

## CHAPTER THREE

### THE DECLINE AND FALL OF THE STATE EXECUTIVE COUNCIL

*“It seems a paradox, and yet it is true, that as a rule a citizen knows more of the national government, with which he may never come in actual contact, than he does of his own State, county, and local government, with which he comes in contact almost daily.”*

— George S. Messersmith<sup>1</sup>

For better or worse, local politics are increasingly subsumed by the national narrative. Nowhere is this clearer than in state constitutional law. Scholars have carefully documented a phenomenon of “convergence” in which state courts adopt federal constitutional interpretations when discerning the meaning of their own fundamental charters.<sup>2</sup> This Chapter shows that there is a structural side to this phenomenon, too. Early state constitutions presented a mosaic of institutional design; but today, their structure largely mirrors that of the federal government. This structural convergence story is best told through the decline and fall of state executive councils. At the Founding, nearly every state had one. But today, only two remain.<sup>3</sup>

Why should anyone care about the fate of an anachronism like the executive council? Thomas Jefferson provides one persuasive answer: “[E]xperience hath shewn, that even under the best forms, those entrusted with power have, in time, and by slow operations, perverted it into tyranny . . . .”<sup>4</sup> Checks and balances, both external and internal, worked to mitigate this inevitable perversion. In the eighteenth century, executive councils, independently elected or appointed, served as a direct internal check on the expansion of executive power. Often, significant executive actions required their advice and consent. In short, state constitutional framers depended on executive councils specifically to prevent the colonies from transforming into miniature royal tyrannies. Yet in the intervening years, “by slow operations,”<sup>5</sup> the institution has almost entirely faded from view.

---

<sup>1</sup> THE GOVERNMENT OF DELAWARE 5 (1908).

<sup>2</sup> See Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1500–03 (2005); JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 126 (2021).

<sup>3</sup> See MASS. CONST. pt. II, ch. II, § III; N.H. CONST. pt. II, arts. 46–47, 60.

<sup>4</sup> Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge* (1778), reprinted in 2 THE PAPERS OF THOMAS JEFFERSON 526, 526 (Julian P. Boyd ed., 1950).

<sup>5</sup> *Id.*

This convergence story is all too common. But in the case of executive councils, it was not inevitable, and it need not be permanent. By examining the decline and fall of the state executive council, this Chapter hopes to provide some insight into the phenomenon of convergence and the shortsightedness it represents.

Section A examines the rise of executive councils, beginning with their origins in medieval England. It catalogs how the early executive council evolved from a small circle of the King's advisors to a central institution in English government exported to the colonies, both shaping and being shaped by early American societies. Section B explores the translation of these colonial-era executive councils into republican institutions and catalogs the abortive failure of the federal plural executive — and the victory of the unitary executive — at the Federal Constitutional Convention. Section C details the executive council's long and consistent fall from grace. Section D discusses the role of the contemporary executive council in New Hampshire, its last true stronghold. Looking at the history of executive council dissolution over time, three sequential historical causes are clear: federalist reaction, Jacksonian democracy, and successive progressive movements. These three trends have one thing in common: They were national, top-down movements that flattened state power. This Chapter concludes that this institution is worthy of a second look, both locally and nationally.

#### A. Rise

The English Privy Council is a standing governing body with its roots in the Middle Ages. Imported across the Atlantic, the executive council became the bedrock of colonial-era governments. After the Revolution, the loyalty of these councils pivoted from the Crown to the people of the several states. So when the first state constitutions were being framed in the middle of the 1770s, “[n]o one” expected the executive power to be carried out by one man alone.<sup>6</sup> Indeed, the governorships created in 1776 were so weak that many functioned as “little more than chairmen of their executive boards.”<sup>7</sup> To understand why the colonists believed that the executive power should not belong to “one man alone,” one should start at the beginning.

1. *England.* — The Privy Council “is one of the oldest parts of the UK’s constitutional arrangements, with origins dating back to at least the 13<sup>th</sup> century.”<sup>8</sup> Its members “included the great officers of state,” whose duties consisted of “advising the King, of acting with him, and of

---

<sup>6</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 138 (2d ed. 1998).

<sup>7</sup> *Id.*

<sup>8</sup> DAVID TORRANCE, *HOUSE OF COMMONS LIBR., NO. CBP7460, THE PRIVY COUNCIL: HISTORY, FUNCTIONS AND MEMBERSHIP 7* (2025).

being always in immediate attendance upon him.”<sup>9</sup> Throughout its early history, the Council served as the King’s most personal advisors.<sup>10</sup> By the fifteenth century, through a series of accretions, “the Council towered above every other constitutional authority.”<sup>11</sup>

The Council’s powers were broad. First, it managed “[t]he whole of the royal expenditure, public and private.”<sup>12</sup> Second, it dealt extensively in commerce by establishing guilds, designating towns as authorized locations for export, granting and depriving corporations of legal entitlements, and tightening or relaxing the operation of commercial statutes “at [its] will.”<sup>13</sup> Third, the Council carried out judicial functions, even hearing some ecclesiastical charges of heresy and sorcery.<sup>14</sup> More generally, it was an instrument for instilling order, and it did so.<sup>15</sup> The Privy Council’s essential role in English government during the Tudor period is best captured by historian Dorothy Gladish, who describes it as the body through which “absolute monarchy performed its work,” embodying not only executive powers but also “what now would be considered exclusively legislative or judicial functions.”<sup>16</sup>

Other scholars concur that the Council’s “strong rule conferred great benefit” on England.<sup>17</sup> The Councilors served as close advisors to the Crown and expert administrators.<sup>18</sup> Yet the Council’s “blessings . . . were counterbalanced by gigantic evils,” most prominently the Council’s undying fealty to despotic kings.<sup>19</sup> But when one’s government relies on the vagaries of heredity, it is difficult to cast aside even a somewhat competent meritocratic institution. At its zenith, the Council helped to bring about one of the most peaceful centuries the English people had experienced to date.<sup>20</sup>

2. *The Colonies.* — The Privy Council’s centrality to the English view of good government and its ability to curb “lawlessness in specially disturbed districts”<sup>21</sup> made it an obvious export to England’s overseas territories. Industrious and zealous, these colonial councils would both shape governance in the new colonies and in turn be shaped by the societies they oversaw.

---

<sup>9</sup> DOROTHY M. GLADISH, *THE TUDOR PRIVY COUNCIL I* (1915).

<sup>10</sup> *See id.*

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; *see also* ALBERT VENN DICEY, *THE PRIVY COUNCIL* 51–75 (London, MacMillan & Co. 1887) (1860) (enumerating the Privy Council’s impressive array of powers during the late Middle Ages).

<sup>16</sup> GLADISH, *supra* note 9, at 74.

<sup>17</sup> DICEY, *supra* note 15, at 118.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> GLADISH, *supra* note 9, at 130 (detailing the work performed by the “Council in Wales” and “Council in the North,” both of which operated “under the supervision of the Privy Council”).

Viewed against the backdrop of the Privy Council's power throughout the 1600s, the inclusion of an executive council in the 1606 Charter of Virginia<sup>22</sup> is unsurprising. Nevertheless, as the councils navigated the challenges of colonial life, they also departed from their English antecedent, taking on a distinct and shared American form over time.

In all, colonial councils may appear to modern Americans as “anomalous bodies which in nearly every colony acted as an upper legislative chamber, an advisory executive council, and a high court of appeal.”<sup>23</sup> Under “the theory of mixed government,” it was believed that such an institution would serve as a critical “fulcrum” between the whims of the people and the authoritarian tendencies of the chief executive.<sup>24</sup>

Three examples — Virginia, Massachusetts, and New Hampshire — demonstrate how the English Privy Council model operated in the colonies. These three states illustrate well the broad adoption of the executive council in colonial America. They benefit in particular from rich historical documentation and scholarly commentary going back to the first English settlements in North America. And taken together, they also represent the various fates of the colonial councils: complete dissolution (Virginia), partial survival (Massachusetts), and success story (New Hampshire).

(a) *Virginia*. — On April 10, 1606, King James I granted the investors in the Virginia Company of London a charter permitting settlement of much of the North American coast.<sup>25</sup> This charter provided for the creation of a thirteen-person colonial council.<sup>26</sup> In relevant part, the charter “ordain[ed] . . . the said colonies *shall have a council*, which shall govern and order all matters and causes . . . according to such laws, ordinances, and instructions” applicable to the colony.<sup>27</sup> Of note, the charter lacked a governor or any other approximation of the Crown in the settlement.<sup>28</sup> It was entirely a government by council, vested with

---

<sup>22</sup> FIRST CHARTER OF VIRGINIA (1606), *reprinted in* 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 57, 60 (photo. reprt. 1969) (William Waller Hening ed., New York, R. & W. & G. Bartow 2d ed. 1823), <https://hdl.handle.net/2027/hvd.hw2scp> [<https://perma.cc/WP3A-KRM2>].

