . . . making it more difficult for any nutty animal rights activist or anti-hunting organization to target Oklahoma So if state lawmakers were to go insane and wanted to eliminate deer hunting, for example, it couldn’t be done without a vote of the people.”). New Jersey includes another compelling example. In 1995, votes approved an amendment that created the Council on Local Mandates. See *State of New Jersey Council on Local Mandates*, OFFICIAL SITE OF THE STATE OF NEW JERSEY, <https://www.state.nj.us/localmandates/>. The Council is independent and was created to monitor legislative mandates to local government that imposed unfunded obligations. It was intended to ensure that decisions regarding unfunded mandates were decided separate from other issues and outside ordinary institutions to ensure greater public exposure and scrutiny.

151. DINAN, *supra* note 18, at 242–43.

the Medical Marijuana Commission to administer and regulate the licensing of cultivation and dispensary facilities.¹⁵² It also gave specific directives to existing state agencies (Department of Health and the Alcoholic Beverage Control Commission) to adopt rules for the regulation of medical marijuana.¹⁵³ The amendment also included an unusual provision that allowed the legislature to modify some of its implementation provisions with a two-thirds vote “so long as the amendments are germane to this section and consistent with its policy and purpose.”¹⁵⁴ The amendment was a masterwork in constitutionalizing administrative agencies and regulatory mandates to constrain the Legislature.¹⁵⁵

Finally, state courts have been attentive to the significance of constitutionalized agencies as a mechanism for promoting government accountability. For example, in 1968 a Florida man was arrested for hunting on Sunday in violation of a Florida statute.¹⁵⁶ The statute conflicted with a rule promulgated by the Game and Fresh Water Fish Commission that permitted hunting every day of the week during “open season.”¹⁵⁷ The Supreme Court of Florida held that the statute was invalid because “the people by constitutional amendment placed in the hands of the Commission the responsibility to fix hunting seasons.”¹⁵⁸

The state practice of constitutionalizing agencies can appear odd and chaotic. However, when examined with sensitivity to state constitutional theory, a more coherent and rational picture emerges. Constitutional agencies are often a product of the state commitment to direct popular involvement in governance. These amendments reflect an effort to make particular areas of state policy more salient and visible by concentrating their regulation in a specialized body. They also reflect an effort to circumvent or limit legislative inaction or recalcitrance by transferring authority from the legislature to an agency.

C. Amendments Adjusting Agency Authority or Structure

State amendments also impact agencies by adjusting their structure or powers. These amendments are partially the result of constitutionalizing

152. ARK. CONST. amend. 98, § 19.

153. *Id.* § 4 (Dept. Health).

154. *Id.* § 23.

155. California’s 2004 Stem Cell amendment is similar. *See* DINAN, *supra* note 18, at 245–46. It created the California Institute for Regenerative Medicine with responsibility for encouraging research in CA with grants and loans.

156. *Whitehead v. Rogers*, 223 So. 2d 330 (Fla. 1969).

157. *Id.* at 331.

158. *Id.* at 331; *see also* *Griffin v. Sullivan*, 30 So. 2d 919 (Fla. 1947) (holding that Wildlife Commission rules trump statutes); *Peterson v. N.D. Univ. Sys.*, 678 N.W.2d 163, 168–69 (N.D. 2004) (addressing constitutional status of agencies and judicial review).

certain agencies. Amendments that use the constitution to create and structure agencies necessarily introduce a degree of rigidity into agency reform. Thus, as states identify the need to update or reform constitutional agencies, they have responded with additional amendments making those adjustments.

It is important to note two things in this regard. First, although these amendments can seem inconsequential or inefficient, they are often consistent with state constitutionalism's underlying rationale. If an agency was initially constitutionalized because the legislature was non-responsive to public preferences, then it makes sense for the public to retain control over the evolution of that agency. Forcing the public to vote directly on seemingly trivial agency reforms helps protect against the legislature unilaterally re-capturing the agency and undoing the purpose of the initial amendment.¹⁵⁹

The most obvious illustrations here are amendments adjusting the selection process for commission and board members. In 2010, for example, Hawaii voters approved an amendment that eliminated elections for members of the state board of education (a constitutionally created board), and authorized the governor to appoint the members subject to confirmation by the senate.¹⁶⁰ This change obviously shifts accountability pathways for the board in significant ways, and took power away from voters. It makes sense, therefore, that the change had to be approved by voters. Other examples relate to agency authority. A 2012 Georgia amendment, for example, specifically authorized state and local school boards to create charter schools because of public backlash from a court ruling denying the boards that power.¹⁶¹ And a 2007 Texas amendment empowered agencies to dispose of state property acquired by eminent domain.¹⁶²

