

SECONDARY PROSECUTORS AND THE SEPARATION-OF-POWERS HURDLE

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This Essay uses the New York Court of Appeals' recent decision in People v. Viviani as a lens through which to examine secondary prosecutors—that is, prosecutors other than the locally elected district attorney—and state constitutional separation-of-powers doctrine. The Viviani court correctly found unconstitutional a state statute that vested concurrent prosecutorial power (with respect to cases alleging the abuse of people with special needs) in a special prosecutor appointed by the governor, and correctly concluded that the statute could not accommodate a saving construction that would have validated special prosecutions upon the consent of the relevant district attorney. Viviani appropriately leaves open the possibility of a revised statute that would allow for a special prosecutor upon such consent. Greater emphasis on the value of democratic accountability would have made the value of the consent clearer.

Moving beyond Viviani, this Essay considers a taxonomy of settings in which a secondary prosecutor might be appropriate. Consent becomes irrelevant where the district attorney is unavailable, and an impediment where the district attorney is unwilling to undertake his or her prosecutorial duties. The Essay also offers some thoughts on secondary prosecutors as a response to progressive prosecutors.

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I. INTRODUCTION

American legal systems generally vest prosecutorial authority in local district attorneys. Sometimes, however, a district attorney may lack capacity, or be unwilling, to undertake certain prosecutions. In such circumstances, it may make sense to empower another government agent to act as a “secondary prosecutor.” But, depending on where that secondary prosecutor’s office resides within the government, such an arrangement may raise separation-of-powers concerns.

When we think of separation of powers in the American federal system, we identify two prototypical settings. The first is separation of powers among the three branches of the federal government; this is often referred to as “horizontal separation of powers.”¹ The second is separation of powers between the federal (national) government and the states, so-called “vertical separation of powers.”²

But states have their own separation-of-powers doctrines. In this Essay, I address the intrastate analog to horizontal separation of powers through the lens of legislation in New York State—ultimately invalidated by the New York Court of Appeals—that vested certain criminal prosecutorial powers in the Office of the Governor. The legislation and ensuing litigation raise the issue of what limits state law might impose on the allocation of power among state governmental actors.

Notably, the issue here is not a power allocation problem that could arise under the guise of traditional, federal separation of powers. New York vests primary prosecutorial power in the state lo-

1. See, e.g., Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664-65 (1978) (using the moniker “separation of powers”).

2. See, e.g., *id.* at 665 (using the moniker “federalism”).

cal district attorneys, who are elected on a county-by-county basis. It allocates additional prosecutorial power to the Office of the Attorney General—a statewide elective office—and the Department of Law, over which the attorney general presides.³ Yet the legislation I discuss here purported to vest certain prosecutorial authority in the Office of the Governor.⁴ That division of power would be essentially meaningless were we dealing with the federal government—and, in any event, would certainly raise no separation-of-powers concerns—since the federal attorney general and (almost always) the local federal district attorneys (“U.S. attorneys”⁵) are appointed by the president with the advice and consent of the Senate.⁶ Put another way, the president, the attorney general, and U.S. attorneys are parts of the executive branch, unified under the leadership of the president. While some question the reality and desirability of the “unitary executive,”⁷ the fact remains, from a legal perspective, that there would be no separation-of-powers concern under a federal analog to the state statute I discuss here.

In contrast, under New York state law, such a division of power is problematic, as evidenced by the New York Court of Appeals’ 2021 decision in *People v. Viviani*.⁸ There, the Court of Appeals concluded that state constitutional separation-of-powers concerns rendered invalid the portion of a statute that vested a special prosecutor appointed by the governor with discretion to prosecute individuals alleged to have abused people with special needs. The court held that the statute violated state separation-of-powers in that the legislature exceeded its authority to shift prosecutorial power from one constitutional officer to another; that is, from the local district attorneys to the governor (both of whom are elected).⁹ The court acknowledged that the legislature had sometimes seen fit to vest prosecutorial discretion in the attorney general (who is also elected) or Department of Law, but explained that there was no historical precedent for vesting such power in a gubernatorial appointee.¹⁰

3. See *infra* notes 14-22 and accompanying text.

4. See N.Y. EXEC. LAW § 552 (McKinney, Westlaw through L. 2021); *infra* notes 25-26 and accompanying text.

5. See 28 U.S.C. § 541(a).

6. See *infra* note 61 and accompanying text.

7. See Jonathan Remy Nash, *Nontraditional Criminal Prosecutions in Federal Court*, 53 ARIZ. ST. L.J. 143, 158 (2021).

8. 169 N.E.3d 224, 229 (N.Y. 2021).

9. See *id.* at 229-31; *infra* notes 34-37 and accompanying text.

10. See 169 N.E.3d at 231-32; *infra* notes 38-45 and accompanying text.

Appearing as an intervenor, the attorney general—represented by Solicitor General Barbara Underwood—argued that the court should save the statute from unconstitutionality by interpreting it to require local district attorney consent before the special prosecutor could act.¹¹ The court did not adopt the solicitor general’s argument—not because it saw consent as irrelevant, but rather because it concluded that the statute at issue was incompatible with a construction that allowed for consent.¹² (A concurring judge accepted the solicitor general’s argument, but nevertheless concurred in the judgment because the record in the cases before the court offered no evidence of any such consent.¹³)

In this Essay, I review and critique the Court of Appeals’ decision in *Viviani*, with a special focus on the solicitor general’s argument in favor of a saving construction. I argue that, while the court reached the correct conclusion in the case, it relied too heavily on historical practices, while providing too little discussion of democratic accountability—a feature that aligns with the solicitor general’s emphasis on district attorney consent.