<sup>23</sup> JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 250 (1996).

<sup>24</sup> *See id.* Professor Jack Rakove identifies the House of Lords, rather than the Privy Council, as “[t]he closest analogue” to colonial councils. *Id.* By the end of the seventeenth century, Parliament had seized much of the powers the Privy Council had exercised in past centuries. DICEY, *supra* note 15, at 121–23.

<sup>25</sup> FIRST CHARTER OF VIRGINIA, *supra* note 22, at 57–59. King James I also granted a charter to the Virginia Company of Plymouth, but that company's colony failed within a year. Mary Sarah Bilder, *English Settlement and Local Governance*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 63, 69 (Michael Grossberg & Christopher Tomlins eds., 2008); *see also* FIRST CHARTER OF VIRGINIA, *supra* note 22, at 59–60.

<sup>26</sup> FIRST CHARTER OF VIRGINIA, *supra* note 22, at 60–61.

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> *See id.* at 57–66.

specific explicit powers such as the power over settlement,<sup>29</sup> mineral rights,<sup>30</sup> minting currency,<sup>31</sup> and inheritances.<sup>32</sup> In this early formulation, the government and the council were synonymous.

In 1625, Virginia became a royal colony, and thereafter the council continued to exercise its legislative, executive, and judicial powers.<sup>33</sup> By 1643, the House of Burgesses had begun to meet separately from the council, with the council becoming a distinct upper house of the Virginia legislature.<sup>34</sup> It also operated as an advisory body for the governor and “the highest judicial body in the colony.”<sup>35</sup> This fusion of powers was characteristic of English government at the time.<sup>36</sup>

The council represented the interests of the Crown, even when those interests diverged from those of the royal governor. For example, six members of the council wrote to Queen Anne “[c]oncerning the Mal-administrations of . . . [Governor] Francis Nicholson.”<sup>37</sup> Detailing extensive “injustice, oppression and insolence,”<sup>38</sup> the letter accused the Governor of “engrossing all power to himself and . . . acting alone in most of the chief affairs of the government,” to the exclusion of the council.<sup>39</sup> He had allegedly raised the council’s ire by unilaterally appointing men to law enforcement roles that had historically required advice and consent.<sup>40</sup> In a testament to their power, the councilors succeeded in getting Queen Anne to recall Governor Nicholson.<sup>41</sup>

In short, the Virginia council was much like its English Privy Council predecessor: It was key to competent governance. But in addition to that role, the colonial council evolved into an executive watchdog that held the royal governor accountable to the ultimate sovereign, the English monarch. That new role would become a cornerstone of its future in a republican model of government.

(b) *Massachusetts*. — King Charles I issued the first royal charter for the Massachusetts Bay Colony in 1628/29.<sup>42</sup> While it mirrored the

<sup>29</sup> *Id.* at 59.

<sup>30</sup> *Id.* at 61–62.

<sup>31</sup> *Id.* at 62.

<sup>32</sup> *Id.* at 65–66.

<sup>33</sup> Brent Tarter, *The Governor’s Council*, ENCYCLOPEDIA VA. (July 8, 2024), <https://encyclopediavirginia.org/entries/governors-council-the> [https://perma.cc/S8LX-P8G7].

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> RAKOVE, *supra* note 23, at 250.

<sup>37</sup> John Lightfoot et al., *A Memoriall Concerning the Mal-administrations of His Excell’y Francis Nicholson, Esqr., Her Ma’ties Lieut. and Governour Generall of Virginia* (1703), reprinted in 3 VA. MAG. HIST. & BIOGRAPHY 373, 373 (1896).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 374.

<sup>40</sup> *Id.*

<sup>41</sup> Tarter, *supra* note 33.

<sup>42</sup> CHARTER OF MASSACHUSETTS BAY (1628/29), reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE

structure of the Virginia charter, it was markedly more democratic in nature, with the legislative power given to “the whole body of the freemen.”<sup>43</sup> Meanwhile, executive power was shared among a governor, a deputy governor, and eighteen “[a]ssistants” all serving on a single Court of Assistants.<sup>44</sup> The initial batch of officials was selected by the Crown, but the charter vested freemen with the power to elect their successors.<sup>45</sup> The Court’s enumerated powers in the charter were vast, and like its Virginian peer, the Court had the capability to exercise executive, judicial, and legislative powers.<sup>46</sup>

Over the next fifty years, the Court of Assistants took on a critical role in exercising the full panoply of colonial power. Formally, the legislative power was exercised by the General Court, on which the members of the Court of Assistants sat.<sup>47</sup> Yet when the Court of Assistants met, its actions were “given the same force as the action of” the whole legislature.<sup>48</sup> Assistants also took on important administrative roles in the “crude” Massachusetts colonial system.<sup>49</sup> Individual assistants, if available, served on courts of first instance, and the Court of Assistants also served as an intermediate appellate court in those early days.<sup>50</sup>

King William and Queen Mary granted a new charter to the Colony in 1691.<sup>51</sup> Known as the Province Charter, it established a new Governor’s Council that would remain in place for the next eighty years.<sup>52</sup> Under this new system, the Crown always appointed the governor, and, on a one-off basis, the Crown appointed the newly expanded council of twenty-eight “assistants” to the governor.<sup>53</sup> Subsequent Councils would be appointed by the General Court.<sup>54</sup> The Province Charter laid out the Council’s duties in detail, prescribing an advice-and-consent role in judicial and law enforcement appointments,<sup>55</sup> requiring it to administer wills and set rules for the administration of estates,<sup>56</sup> mandating its

---

STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1846, 1846 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE].

<sup>43</sup> LOUIS ADAMS FROTHINGHAM, A BRIEF HISTORY OF THE CONSTITUTION AND GOVERNMENT OF MASSACHUSETTS 6 (1925).

<sup>44</sup> CHARTER OF MASSACHUSETTS BAY, *supra* note 42, at 1852–53.

<sup>45</sup> *See id.* at 1852.

<sup>46</sup> *See id.* at 1853.

<sup>47</sup> FROTHINGHAM, *supra* note 43, at 9.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 8–9.

<sup>51</sup> *Id.* at 11.

<sup>52</sup> *Id.* at 11–12, 17.

<sup>53</sup> CHARTER OF MASSACHUSETTS BAY (1691), *reprinted in* THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 18, 27–28 (Boston, T.B. Wait & Co. 1814).

<sup>54</sup> *Id.* at 29.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 32.

consent to the imposition of martial law,<sup>57</sup> and providing that a majority vote of the Council would govern in the absence of the governor and lieutenant governor.<sup>58</sup> Overall, the Crown's charter modifications in Massachusetts arced in a more democratic direction by placing the Council's selection, and thus its loyalties, in the legislature.<sup>59</sup>

(c) *New Hampshire*. — In 1679, “for the better execution of Our Royall pleasure,” King Charles II decreed that his “loving Subjects” of the Province of New Hampshire were to be separated from Massachusetts.<sup>60</sup> The King, “by & with the advice of Our Privy Councill,” appointed a president and council for this new province,<sup>61</sup> “requiring” that the inhabitants of New Hampshire “give obedience unto them.”<sup>62</sup> Under a second commission issued in 1682, a royal governor took the place of the president, aided by a new council serving at the pleasure of the King.<sup>63</sup>

The royal governor operated by and with the advice and consent of the council in fulfilling many of his duties.<sup>64</sup> These duties included appointing judges and public officers, granting public lands, pardoning crimes, and serving as a court of final appeal in all cases.<sup>65</sup> While the council formally had an advice-and-consent role, its chief political role was “report[ing] on the activities of the Governor to the King, especially if he strayed the least bit from the crown's dictates.”<sup>66</sup> At the same time, the royal governor and, to some extent, his council, had significant leverage over the state legislature.<sup>67</sup> The lower assembly, while having the power to introduce and pass bills, could be “prorogue[d] or dissolve[d]” by the governor whenever he wished.<sup>68</sup> And any bill passed by that assembly had to also pass the council and be signed by the governor to become law.<sup>69</sup>

This top-heavy structure, lacking meaningful democratic input, was predictably abused. New Hampshire's longest-serving colonial

---

<sup>57</sup> *Id.* at 35.

<sup>58</sup> *Id.* at 35–36.

<sup>59</sup> *See id.* at 29.

<sup>60</sup> THE COM'ISSION CONSTITUTING A PRESIDENT & COUNCEL FOR THE PROVINCE OF NEW-HAMPSHIRE IN NEW-ENGLAND (1679), reprinted in 1 LAWS OF NEW HAMPSHIRE 1, 2 (Albert Stillman Batchellor ed., 1904).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 6.