Second, amendments adjusting agency structure and authority can help promote agency accountability. This is especially true of initiative amendments, but it can also occur through legislative proposal if public outcry against an agency is sufficient to capture the legislature's attention. A 2008 Louisiana amendment, for example, was proposed by the legislature

159. Of course, legislatures may capitalize on voter confusion or ignorance to slowly erode constitutional agencies through legislature-referred amendments.

160. Dinan, *supra* note 148, at 3, 9.

161. John Dinan, *State Constitutional Developments in 2012*, in *THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES* 3, 10 (2013).

162. See John Dinan, *State Constitutional Developments in 2007*, in *THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES* 3, 6 (2008). For an extreme example of agency restructuring, Kentucky adopted an amendment in 2001 that eliminated the railroad commission. See Janice C. May, *State Constitutional Developments in 2000-01*, in *THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES* 3, 8 (2002); see also MO. CONST. art. 1, § 21 (prohibiting agencies from issuing fines or imprisonment).

and imposed term limits on officials serving on ten different state commissions and boards to enhance accountability.¹⁶³

Finally, I also include in this category amendments that alter the authority or structure of statutory agencies. From time to time, amendments have responded to concerns that agencies have assumed government powers that are inappropriate for agencies or that the legislature has impermissibly crept into agency affairs. For example, Rhode Island adopted a “separation of powers” amendment in 2004 that was principally responsive to public concern that acting legislators were serving on regulatory boards and commissions.¹⁶⁴ These amendments obviously affect agencies in significant ways because they limit the types of action and policies that an agency can pursue. These amendments can also reflect an effort by amendment actors to protect against the expansion of agency authority or legislative encroachment.

D. Amendments Indirectly Affecting Agency Policy

The above categories have mostly described amendments that explicitly address state agencies in some way. However, a significant but largely overlooked impact on state agencies is the myriad policy amendments that do not explicitly address state agencies. As noted above, since at least the mid-nineteenth century, the states have used constitutional amendment to manage and guide public policy; especially when the public perceives a misalignment between government policy and popular preferences. These amendments rarely address state agencies or state administrative law, but they often have immediate and far-reaching effects on agencies. Moreover, they can be responsive to unpopular policies or practices by state agencies.

To illustrate how policy amendments can impact state agencies in important but indirect ways, consider the extreme example of Florida’s 2000 high speed rail amendment. For decades, Floridians have pressured government to construct a high-speed rail system that would connect the state’s major metropolitan areas.¹⁶⁵ By 2000, there had been multiple legislative commissions, reports, investigations, and failed statutes.¹⁶⁶ The final straw in public sentiment appears to have been a conservative and

163. See John Dinan, *State Constitutional Developments in 2008*, in THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 3, 8 (2009).

164. See R.I. CONST. art. III, § 6; see also Robert F. Williams, *Rhode Island's Distribution of Powers Question of the Century: Reverse Delegation and Implied Limits on Legislative Powers*, 4 ROGER WILLIAMS U. L. REV. 159, 166 (1999) (describing practice in Rhode Island before amendment).

165. See Allison L. C. De Cerreno et al., *High-Speed Projects in the United States: Identifying the Elements for Success-Part 1, MTI Report 05-01*, MINETA TRANSP. INST. PUBL’NS, Oct. 1, 2005, at 28, 29.

166. *Id.* at 29–30.

incremental plan developed by the Florida Department of Transportation that would have extended ordinary rail service across the state over three, multi-year phases.¹⁶⁷ As a result of this plan, frustrated citizens took to the initiative and proposed a constitutional amendment that would require the government to create a high-speed rail system by a date certain.¹⁶⁸ The amendment was ratified by voters, and it required construction to begin by “November 1, 2003” on a “high speed ground transportation system . . . capable of speeds in excess of 120 miles per hour” and connecting “the five largest urban areas of the State.”¹⁶⁹ The amendment did not mention any agencies, but required “the Legislature, the Cabinet and the Governor” to deliver the rail system.¹⁷⁰