<sup>63</sup> William Henry Fry, *New Hampshire as a Royal Province*, 29 *STUD. HIST., ECON. & PUB. L.* 184, 252, 303 (1908).

<sup>64</sup> *Id.* at 301.

<sup>65</sup> *Id.* at 254–55, 308–09.

<sup>66</sup> *History of the Executive Council*, STATE OF N.H. EXEC. COUNCIL, <https://www.council.nh.gov/history-executive-council> [<https://perma.cc/K7HK-LBUL>].

<sup>67</sup> Fry, *supra* note 63, at 255.

<sup>68</sup> *Id.* at 351.

<sup>69</sup> *Id.* at 314.

governor is a famous example.<sup>70</sup> To stay in power, Governor Benning Wentworth's "general approach was to buy off those who might become opponents by distributing over one hundred justice of the peace and military commissions, granting land in new townships . . . and placating the all-important timber interests by ignoring" laws meant to reserve the oldest trees for the Royal Navy.<sup>71</sup> In one episode, to prevent his own removal from power, Governor Wentworth managed to halt all legislative activity for four years.<sup>72</sup> Despite this somewhat sordid history, New Hampshire's citizens apparently saw a potentially productive role for the council in a republican government.<sup>73</sup>

As the Revolution would make clear, interventions from England and divided loyalties frequently rendered colonial councils incapable of performing their mediating role between the royal governor and the legislature. This dilemma was captured well by a prominent New Hampshire statesman who remarked that he found "much trouble and little profit in that office."<sup>74</sup>

The colonial councils wielded vast and important powers. They provided a check on the governor's authority and held him accountable to the English sovereign. These features — serving as a watchdog and an internal check on the abuse of executive power — did not change in the revolutionary translation. But *to whom* these councils were accountable did: When the people wrested sovereignty from the hands of King George III, the councils became instruments of new masters.

### B. Translation and Rejection

The earliest state constitutions produced during the Revolution uniformly created executive councils designed to limit the concentration of executive power in a single individual. The creation of these councils should be viewed not as a severance from the English model but as a translation. "[T]he first State constitutions . . . were the connecting links between the previous organic law of the colonies and the subsequent organic law of the Federal Union."<sup>75</sup> Like their English forebears, the majority of early state constitutions required their governors to obtain the advice and consent of the executive council on "any major executive action."<sup>76</sup> While new ideas about separating powers between branches of government stripped councils of some of their non-executive

---

<sup>70</sup> See David E. Van Deventer, *Wentworth, Benning*, in OXFORD DICTIONARY OF NAT'L BIOGRAPHY (Sep. 23, 2004), <https://doi.org/10.1093/ref:odnb/68772> [<https://perma.cc/6GRG-M8JK>].

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See N.H. CONST. of 1776, reprinted in 4 THORPE, *supra* note 42, at 2451, 2452.

<sup>74</sup> Fry, *supra* note 63, at 305.

<sup>75</sup> William C. Morey, *The First State Constitutions*, 4 ANNALS AM. ACAD. POL. & SOC. SCI. 201, 202 (1893).

<sup>76</sup> STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 31 (2008).

functions, several retained their quasi-judicial roles.<sup>77</sup> Councilors were elected directly by the people,<sup>78</sup> or indirectly through appointment by the state legislature.<sup>79</sup>

Yet, by the 1780s, cracks were beginning to show in these early state constitutions. Weak executive branches and runaway legislatures became scapegoats for the political unrest of the 1780s.<sup>80</sup> These political battles and grievances set the stage for the 1787 Constitutional Convention in Philadelphia, where the Framers roundly rejected a federal executive council. Understanding these debates suggests the U.S. Constitution set the stage for future state lockstepping. As one contemporaneous critic framed the newly proposed federal charter: “[T]his constitution . . . was calculated to abolish entirely the state governments, and to melt down the states into one entire government.”<sup>81</sup>

*I. The Revolutionary Constitutions.* — The power of executive councils varied considerably across the early state constitutions. Some had enumerated powers limited by subject matter,<sup>82</sup> whereas others were vested, alongside a chief magistrate,<sup>83</sup> with the “supreme executive power.”<sup>84</sup> In the main, these early executive councils were designed to render early state chief magistrates “little more than chairmen of their executive boards.”<sup>85</sup>

In surveying these early revolutionary constitutions, three archetypes emerge. First, the executive power is vested in an independent governor-and-council; second, the executive branch is dependent on a council loyal to the legislature; and third, a general executive power is vested in a governor advised by a constitutionally required council with specific powers. These forms all shared a similar purpose: to reduce a state governor to “a very pale reflection indeed of his regal ancestor.”<sup>86</sup>

<sup>77</sup> See, e.g., N.J. CONST. of 1776, art. IX; S.C. CONST. of 1776, art. XVI.

<sup>78</sup> See, e.g., PA. CONST. of 1776, § 19.

<sup>79</sup> See CALABRESI & YOO, *supra* note 76, at 31.

<sup>80</sup> See *id.* at 31–32.

<sup>81</sup> BRUTUS NO. XV, N.Y.J., Mar. 20, 1788, *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS 871, 875 (John P. Kaminski et al. eds., 2004).

<sup>82</sup> See, e.g., DEL. CONST. of 1776, arts. 8–10, 12, 15.

<sup>83</sup> This Chapter uses the common meaning of “chief magistrate” at the Founding: the head of an executive branch of government. See, e.g., President George Washington, Second Inaugural Address in the City of Philadelphia (Mar. 4, 1793), *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 6, 6 (Bicentennial ed. 1989) (“I am again called upon by the voice of my country to execute the functions of its Chief Magistrate.”).

<sup>84</sup> E.g., PA. CONST. of 1776, § 3 (“The supreme executive power shall be vested in a president and council.”); VT. CONST. of 1777, ch. II, § III.

<sup>85</sup> WOOD, *supra* note 6, at 138.

<sup>86</sup> *Id.* at 136.

Massachusetts, Vermont, and New Hampshire all distributed power within their executive branches between a governor and a council.<sup>87</sup> Similarly, in Georgia, “[t]he governor . . . with the advice of the executive council, exercise[d] the executive powers of government.”<sup>88</sup> South Carolina’s 1776 constitution delineated which powers the chief magistrate could exercise only with the council’s permission.<sup>89</sup> This form of governor-chairman council can be viewed as a continuation of the charter forms of government that predated the Revolution.<sup>90</sup>

Other revolutionary state constitutions created even weaker executive branches, with both governors and their councils dependent on the legislature. Delaware’s 1776 constitution, for example, did not have its own independently elected executive branch. Rather, the “president” was elected by a “joint ballot of both houses” of the Delaware Legislature.<sup>91</sup> Once elected, the president “by and with the advice of the privy council . . . may exercise all the other executive powers of government.”<sup>92</sup> This Privy Council — made up of four appointees from the legislature — was a real check on the chief magistrate’s power, especially because the president lacked appointment or removal power over councilors.<sup>93</sup> For example, the president could not “embody the [Delaware] militia” without the “advice and *consent* of the privy council.”<sup>94</sup> Other states followed in a similar vein. North Carolina’s original constitution had a chief magistrate who was elected by a joint ballot of the legislature at the first sitting of each legislative session.<sup>95</sup> A seven-person Council of State was also elected by the legislature and would “advise the Governor in the execution of his office.”<sup>96</sup> And Virginia’s 1776

<sup>87</sup> VT. CONST. of 1777, ch. II, § III; MASS. CONST. of 1780, pt. II, ch. II, §§ I, III; *cf.* N.H. CONST. of 1776, reprinted in 4 THORPE, *supra* note 42, at 2451, 2452 (creating a “Council” headed by a “President”). New Hampshire’s 1776 constitution called its council a “distinct and separate branch of the Legislature” and vested in it both legislative and executive power. *See* N.H. CONST. of 1776, reprinted in 4 THORPE, *supra* note 42, at 2451, 2452.

<sup>88</sup> GA. CONST. of 1777, art. XIX.

<sup>89</sup> *See* S.C. CONST. of 1776, art. V.

<sup>90</sup> Connecticut and Rhode Island were governed by their royal charters well into the nineteenth century. *See* COMM. ON HIST. PUBL’NS, TERCENTENARY COMM’N OF THE STATE OF CONN., THE CHARTER OF CONNECTICUT, 1662, at 11 (1933) (“[F]or the better ordering and managing of the affaires and businesse of the said Company and their Successors there shall bee one Governour[,] one Deputy Governour[,] and Twelve Assistants[,] to bee from tyme to tyme Constituted Elected and Chosen out of the Freemen of the said Company . . . .”); CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS — 1663, reprinted in 6 THORPE, *supra* note 42, at 3211, 3214 (providing for the same, but with only “ten Assistants” on the council).

<sup>91</sup> DEL. CONST. of 1776, art. 7.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* art. 8. The structure of the Delaware Constitution suggests the Privy Council was an instrument of the legislative branch, rather than a group of advisers. The president could not speak to this body in confidence, for “their advice and proceedings” were required to be “entered of record, and signed by the members present.” *Id.*

<sup>94</sup> *Id.* art. 9 (emphasis added).

<sup>95</sup> N.C. CONST. of 1776, art. XV.

<sup>96</sup> *Id.* art. XIV.

constitution provided for the same structure, except that its Council of State had eight individuals.<sup>97</sup>

One state pursued an even more radical reform. Among the revolutionary constitutions, Pennsylvania's had by far the weakest executive. The state's 1776 constitution placed the "supreme executive power . . . in a president and council."<sup>98</sup> This president, although titled as such, had virtually no independent power. The chief magistrate of the state was the council itself, made up of twelve men directly elected by the people.<sup>99</sup> From those twelve, two would be elevated to the office of president and vice president "annually by the joint ballot of the general assembly and council."<sup>100</sup> Separately, the Pennsylvania Constitution created a "Council of Censors," whose primary duty was to "enquire whether the constitution has been preserved inviolate."<sup>101</sup> The Council of Censors thus acted as a sort of Platonic guardian of the people's rights to lawful government<sup>102</sup> and could call a constitutional convention "if there appear[ed] to them an absolute necessity of amending any article of the constitution which may be defective."<sup>103</sup>

This is not to say that the executives were roundly neutered across the original thirteen states. Maryland's 1776 constitution, for example, created a more limited council. Like in Delaware, the "advice and consent" of the council was required before the governor could "embody the militia."<sup>104</sup> But once called up, the governor generally had sole direction over its use.<sup>105</sup> Moreover, in peacetime Maryland's governor was empowered to "alone exercise all [the other] executive powers of government, where the concurrence of the Council [was] not required."<sup>106</sup> In New Jersey, members of the upper house of the legislature also constituted the privy council.<sup>107</sup> Yet the governor, vested with "the supreme executive power," did not appear to be tightly bound by this council.<sup>108</sup> So too in New York, whose 1777 constitution instantiated a strong governor yet retained institutions that limited his powers.<sup>109</sup> While New York lacked a standing executive council, it had a Council of

<sup>97</sup> VA. CONST. of 1776, reprinted in 7 THORPE, *supra* note 42, at 3812, 3817.

<sup>98</sup> PA. CONST. of 1776, § 3.

<sup>99</sup> WOOD, *supra* note 6, at 137-38; PA. CONST. of 1776, §§ 3, 19.

<sup>100</sup> PA. CONST. of 1776, § 19.

<sup>101</sup> *Id.* § 47.

<sup>102</sup> See Angus Harwood Brown, *The Pennsylvania Council of Censors and the Debate on the Guardian of the Constitution in the Early United States*, 64 AM. J.L. HIST. 1, 6 (2024).

<sup>103</sup> PA. CONST. of 1776, § 47.

<sup>104</sup> MD. CONST. of 1776, art. XXXIII.

<sup>105</sup> *Id.* Maryland notably prohibited the governor from commanding the army "in person, unless advised thereto by the Council, and then, only so long as they shall approve thereof." *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> N.J. CONST. of 1776, arts. III, VIII.

<sup>108</sup> *Id.* art. VIII (establishing the council as a body for the governor "to consult" but nowhere requiring the council's consent to gubernatorial action).

<sup>109</sup> See N.Y. CONST. of 1777, art. III.

Revision — which exercised the veto power<sup>110</sup> — and vested appointment power in a council on which sat at varying times the governor, lieutenant governor, or president of the state senate.<sup>111</sup>

But even as these councils became embedded in the first revolutionary constitutions, they lost power relative to their prerevolutionary antecedents. In ten of the thirteen original states, the revolutionary constitutions placed judicial power in new courts of appeal and chancery.<sup>112</sup> And some councils did not retain specific independent executive powers beyond the duty to advise the chief executive in the general administration of the government.<sup>113</sup> Even so, these councils exercised real power. One historian characterized early state governors as “shorn of all the royal features which made the previous governors obnoxious to the people.”<sup>114</sup>

The broad acceptance of executive councils during the 1770s and early 1780s would not last. At the Federal Convention, the executive council would suffer its first serious blow, triggering a wave of early lockstepping from states convinced that the federal model precluded their own.

2. *Federal Rejection.* — In the twilight of the eighteenth century, the state executive council was at its zenith. But the enthusiasm for that design had waned. The failure of the Articles of Confederation to produce a coherent political settlement and the abuses of some state legislatures led the Framers to envision a new form of American chief magistrate empowered with an energetic and decisive character. The executive council, with its deliberative and oppositional character, was inapposite to this vision. At the Convention, the Framers thrice rejected plural executive proposals that would have aligned the federal government with those of the several states. Those rejections would lock in a national preference for unitary executives, sounding the starting gun for the slow death of the executive council.

The Constitutional Convention began in the spring of 1787. At the outset, James Wilson of Pennsylvania advocated for a “national executive . . . consist[ing] of a single person.”<sup>115</sup> John Rutledge concurred on the grounds that an individual vested with the national executive power would “feel the greatest responsibility and administer the public affairs best.”<sup>116</sup> While Elbridge Gerry supported a unitary executive, he also

---

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* art. XXIII.

<sup>112</sup> WOOD, *supra* note 6, at 160.

<sup>113</sup> See, e.g., N.J. CONST. of 1776, art. VIII.

<sup>114</sup> Morey, *supra* note 75, at 229.

<sup>115</sup> Journal of the Constitutional Convention (June 1, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 62, 63 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (statement of James Wilson).

<sup>116</sup> James Madison, Notes on the Constitutional Convention (June 1, 1787), in 1 FARRAND'S RECORDS, *supra* note 115, at 64, 65 (statement of John Rutledge).

suggested that an executive council would add gravitas to an independent executive branch.<sup>117</sup> Pierce Butler said that the federal executive should possess “unity” in order to “promote dispatch.”<sup>118</sup> But these views were not universal. Most notably, future Attorney General Edmund Randolph argued that a single executive would be “the foetus of a Monarchy,” preferring instead a three-person executive.<sup>119</sup>

By June 4, 1787, the Convention had settled on a unitary executive.<sup>120</sup> Randolph’s hydra had gained few supporters.<sup>121</sup> While consensus was “scarce” elsewhere, Wilson argued that all thirteen states favored a unitary executive, and that much trouble for little gain would come from a tripartite executive.<sup>122</sup> He pressed a thematic argument from opponents of executive councils: “Among three equal members, he foresaw nothing but uncontroled, continued, & violent animosities.”<sup>123</sup> Nevertheless, the presumption remained that the federal executive would still possess *some* constitutionally prescribed council. Roger Sherman made this point exactly when, in the process of arguing for a federal executive council attached to a single executive, he observed that “[e]ven the king of Great Britain has his privy council.”<sup>124</sup>

The Convention would not return to the structure of the executive branch until later that summer. At this point, the Founders had not yet coalesced around a strict separation of powers principle. Oliver Ellsworth proposed that the President’s council should be a blended entity consisting of the “President of the Senate—the Chief-Justice,” and the heads of certain important departments.<sup>125</sup> Charles Pinckney, in offering a compromise, warned the Convention against creating either a powerful council that might “thwart” the President or a weak council where a President could “shelter himself under their sanction.”<sup>126</sup>

On August 20, the Convention referred to the Committee of Detail a proposal for a six-member Council of State composed of five constitutionally created cabinet secretaries and the Chief Justice of the Supreme

---

<sup>117</sup> *Id.* at 66 (statement of Elbridge Gerry).

<sup>118</sup> William Pierce, Notes on the Constitutional Convention (June 2, 1787), in 1 FARRAND’S RECORDS, *supra* note 115, at 91, 92 (statement of Pierce Butler).

<sup>119</sup> *Id.* (statement of Edmund Randolph).

<sup>120</sup> Journal of the Constitutional Convention (June 4, 1787), in 1 FARRAND’S RECORDS, *supra* note 115, at 93, 93. Charles Pinckney’s motion that the “national executive be instituted to consist of . . . a single person” passed 7–3, with New York, Delaware, and Maryland voting no. *Id.* at 95.

<sup>121</sup> *Id.* at 93.

<sup>122</sup> James Madison, Notes on the Constitutional Convention (June 4, 1787), in 1 FARRAND’S RECORDS, *supra* note 115, at 96, 96 (statement of James Wilson).