Within six months of the amendment, the Legislature adopted the Florida High-Speed Rail Authority Act, which essentially passed the constitutional policy mandate on to state agencies in various ways.¹⁷¹ First, it created a new nine-member board called the Florida High Speed Rail Authority (hereinafter “FHSRA”).¹⁷² The FHSRA was charged with locating, planning, designing, financing, constructing, maintaining, owning, operating, administering, and managing a high-speed rail system capable of speeds in excess of 120 mph.¹⁷³ The statute also placed the FHSRA within the Department of Transportation for administrative purposes, but with independence from the Secretary of Transportation. The statute further directed that several other state agencies (Environmental Protection, Transportation Commission, etc.) were required to assist the FHSRA. Thus, the amendment indirectly spawned an entirely new state agency, reversed the course of the existing agency, and re-arranged the responsibilities of various other agencies.

Michigan’s stem-cell research amendment provides another helpful example. In 2008, voters approved an amendment legalizing stem cell research following longstanding legislative opposition notwithstanding growing popular support.¹⁷⁴ The amendment not only legalized stem cell research, but it imposed various specific regulations on the research.¹⁷⁵ Per the amendment, “no stem cells may be taken from a human embryo more than fourteen days after cell division begins” except that the “time during which an embryo is frozen does not count.”¹⁷⁶ The amendment also

167. *See id.* at 37.

168. *See id.* at 38.

169. *See id.* at 38–39 (re-printing amendment).

170. *See id.* The amendment was subsequently repealed by another initiative in 2004. *See* FLA. CONST. art. X, § 19.

171. *See* De Cerreno, *supra* note 165, at 39.

172. *Id.* at 39 n.75 (citing to FLA. STAT. § 341.822 (2001)).

173. Fla. Stat. § 341.822 (2001).

174. *See* DINAN, *supra* note 18, at 245.

175. *See* MICH. CONST. art. I, § 27.

176. *See id.* § 27(2)(a).

imposes specific, regulation-like limitations on when embryos created for the purpose of fertility treatment can be used for research.¹⁷⁷ Finally, the amendment prohibits any state laws (and presumably regulations) that would “discourage” stem cell research or “create disincentives for any person to engage in or otherwise associate with such research or therapies or cures.”¹⁷⁸

These examples are not outliers. It is hard to overstate how intrusive policy amendments can be for state agencies. Voters have, for example, micromanaged the legalization and regulation of gaming and lotteries by constitutional amendment.¹⁷⁹ In the education context, voters have adopted amendments setting class-sizes for K-12 public schools,¹⁸⁰ regulating the power of state universities to charge tuition,¹⁸¹ and setting spending priorities.¹⁸² Regarding animal rights, voters have approved amendments regulating the types of permissible fishing nets,¹⁸³ the conditions of pregnant pigs,¹⁸⁴ and the methods of trapping and hunting.¹⁸⁵ Other regulation-like amendments have set the size of alcohol containers in South Carolina,¹⁸⁶ the length and width of ski slopes on particular mountains in New York,¹⁸⁷ and the documents a borrower should receive at closing on a residential mortgage in Texas.¹⁸⁸

One final phenomenon is worth noting here. Amendment actors have increasingly used state constitutional rights to push back against fears or perceptions of overregulation. These amendments do not contain as much detail as the examples listed above, but they are often “framed less as

177. *See id.* § 27(2)(b).

178. *See id.* § 27(2)(d).

179. *See, e.g.*, OHIO CONST. art. XV, § 6(c) (regulating the hours of operation of casinos and the location and number of casinos).

180. Dinan, *supra* note 148, at 9–10.

181. *See id.* at 10 (Idaho).

182. *See* John Dinan, *State Constitutional Developments in 2013*, in THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 6–7 (2014) (Colorado).

183. *See* DINAN, *supra* note 18, at 246 (California and Florida).

184. *See id.*

185. *See id.* at 246–47 (Colorado amendment stating that it is “unlawful to take wildlife with a leghold trap, any instant kill body-gripping design trap, or by poison or snare.”).

186. A South Carolina amendment in 1973 limited alcohol to two-ounce containers for certain distributors and one-ounce for other distributors. A 2004 amendment removed the two-ounce limitations and gave the legislature the power to regulate the size of the containers.

187. *See* N.Y. CONST. art. XIV, § 1 (1938) (amended in 1957 to first include ski-slope measurements).