<sup>123</sup> *Id.*

<sup>124</sup> Robert Yates, Notes on the Constitutional Convention (June 4, 1787), in 1 FARRAND’S RECORDS, *supra* note 115, at 105, 105 (statement of Roger Sherman).

<sup>125</sup> James Madison, Notes on the Constitutional Convention (Aug. 18, 1787), in 2 FARRAND’S RECORDS, *supra* note 115, at 324, 329 (statement of Oliver Ellsworth).

<sup>126</sup> *Id.* (statement of Charles Pinckney).

Court.<sup>127</sup> This Council, however, appeared to have little power. The proposal provided that while the President “shall in all cases exercise his own judgment, . . . every officer . . . shall be responsible for his opinion on the affairs relating to his particular Department.”<sup>128</sup> It is unclear what being “responsible for [one’s] opinion”<sup>129</sup> meant because the Council of State as conceived seemed a purely advisory body. The draft section returned by the Committee for a body called the “Privy Council” largely adopted this framework.<sup>130</sup>

The inclusion of the Chief Justice on an executive council may seem alien today but was not so at the Founding. As noted above, many revolutionary constitutions did not have a strict separation of powers.<sup>131</sup> The participation of the Chief Justice as an official in the administration borrows directly from that tradition of mixed government.<sup>132</sup> Inversely, other revolutionary constitutions retained the colonial practice in which executive branch officials performed specific judicial functions.<sup>133</sup> Even states that had a textual commitment to the separation of powers permitted governors to request advisory opinions from the judiciary.<sup>134</sup> Indeed, this very question would not be resolved at the federal level until well after ratification.<sup>135</sup>

Geographic representation played a role in the makeup of the proposed council. George Mason argued that the President should have a six-person Council of State composed of two individuals each from the “[e]astern, . . . middle, and . . . [s]outhern States, with a rotation and duration of office similar to those of the Senate; such Council to be appointed by the Legislature or by the Senate.”<sup>136</sup> Mason’s invocation of existing state structures illustrated how at least some of the Framers aimed to import what they viewed as the best ideas from the states and lock them into the federal government.

---

<sup>127</sup> Journal of the Constitutional Convention (Aug. 20, 1787), in 2 FARRAND’S RECORDS, *supra* note 115, at 334, 335–36.

<sup>128</sup> *Id.* at 337.

<sup>129</sup> *Id.*

<sup>130</sup> Journal of the Constitutional Convention (Aug. 22, 1787), in 2 FARRAND’S RECORDS, *supra* note 115, at 366, 367.

<sup>131</sup> Massachusetts being the notable exception. See MASS. CONST. of 1780, pt. I, art. XXX.

<sup>132</sup> See, e.g., N.Y. CONST. of 1777, art. III (providing for a body composed of the governor of New York, the chancellor, and the judges of the state supreme court whose task was to “revise all bills about to be passed into laws by the legislature” so as not to be “inconsistent with the spirit of this constitution, or with the public good”).

<sup>133</sup> See, e.g., S.C. CONST. of 1776, art. XVI; N.J. CONST. of 1776, art. IX; cf. DEL. CONST. of 1776, art. 17 (providing for a “court of appeals,” consisting of the “president” plus six others appointed by the legislature, that took “appeal[s] from the supreme court of Delaware”).

<sup>134</sup> See, e.g., MASS. CONST. of 1780, pt. II, ch. III, art. II.

<sup>135</sup> See Letter from Chief Justice John Jay & Associate Justices to President George Washington (Aug. 8, 1793), reprinted in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY (Henry P. Johnston ed., New York, G.P. Putnam’s Sons 1891), at 488, 488–89 (declining request for advisory opinion on separation of powers grounds).

<sup>136</sup> James Madison, Notes on the Constitutional Convention (Sep. 7, 1787), in 2 FARRAND’S RECORDS, *supra* note 115, at 535, 542 (statement of George Mason).

While it is unclear why George Mason's proposal did not carry the day,<sup>137</sup> its primary faults are easy to see. First, geographic separation of the Council would promote the very regional factionalism that the Framers hoped to avoid.<sup>138</sup> Second, vesting the appointment of councilors in the legislature could inspire loyalty to Congress, not the President. A future hostile Congress could frustrate a President's administration by elevating its partisans to his Council of State. This would have the effect of aggrandizing Congress at the expense of the President, eroding the very purpose of the independent executive the Framers were seeking to create.

In a last-ditch effort to place some pluralism in the federal executive, George Mason argued that the entity they were creating was a dangerous and untested novelty: "The President of the United States has no Constitutional Council, a thing unknown in any safe and regular government. He will therefore be unsupported by proper information and advice, and will generally be directed by minions and favorites . . ." <sup>139</sup> His warning fell on deaf ears. At the end of the Convention, the state executive council that was so well known to the men assembled would not become part of the federal plan.<sup>140</sup>

The Framers moved the powers that would have been exercised by an executive council outside of the executive branch. As Rufus King of Massachusetts observed, "most of the inconveniencies [sic] charged on the Senate are incident to a Council of Advice."<sup>141</sup> For example, all non-inferior officers of the United States, including ambassadors and judges, had to be appointed "by and with the Advice and Consent of the Senate."<sup>142</sup> The Constitution also granted Congress near-plenary ability to vest the appointment of "inferior Officers" in various officials across the executive and judicial branches.<sup>143</sup>

This decision to create a federal unitary executive posed a dilemma for the states: Although the several states were the locus of legislative power at that time, the federal executive did not mirror their pluralist institutions. This permitted the federal government to act decisively where a council-led state would be slowed down by its deliberative processes. The states answered this dilemma by mirroring the federal executive.

---

<sup>137</sup> *Id.* (noting the states voted the proposal down 3–8).

<sup>138</sup> See THE FEDERALIST NO. 10, at 77–78 (James Madison) (Clinton Rossiter ed., 1961).

<sup>139</sup> George Mason, Notes on the Constitutional Convention (Sep. 15, 1787), in 2 FARRAND'S RECORDS, *supra* note 115, at 636, 638.

<sup>140</sup> James Madison, Notes on the Constitutional Convention (Sep. 7, 1787), in 2 FARRAND'S RECORDS, *supra* note 115, at 535, 542.

<sup>141</sup> *Id.* at 539 (statement of Rufus King).

<sup>142</sup> U.S. CONST. art. II, § 2.

<sup>143</sup> *Id.*

### C. Fall

Historical autopsy is a fraught business. It rarely reveals a single cause of death, and executive councils are no exception. But examining their uniform demise across the United States does reveal consistent themes, all of which flow from the same fount — Washington. The fall of executive councils happens to be one of the greatest lockstepping stories not yet told.

*I. Reactions to Revolution.* — Even before the Federal Constitution was adopted, the revolutionary spirit that motivated the first state constitutions had begun to wane.<sup>144</sup> The results of the Convention catalyzed change already ongoing in states across the country. After the Federal Constitution rejected a national executive council, three states decided to imitate it with their own executive structures by abolishing their executive councils.

Pennsylvania's experience is instructive. The state had committed aggressively to the council model by creating a directly elected council of twelve.<sup>145</sup> The executive power was vested not in the state president, who had to be a member of the council anyway, but in the council itself — so every executive action was a collective action.<sup>146</sup>

As noted above, Pennsylvania at this time had a Council of Censors monitoring compliance with the state constitution.<sup>147</sup> In 1784, that Council resolved to investigate possible amendments and revisions to the 1776 constitution.<sup>148</sup> From this process the Council concluded Pennsylvania's Executive Council was "materially defective" because it was "expensive and burthensome," lacked the "decision necessary for action on sudden emergencies," and was too unaccountable.<sup>149</sup> Accordingly, the Council recommended that the "president and council" be replaced with a single "governor."<sup>150</sup>

<sup>144</sup> See Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 69, 73–74 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987) (describing the economic instability of the 1780s and the "excesses of democracy" that alarmed many fervent Federalists). Madison's distaste for the rough-and-tumble of Virginia state politics in the 1780s informed his approach to drafting the Constitution. See *id.*; J. Gordon Hylton, *James Madison, Virginia Politics, and the Bill of Rights*, 31 WM. & MARY L. REV. 275, 285 (1990).

<sup>145</sup> PA. CONST. of 1776, § 19.

<sup>146</sup> See *id.* §§ 3, 19.

<sup>147</sup> *Id.* § 47; see Brown, *supra* note 102, at 2.

<sup>148</sup> THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790: THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA 68 (John S. Wiestling & Francis R. Shunk eds., 1825) [hereinafter PROCEEDINGS].