188. *See* TEX. CONST. art. XVI, § 50(a), (g), and (t) (amendment adopted in 2007).

rights-protective measures than as policy-exhortation measures.”¹⁸⁹ Georgia’s 2006 amendment, for example, provides: “The tradition of fishing and hunting and the taking of fish and wildlife shall be preserved for the people and shall be managed by law and regulation for the public good.”¹⁹⁰

All of this constitutional policy undoubtedly trickles down in significant ways to the responsible agencies. More fundamentally, the frequent use of constitutional amendment to make detailed policy results in a very different institutional environment for state agencies. Like federal agencies, state agencies must be attentive to legislative changes. However, state agencies must also conform to voter-approved policies, which are often the result of a misalignment between the public and the legislature regarding a particular policy.¹⁹¹ State agencies operate in a dynamic and complex policy environment that includes multiple sources of changing (sometimes conflicting) policy. This could have various affects in state agency independence and performance. It could, for example, have a paralyzing effect on agencies because it creates uncertainty. It could also enhance public accountability if agencies look to conform to public preferences to avoid responsive amendments. Alternatively, it could have negative consequences for the rule of law if agencies find the law too indefinite and fluid to pursue compliance. In any event, state amendments likely present a unique constraint on agencies that should be addressed when analyzing state administrative law and theory.

E. Finance Amendments and Agency Outcomes

There is a general understanding in administrative law and theory that legislatures and executives can exert informal influence on agencies through budgetary controls.¹⁹² At the federal level, these processes are surely complex because they implicate a morass of opaque executive and congressional bureaucracy.¹⁹³ They are, however, ultimately driven by the President or Congress as the constitutional actors that can monitor and

189. See DINAN, *supra* note 18, at 105.

190. GA. CONST. art. I, § 1 para. XXVIII; see also N.D. CONST. art. XI, § 29 (“right to farm” provides “. . . No law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology, modern livestock production and ranching practices.”); Usman, *supra* note 150, at 82–84 (describing right to hunt and fish in these terms); DINAN, *supra* note 18, at 91–94 (describing right to bear arms).

191. Of course, they must also be attentive to changes in federal law which can similarly affect their responsibilities.

192. See Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L. J. 2182 (2016).

193. See *id.*

control federal agencies within some variation of the traditional separation of powers scheme.

State constitutionalism presents a unique complication to the ways that funding can impact agencies. The states have a long and enduring practice of using state constitutional amendments to manage the collection and allocation of state funds. Indeed, amendments addressing state finance are usually the largest category of amendments across the states. In this section, I draw attention to a few illustrative ways that amendment actors can impact state agencies through finance amendments.

First, amendment actors can protect agencies from the governor and/or the legislature by earmarking funds for specific agencies or programs.¹⁹⁴ This strategy is an extension of state constitutionalism's basic premise that frequent popular intervention is an effective accountability device. By using the constitution to allocate certain funds to agencies, voters can protect against defunding by the legislature or governor, and, therefore, facilitate the performance of preferred agencies. The corollary of this is that voters gain a degree of continuing control over agencies as funding is constitutionalized.

By way of example, voters in several states have adopted amendments dedicating funds to conservation programs managed by state agencies.¹⁹⁵ In 1976, Missouri voters approved an amendment that increased the sales tax "for the purpose of providing additional moneys to be expended and used by the conservation commission" for the "control, management, restoration, conservation, and regulation of . . . forestry and wildlife resources of the state."¹⁹⁶ Minnesota adopted a similar amendment that earmarked funds for various conservation efforts on a program-by-program basis.¹⁹⁷ In effort to realize the underlying strategy of the amendment, it included a provision saying: "The dedicated money under this section must supplement traditional sources of funding for these purposes and may not be used as a substitute."¹⁹⁸ There are many other examples, including: amendments dedicating gas taxes to transportation departments for road improvement,¹⁹⁹ lottery proceeds to education departments,²⁰⁰ and cigarette taxes to health programs.²⁰¹

194. See DINAN, *supra* note 18, at 258 (noting that these amendments are result of public dissatisfaction with legislature budgeting).

195. See *id.* at 257.

196. See ARK. CONST. amend. 75 (adopted 1996) (specifically allocating funds from tax to Arkansas Game and Fish Commission and the Department of Parks and Tourism).