<sup>149</sup> *Id.* at 70. Ironically, the Council of Censors would itself suffer a similar fate: "By 1790, the institution had been eliminated from even the Pennsylvanian Constitution in a thoroughgoing revision which brought the state Constitution in line with its bicameral and presidential counterpart at the Federal level." Brown, *supra* note 102, at 2.

<sup>150</sup> PROCEEDINGS, *supra* note 148, at 77.

Some censors disagreed. The dissenters, after arguing that the whole process was itself unconstitutional,<sup>151</sup> lamented that a more unitary executive would be a stalking horse for royal tyranny: “[T]he good people of Pennsylvania . . . abhor all attempts to lift . . . one citizen to the throne of royalty; and herein we are confident we speak not only the language of our constituents, but that we proclaim also the voice of God and nature.”<sup>152</sup>

The only sign of resistance to stripping power from the Executive Council at the subsequent 1790 Pennsylvania convention was a proposal to add the words “and council” after “[t]he supreme executive power of this commonwealth shall be vested in a governor.”<sup>153</sup> That proposal was defeated, and with it Pennsylvania’s government-by-council.<sup>154</sup>

Delaware and Georgia have similar stories. In Delaware, the resolution calling its 1791 convention decried that its constitutional superstructure, which included an executive council, was “prevent[ing] an impartial, beneficial, and energetic operation” of government.<sup>155</sup> Georgia’s reformers were so motivated by the results of the Federal Convention that, just two years after the American government was reframed, they decided on a nearly identical copy for their own state.<sup>156</sup>

Critically, neither Pennsylvania, nor Delaware, nor Georgia looked to neighboring states to consider how they might reform and retain their executive councils. Rather, extant records show them looking to the federal model, and the federal convention, for how to respond to council criticism. Had they looked to other states, they might have found examples of executive councils that had been more successfully translated into a system of checks, balances, and separated powers.<sup>157</sup> By looking merely to the federal model for guidance, these states were early victims of institutional lockstepping.

2. *Jacksonian Democracy.* — In 1800, only two states allowed their presidential electors to be selected directly by the people.<sup>158</sup> By 1832, South Carolina was the sole state that didn’t.<sup>159</sup> This trend is frequently referred to as “Jacksonian democracy.”<sup>160</sup> In a similar fashion, because

<sup>151</sup> *Id.* at 78.

<sup>152</sup> *Id.* at 79.

<sup>153</sup> *Id.* at 338.

<sup>154</sup> *Id.*; see also PA. CONST. of 1790, art. II, § 1.

<sup>155</sup> RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION 11 (2d ed. 2017); see also MESSERSMITH, *supra* note 1, at 15 (noting that Delaware’s new constitution lacked a Privy Council).

<sup>156</sup> KENNETH COLEMAN, THE AMERICAN REVOLUTION IN GEORGIA, 1763–1789, at 272 (1958) (“The constitution drawn up by the [1789] convention was modeled on the new federal constitution . . .”).

<sup>157</sup> See *supra* section B.1, pp. 1433–36.

<sup>158</sup> *Creating the United States: Election of 1800*, LIB. OF CONG., <https://www.loc.gov/exhibits/creating-the-united-states/election-of-1800> [<https://perma.cc/4ANA-ZEB3>].

<sup>159</sup> Adam Gopnik et al., *Jacksonian Democracy*, ENCYCLOPEDIA BRITANNICA (Feb. 18, 2026), <https://www.britannica.com/place/United-States/Jacksonian-democracy> [<https://perma.cc/J3VL-5628>].

<sup>160</sup> *Id.* Note, however, that the trend is not attributable to him, or even his party. See *id.*

executive councils were traditionally selected by legislatures rather than popularly elected,<sup>161</sup> they were obvious targets for democracy proponents. In response to democratic critiques, states did not look to democratize their executive councils and, in doing so, create a node for regional democratic input in the executive itself. Rather, the states overwhelmingly neutered or removed executive councils in favor of a unitary governor possessing the whole of executive power. Consequently, an important mode of democratic input was lost.

During Jefferson's presidency, "[p]opular participation in politics grew apace, in some places . . . exploding to levels unimaginable in the 1790s."<sup>162</sup> But while "democratic power and participation were expanding, politics and [Democratic-]Republican Party affairs continued to operate at the national level largely from the top down."<sup>163</sup> This approach to politics, where a single person would represent the spirit of the demos, would typify the Jacksonian Democratic era — especially as states abolished their executive councils to match the federal structure.

Connecticut and New York were the earliest movers. In the early nineteenth century, Connecticut was still operating largely under its Royal Charter.<sup>164</sup> Connecticut Republicans, having overcome the historical dominance of the Federalists,<sup>165</sup> sought to extend the franchise to all taxpayers because paying taxes was "sufficient economic proof of an individual's qualifications as a virtuous citizen."<sup>166</sup> They accordingly removed the executive council, opting instead for a governor vested with "[t]he supreme executive power of the State."<sup>167</sup>

Similar demands for popular representation arose in New York, in no small part due to abuses of the state's existing constitution.<sup>168</sup> New York had tried to reform its executive council by splitting it in two — into a Council of Revision (responsible for monitoring governmental compliance with the constitution) and a Council of Appointments.<sup>169</sup> Near the end of a bitter rivalry between New York's top two parties that lasted through the 1810s, one party controlled the Council of Appointments, and another the Council of Revision.<sup>170</sup> The former used its broad power to clean house of the opposing party's appointees and install loyalists in nearly every appointed position "in what one newspaper called a 'bloody inquisition.'"<sup>171</sup> The Council of Revision

---

<sup>161</sup> See, e.g., VA. CONST. of 1776, reprinted in 7 THORPE, *supra* note 42, at 3812, 3817.

<sup>162</sup> SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 138 (2005).

<sup>163</sup> *Id.* at 139.

<sup>164</sup> *Id.* at 183.

<sup>165</sup> *Id.* at 184.

<sup>166</sup> *Id.* at 186.

<sup>167</sup> CONN. CONST. of 1818, art. IV, § 1.

<sup>168</sup> See WILENTZ, *supra* note 162, at 189.

<sup>169</sup> See *id.* at 191.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

then vetoed that party's attempt to call a constitutional convention, nearly sparking a political crisis.<sup>172</sup> Ultimately, the franchise was dramatically expanded, resulting in the most democratic convention the United States had yet seen.<sup>173</sup> Rather than reforming the council structure to correct for its abuses, New York opted to ditch it in favor of a system similar to the federal model: a single governor, with the legislature approving appointments.<sup>174</sup>

The wave of Jacksonian democracy would go on to sweep the nation, with more and more of the original colonies removing their executive councils. North Carolina's went in 1835,<sup>175</sup> and Maryland (1837),<sup>176</sup> Rhode Island (1842),<sup>177</sup> New Jersey (1844),<sup>178</sup> and Virginia (1850)<sup>179</sup> quickly followed suit.

3. *Successive Progressive Movements.* — Over the last one hundred years, executive power has undergone a dramatic expansion at both the federal level and the state level.<sup>180</sup> Following the federal trend toward centralization and administrative expansion, state governments also grew to provide for more than just citizens' basic needs. This development forced one state, Maine, which had retained its executive council well into the twentieth century, to confront whether its longstanding check on executive power could be squared with what critics saw as the demands of the present age.<sup>181</sup> In the end, legislators took the easy road — removing the “anachronism”<sup>182</sup> of the executive council to match the well-known unitary executive.

The extensive debate records showcased nearly every argument present in the earlier executive council debates, but each with a modern twist. Critics focused on what they saw as two fundamental flaws of the institution. First, its age: Maine's executive council had remained relatively unchanged since its first constitution in 1820.<sup>183</sup> Second, reformers decried the inefficiency baked into the constitutional design.

Much of the ire was pure rhetoric against old institutions. One representative argued that “[t]he executive council is a dinosaur that has

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See N.Y. CONST. of 1821, art. III, § 1; *id.* art. IV, § 6.

<sup>175</sup> See N.C. CONST. of 1776, amend. art. II (1835).

<sup>176</sup> See MD. CONST. of 1776, amend. §§ 13–14 (1837) (abolishing the council and moving advice-and-consent powers over state officer appointments to the state senate).

<sup>177</sup> See R.I. CONST. of 1842, art. VII, § 1.

<sup>178</sup> See N.J. CONST. of 1844, art. V, § 1.

<sup>179</sup> See VA. CONST. of 1850, art. V, § 1.

<sup>180</sup> See James T. Patterson, *The Rise of Presidential Power Before World War II*, LAW & CONTEMP. PROBS., Spring 1976, at 39, 39; LARRY SABATO, GOODBYE TO GOOD-TIME CHARLIE: THE AMERICAN GOVERNOR TRANSFORMED, 1950–1975, at xiii (1978).

<sup>181</sup> See William Adams Newdick, *The Executive Council of Maine* 85, 87 (June 1951) (M.A. thesis, University of Maine) (on file with the Harvard Law School Library).

<sup>182</sup> 107 ME. LEGIS. REC. B1611 (June 4, 1975) (statement of Rep. Snowe).

<sup>183</sup> See ME. CONST. of 1820, art. V, pt. II.

been lumbering around this State House for a century and a half.”<sup>184</sup> Another representative — a self-proclaimed “friend of historic preservation” — opined that he had “to draw the line at historical preservation when it comes to institutionalizing a carry-over from [the] colonial period.”<sup>185</sup> A defender responded that age was a benefit; that “[t]he council . . . ha[d] served Maine well since statehood in 1820.”<sup>186</sup> That same representative later remarked that “[c]hange for the sake of change . . . is not good, and that is what this is in my opinion.”<sup>187</sup>

Detractors also focused on the efficiency gains that would come from a council-free state executive. This critique was nothing novel. One state representative quoted a 1915 detractor of executive councils: A “council destroys the unity of the executive, the concentration of responsibility, and thus militates against efficiency.”<sup>188</sup> Another representative argued that the executive council was “a hangover from colonial days when we had to protect ourselves from the prerogatives [sic] of royalty, and it long since has lapsed into merely an *instrument of obstruction*.”<sup>189</sup>

Other critics linked the growth of the state bureaucracy to the decline of the governor’s council. Representative Snowe argued that the council was a historically contingent object superseded by the modern state:

The council was also created as an attempt to avoid an administratively oriented government, to which our founding fathers were adverse. . . . [Since,] the Governor’s duties and responsibilities have undergone a tremendous expansion, so much so, that . . . [t]he council, as it was originally conceived, can not keep up with the ever increasing demands of state government.<sup>190</sup>

Even the governor of a small state must preside over a sprawling bureaucracy covering licensing schemes, law enforcement, election administration, and public education.<sup>191</sup> The size of the government magnified whatever inefficiencies were added by the executive council’s internal check on the governor’s power, reducing the effectiveness of a

<sup>184</sup> 107 ME. LEGIS. REC. B1610 (June 4, 1975) (statement of Rep. Cooney).

<sup>185</sup> *Id.* at B1611 (statement of Rep. Wagner).

<sup>186</sup> *Id.* at B1610 (statement of Rep. Rollins); *see also* Newdick, *supra* note 181, at 1 (noting that the establishment of the Maine Executive Council “came about with a minimum of debate” in the first state Convention).

<sup>187</sup> 107 ME. LEGIS. REC. B2252 (June 24, 1975) (statement of Rep. Rollins).

<sup>188</sup> 107 ME. LEGIS. REC. B1610 (June 4, 1975) (statement of Rep. Snowe).

<sup>189</sup> 107 ME. LEGIS. REC. B2282 (June 24, 1975) (emphasis added) (statement of Sen. Berry).

<sup>190</sup> 107 ME. LEGIS. REC. B1610 (June 4, 1975) (statement of Rep. Snowe).

<sup>191</sup> Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1093 (2018) (“In 1954, state governments employed 1.1 million employees; by 2015, that number had increased to 5.4 million.”); *see also* CHRISTOPHER A. SIMON, BRENT S. STEEL & NICHOLAS P. LOVRICH, *STATE AND LOCAL GOVERNMENT AND POLITICS* 280 (3d ed. 2024) (detailing the largest sectors of state employment). The professionalization of state bureaucracies may be largely attributable to the immense growth of federal public spending over the twentieth century. *See* John Joseph Wallis & Wallace E. Oates, *The Impact of the New Deal on American Federalism*, in *THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* 155, 157–58 (Michael D. Bordo, Claudia Goldin & Eugene N. White eds., 1998).

government increasingly seen as both a sovereign and a provider of goods and services.

But in this drive for efficiency, a true check on state executive power was lost. One defender spoke of the council as an important pillar of the separation of powers:

[T]here should be a balance of power . . . between the Executive and the Legislature and the Judicial. In Maine, we have been very strongly for this balance of power and all through our years there has [sic] always been the proponents who said ‘we could have better government if we gave more power to the Executive and less check and balance over the Executive’s role in government.’ . . . If the Executive Council is defeated here tonight, one would only hope that that check and balance system exists in another way.<sup>192</sup>

In this vein, Representative Rollins argued that the executive council “provides a reasonable, efficient and low cost check on the governor’s powers,” and that “few instruments in state government . . . work as well and at such little cost to taxpayers as the executive council.”<sup>193</sup>

Unsurprisingly, the Maine record is replete with references to the federal model.<sup>194</sup> The argument that ended up prevailing was nothing more than a mantra: “The simple, the smooth way, the method . . . to use in this state, is to have the confirmation [of executive and judicial branch officials] reside in one body directly elected by the people . . . and that would be the Senate.”<sup>195</sup>

That would seem to be the end of this lockstepping story. But there is one state whose council has stood the test of time, which might offer the inspiration other states need to reconsider the merits of this institution.

#### *D. New Hampshire and the Merits of Government by Council*

Despite its long losing streak, the executive council exists in substantially the same form as it did in 1789 in one state: New Hampshire.<sup>196</sup> The New Hampshire Executive Council serves as a reminder “of the basic distrust Granite State citizens have for dictatorial government.”<sup>197</sup> The Council’s bark matches its bite, as its sweeping powers attest.<sup>198</sup> The Council consists of five members who are elected by each county every two years, matching the governor’s election cycle.<sup>199</sup> A majority of the Council has a veto on the governor “in the nominations and

<sup>192</sup> 107 ME. LEGIS. REC. B2330 (June 26, 1975) (statement of Rep. Silverman).

<sup>193</sup> 107 ME. LEGIS. REC. B1610 (June 4, 1975) (statement of Rep. Rollins).

<sup>194</sup> *E.g.*, 107 ME. LEGIS. REC. B2276 (June 24, 1975) (statement of Sen. Curtis).

<sup>195</sup> *Id.*

<sup>196</sup> Massachusetts retains an executive council as well, but it is only a shadow of its former self. See Charles C. Euchner, *Governing Greater Boston: Fragmented Bodies, Fragmented Policies*, in GOVERNING GREATER BOSTON 1, 8 (Charles C. Euchner ed., 2003).

<sup>197</sup> *History of the Executive Council*, STATE OF N.H. EXEC. COUNCIL, <https://www.council.nh.gov/history-executive-council> [<https://perma.cc/K24L-M9EX>].

<sup>198</sup> See N.H. CONST. pt. II, arts. 46–47.

<sup>199</sup> *Id.* pt. II, art. 60.

appointments” of nearly every office in the state, from art commissioners to state supreme court justices.<sup>200</sup> Once appointed, those officers can be removed only with the Council’s consent.<sup>201</sup> The Council also must consent to any budgetary transfer or contract “with a value of \$10,000” or greater.<sup>202</sup> And although the governor holds the pardon power, he may only exercise it “by and with the advice” of the Executive Council.<sup>203</sup> New Hampshire citizens, moreover, are deeply aware and proud of the Council’s longstanding role in New Hampshire politics.<sup>204</sup>

New Hampshire’s Executive Council carries on a number of “noteworthy duties and responsibilities” today,<sup>205</sup> which can be categorized under three distinct umbrellas. First, it serves as a government watchdog. Second, it provides an internal check on executive power. And third, it provides another source of expertise and consultation for the governor.

As government watchdog, the Executive Council boasts that “[n]o other state in the nation has two governmental branches as accountable to its citizens as New Hampshire.”<sup>206</sup> Since 1933, virtually all Executive Council meetings have been open to the public<sup>207</sup> and they are now recorded and posted in audio and video format alongside the agenda and minutes.<sup>208</sup> In one representative exchange from a 2024 meeting, an executive councilwoman interrogated the State Treasurer about budget shortfalls, eliciting a vow to avoid such mistakes in the future.<sup>209</sup>

More than a mere inspector general, the Executive Council provides an internal check on the governor within the executive branch. Since 2012, the Council has denied funding to health centers that provide

<sup>200</sup> *Id.* pt. II, arts. 46–47.

<sup>201</sup> *Id.* pt. II, art. 73.

<sup>202</sup> *About Us*, STATE OF N.H. EXECUTIVE COUNCIL, <https://www.council.nh.gov/about-us> [<https://perma.cc/2R5Z-Y5ZB>].

<sup>203</sup> N.H. CONST. pt. II, art. 52.