197. MINN. CONST. art. XI, § 15.

198. *Id.*

199. See DINAN, *supra* note 18, at 258.

200. See *id.*

201. See *id.* at 257 (California and Colorado).

Second, voters can use constitutional amendment to regulate agency authority to incur state debt. These amendments can operate to constrain agencies that the public perceives to have overstepped by incurring impermissible debt. Amendments can also be used to grant agencies special authority to incur debt that state government does not generally enjoy. In either case, the public exerts control over agency funding and performance by constitutionalizing public debt authority.

Finance amendments further illustrate how state constitutionalism presents a unique institutional environment for agencies. Funding for agencies is often affected by constitutional amendments that earmark funds for specific agency programs, which can empower some agencies and programs and subject them to continuing popular review as funding adjustments must now pass through constitutional amendment procedures. Similarly, amendments can be used to control agency debt authority in ways that influence agency performance.

III. ASSESSING THE SIGNIFICANCE OF “POPULAR REGULATION”

In this essay, I have argued that state agencies operate in a unique institutional environment and that state constitutional amendment practice is an important but overlooked factor in that environment. Having explored some of the ways that state amendments can affect state agencies, it is now possible to begin a more authentic and constructive assessment of state agencies within their native environment as well a critical assessment of state constitutional theory and design. My analysis here will necessarily be incomplete and speculative. More work is necessary to fully assess these issues. My modest goal in this section is to suggest a few lines of future inquiry that spring from the contextualization of state agencies that I have advanced in this essay.

First, state agencies seem to be more susceptible to direct popular intervention than federal agencies. To be sure, civil society plays a role in monitoring federal agencies, but that role is mostly supplemental to Congress and the President. In the states, the public often responds to agency action and policy with detailed amendments that significantly affect agency rules, priorities, and funds. It is possible that this public intervention helps hold agencies accountable in ways that have no analog at the federal level. The corollary of this is that state agencies are unlikely to enjoy the degree of entrenchment and independence experienced by federal agencies because state constitutionalism provides accessible opportunities for public oversight and involvement.

That said, there are surely practical limitations on this form of agency accountability (or “non-independence”). As Miriam Seifter has observed in her study of civil society oversight in the states, it may be more difficult for the public to monitor state agencies because of a lack of state

watchdog groups or state-oriented press.²⁰² Relatedly, the work of state agencies is vast and much of it lacks the degree of political salience necessary to trigger a constitutional amendment (even in the states).

However, my analysis in this essay suggests a different, state-oriented point of view. As explained above, not all state agencies are similarly situated. Some state agencies ascend to constitutional status because of significant public interest in a particular topic and the legislature's failure to act. State conservation commissions, for instance, seem to have great political salience with a variety of organized state-level interest groups. By constitutionalizing those agencies and siphoning conservation policy into a specialized agency, state constitutionalism may actually enhance the salience of conservation policy and administration. Indeed, one of the objectives behind the creation of constitutional agencies was to separate an issue from the opaque "sausage making" that occurs during the legislative process so that the public could monitor it more closely.

Thus, although it may be true that civil society oversight of state agencies will never ascend to the levels experienced by federal agencies, placing state agencies in their authentic institutional environment suggests that this may not be the most relevant comparison. Perhaps a more fruitful inquiry is to explore how state agencies can be used to enhance the salience of state governance on a particular issue compared to the obfuscation produced by the ordinary legislative process. The state experience with agencies suggests that this might be a worthwhile endeavor.

Second, state agencies may offer a critique of state constitutional theory and design. State constitutional design is committed to the idea that government accountability includes recurring opportunities for direct popular intervention. This commitment likely explains why state constitutions are amended so frequently and with so much statutory-like detail. As government has diverged from popular preferences, the public has intervened with new constitutional text intended to bring government back into alignment with the public. However, to the extent state governance is increasingly handled by low-visibility agencies who operate in routine and bureaucratic ways, direct democracy may be too cumbersome to effectively monitor and correct government policy and administration. Thus, agencies may experience a degree of *de facto* independence that state constitutional design has not fully reckoned with.

CONCLUSION

State agencies occupy an increasingly significant position in American governance. It is important, therefore, that they receive more focused scholarly attention. However, as scholars engage with state

202. See Seifter, *supra* note 11, at 110–12.

agencies, it is equally important that they recognize that state agencies operate in very different institutional environments than federal agencies. Rigorous study of state agencies requires careful attention to the ways that state constitutional design and theory have affected state administrative law and practice. My goal in this essay is to draw attention to the highly contextual nature of state agencies and to emphasize the impact that state constitutional amendment has on state governance.