<sup>204</sup> See, e.g., Annmarie Timmins, *The Behind-the-Scenes Power of the State’s Executive Council Is Now at Center Stage*, N.H. BULL. (Oct. 25, 2021, at 05:49 ET), <https://newhampshirebulletin.com/2021/10/25/the-behind-the-scenes-power-of-the-states-executive-council-is-now-at-center-stage> [<https://perma.cc/JMN7-YWT5>] (quoting a New Hampshire citizen saying that “[w]hen the Executive Council is properly functioning, it prevents the governor from going out on his own and limits him to make more reasonable decisions that are in the people’s best interests”).

<sup>205</sup> *About Us*, *supra* note 202.

<sup>206</sup> *History of the Executive Council*, *supra* note 197.

<sup>207</sup> *Id.*

<sup>208</sup> See, e.g., NH EXECUTIVE COUNCIL, *May 21, 2025 NH Executive Council Meeting* (YouTube, May 26, 2025), [https://youtu.be/fqU4SN2C\\_V4?si=R271qa2EoM9gj7oY](https://youtu.be/fqU4SN2C_V4?si=R271qa2EoM9gj7oY) [<https://perma.cc/3Q7Q-5EU9>].

<sup>209</sup> NH EXECUTIVE COUNCIL, *November 13, 2024 NH Executive Council Meeting*, at 1:11:50–1:17:40 (YouTube, Nov. 15, 2024), <https://youtu.be/aSfA59fsZwg?si=rQi58rhDZ7wfBcCH> [<https://perma.cc/RM53-PSL4>].

abortions,<sup>210</sup> blocked a nominee to the state supreme court,<sup>211</sup> rejected federal funds for a commuter rail,<sup>212</sup> and rejected federal funds for COVID-19 vaccinations.<sup>213</sup> Indeed, the Executive Council's power is such that the New Hampshire Supreme Court has refused to opine on whether the state's executive power vesting clause, which mentions only the governor, vests the entirety of the state's executive power in the governor alone, or the governor and Council.<sup>214</sup>

New Hampshire citizens appear to be well-adjusted to the idea of holding the governor and Executive Council separately accountable. Despite being on the same two-year election cycle, the makeup of the Executive Council regularly changes while the governor remains in office, and vice versa.<sup>215</sup> The institution also provides critical flexibility to voters, allowing them to turn to their councilors to provide continuity in the executive branch when desired.<sup>216</sup> And it provides a valuable training ground in executive branch governance for future leaders in the state — most recently producing four-term Governor Chris Sununu<sup>217</sup> and three-term congressional Representative Chris Pappas.<sup>218</sup>

---

<sup>210</sup> See Annmarie Timmins, *Executive Council Republicans Again Reject Family Planning Contracts*, N.H. BULL. (Nov. 29, 2023, at 14:56 ET), <https://newhampshirebulletin.com/2023/11/29/executive-council-republicans-again-reject-family-planning-contracts> [https://perma.cc/ZQ7Z-A9S8].

<sup>211</sup> Holly Ramer, *Council Rejects Attorney General as Chief Justice*, FOSTER'S DAILY DEMOCRAT (July 10, 2019, at 14:26 ET), <https://www.fosters.com/story/news/2019/07/10/council-rejects-nh-ag-gordon-macdonald-as-chief-justice/4725136007> [https://perma.cc/8C9G-RQ6W].

<sup>212</sup> *AFP-NH Praises Executive Council Decision to End Commuter Rail Boondoggle*, AMS. FOR PROSPERITY (Dec. 21, 2022), <https://americansforprosperity.org/press-release/afp-nh-praises-executive-council-decision-to-end-commuter-rail-boondoggle> [https://perma.cc/AP8N-5BG5].

<sup>213</sup> Alli Fam & Josh Rogers, *N.H. Executive Council Rejects \$27 Million in Federal Contracts Related to COVID Vaccination Efforts*, NHPR (Oct. 13, 2021, at 17:00 ET), <https://www.nhpr.org/nh-news/2021-10-13/nh-executive-council-rejects-27-million-in-federal-contracts-related-to-covid-vaccination-efforts> [https://perma.cc/SVW8-9AJJ].

<sup>214</sup> See *In re Opinion of Justices*, 27 A.3d 859, 865 & n.1 (N.H. 2011) (explaining, when writing that the New Hampshire Constitution “provides that the Governor is the ‘supreme executive magistrate,’” that “[w]e use the term ‘Governor’ because it is the term used in the New Hampshire Constitution, but express no opinion as to whether the term refers to the Governor alone or also includes the Executive Council” (quoting N.H. CONST. pt. II, art. 41)).

<sup>215</sup> For detailed election results since 1970, see *Introducing NHPR's Election Database*, NHPR, <https://www.nhpr.org/introducing-nhprs-election-database> [https://perma.cc/MFW2-NYGZ]. For example, in 2010, Democratic Governor John Lynch won an unprecedented fourth term while all five of the Executive Council's seats went to Republicans. See *id.* And in 2014, Democrat Maggie Hassan won reelection as governor while the Council flipped from majority-Democrat to 3–2 Republican control. See *id.*

<sup>216</sup> Councilor Raymond S. Burton represented the North Country for thirty-four years, gaining a reputation for saying, “[O]h, governors come and go, but we Councilors continue to do the state's business.” *New Hampshire's Almighty Executive Council*, DENNEHY & BOULEY (Apr. 1, 2024), <https://www.dennehybouley.com/post/new-hampshire-s-almighty-executive-council> [https://perma.cc/RMM4-6CTY].

<sup>217</sup> See *New Hampshire Gov. Chris Sununu*, NAT'L GOVERNORS ASSOC., <https://www.nga.org/governor/chris-sununu> [https://perma.cc/4USE-M5MX].

<sup>218</sup> See *Meet Chris*, CHRIS PAPPAS FOR U.S. SENATE, <https://chrispappas.org/about> [https://perma.cc/6S49-YREA].

The impact of New Hampshire's Executive Council raises questions about what other states' executive councils could have done if they were still around today, albeit in a format more consistent with the separation of powers. Perhaps an executive council's oversight during COVID-19 would have prevented New York State's nursing home crisis and the governor's subsequent attempts to cover it up before it was too late to remedy.<sup>219</sup> Or maybe former Illinois Governor Blagojevich wouldn't have tried to abuse his power in allocating the United States Senate seat President Obama vacated upon becoming President if he had had to go through an independent executive council in making the appointment.<sup>220</sup> And while it cannot be fully explored in this Chapter, future research might consider whether a federal executive council, with power to check the President, could have curbed certain pardon practices in the Biden and Trump presidencies.<sup>221</sup> These are but a few examples of the abuse that occurs when power is vested in a single individual to create and execute public policy.

### Conclusion

State executive councils used to operate in every state in this country, and they could do so again. In their heyday, these bodies served as trusted advisors, protectors of the public fisc, and internal checks on executive power, and added a democratic surplus to state governments across the country. Those who pioneered their decline saw them as anachronistic and divisive, preferring instead the efficiency of a unitary executive. This Chapter takes the reverse view. Executive councils with properly defined jurisdictions accountable to the people are an effective way to promote the separation of powers and protect individual liberty.

More generally, this Chapter illustrates that the seductive phenomenon of convergence is not always positive when it comes to the distribution of executive power. In this context — and any other instance of “convergence” or “lockstepping” — the decline and fall of the executive council counsels against rash action. Rational actors should instead take a second look at the noble origins of alternatives to the federal model before proceeding.

---

<sup>219</sup> See Staff Memorandum from House Select Subcomm. on the Coronavirus Pandemic Majority Staff to Subcomm. Members, Re: Findings from the Select Subcommittee's Investigation into the Cuomo Administration's March 25 Directive Admitting COVID-Positive Patients into Nursing Homes 1–2 (Sep. 9, 2024), <https://oversight.house.gov/wp-content/uploads/2024/09/2024.09.09-SSCP-Staff-Memorandum-Re.-Investigation-of-Governor-Andrew-Cuomo.pdf> [<https://perma.cc/AAW7-YKQN>].

<sup>220</sup> See *Former Illinois Gov. Rod R. Blagojevich Sentenced to 14 Years in Prison for Corruption in Office*, U.S. ATT'Y'S OFF., N. DIST. OF ILL. (Dec. 7, 2011), [https://www.justice.gov/archive/usao/iln/chicago/2011/pr1207\\_01.pdf](https://www.justice.gov/archive/usao/iln/chicago/2011/pr1207_01.pdf) [<https://perma.cc/U92M-7EEB>].

<sup>221</sup> See Proclamation No. 10887, 90 Fed. Reg. 8331 (Jan. 29, 2025); *Pardons Granted by President Joseph Biden (2021–2025)*, OFF. OF THE PARDON ATT'Y, U.S. DOJ (July 9, 2025), <https://www.justice.gov/pardon/pardons-granted-president-joseph-biden-2021-2025> [<https://perma.cc/V82S-FEPQ>].