Beyond *Viviani* itself, I offer a taxonomy of settings in which secondary prosecutors might be appropriate. For each setting, I consider whether district attorney consent would likely be forthcoming, and whether it should be normatively required. I argue that, while consent is critical to validate district attorneys’ democratic accountability to their local constituencies, there are some settings in which the requirement of consent must be balanced against the need for a secondary prosecutor. I also offer a few thoughts on conflicts over control of prosecutions between local and state officials, particularly the debate over so-called progressive prosecutors.

The Essay proceeds as follows. Part II presents some background on New York state separation-of-powers jurisprudence and then discusses the *Viviani* case. Part III critiques *Viviani* and highlights the importance of district attorney consent as a means to ensure democratic accountability. Part IV presents the taxonomy of secondary prosecutors and anticipates the future of secondary prosecutors. Part V examines the role of secondary prosecutors in light of the rise of the progressive prosecutor.

11. See 169 N.E.3d at 232.

12. See *id.* at 232-34; *infra* notes 46-52 and accompanying text.

13. See 169 N.E.3d at 236-43 (Rivera, J., concurring); *infra* text accompanying note 53.

II. THE *VIVIANI* CASE AND SEPARATION OF POWERS UNDER NEW YORK STATE CONSTITUTIONAL JURISPRUDENCE

How might secondary prosecutor statutes run afoul of separation-of-powers doctrine? That issue came before the New York Court of Appeals in the *Viviani* case.

The statute at issue in *Viviani*—section 552 of the state’s Executive Law¹⁴—implicated the ability of the legislature to vest criminal prosecutorial power not in state district attorneys, or even the state attorney general, but instead in the governor. The New York Court of Appeals concluded that this allocation of authority violated state separation-of-powers protections. It also rejected an argument—advanced by the attorney general, as enunciated by Solicitor General Barbara Underwood—that the statute could be saved by interpreting it to require, if implicitly, the approval in any given case of, and supervision over any given case by, the appropriate district attorney.

Most states vest authority to prosecute criminal cases in local district attorneys, with some residual prosecutorial authority assigned to the state attorney general.¹⁵ New York follows this general model.

The New York Constitution provides for the election of a district attorney in each county,¹⁶ but it does not delineate the district attorney’s powers, responsibilities, and duties.¹⁷ Instead, it is clear from statutory authority¹⁸ and historical practice that “District Attorneys have plenary prosecutorial power in the counties where they are elected”¹⁹

14. N.Y. EXEC. LAW. § 552 (McKinney, Westlaw through L. 2021).

15. See Nash, *supra* note 7, at 158.

16. See N.Y. CONST., art. XIII, § 13(a) (“In each county a district attorney shall be chosen by the electors once in every three or four years as the legislature shall direct.”).

17. *People v. Viviani*, 169 N.E.3d 224, 230 (N.Y. 2021) (“Although the Constitution establishes the elected office of the District Attorney, it does not assign prosecutorial authority to any constitutional officer, leaving that allocation as a matter for the Legislature”).

18. See N.Y. COUNTY LAW § 700(1) (McKinney 2019) (subject to limited exceptions, “it shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected or appointed”); *id.* § 927 (similar effect for the counties within New York City).

19. *People v. Romero*, 698 N.E.2d 424, 426 (N.Y. 1998); *accord* *In re Haggerty v. Himelein*, 677 N.E.2d 276, 278 (N.Y. 1997) (identifying “the ‘discretionary power to determine whom, whether and how to prosecute [a criminal] matter’” as “the essence of a District Attorney’s constitutional, statutory, and common-law

Similarly, the New York Constitution provides for the office of Attorney General,²⁰ but does not set out the office's essential powers, responsibilities, and duties.²¹ The Court of Appeals has made clear that the attorney general enjoys only residual prosecutorial power as expressly conferred by statute.²² And, indeed, statutory law vests limited prosecutorial authority in the attorney general and the Department of Law,²³ of which the attorney general is the head.²⁴

The prosecution challenged in *New York v. Viviani* was commenced under section 552 of New York's Executive Law. Section 552(2) empowered the governor to appoint "a special prosecu-

prosecutorial authority" (quoting *In re Schumer v. Holtzman*, 454 N.E.2d 522, 525 (N.Y.1983)).

20. See N.Y. CONST., art. V, § 1 ("The . . . attorney-general shall be chosen at the same general election as the governor and hold office for the same term . . .").

21. *People v. Gilmour*, 773 N.E.2d 479, 482 (N.Y. 2002) ("The New York State Constitution establishes the offices of Attorney General . . . and District Attorney . . . , but does not specify or allocate the powers of the respective offices.").

22. See *id.* at 482 ("[S]ince 1796 the Legislature has never accorded general prosecutorial power to the Attorney General . . ."); *Romero*, 698 N.E.2d at 426 ("Although the District Attorneys have plenary prosecutorial power in the counties where they are elected, the Attorney-General has no such general authority . . ."); *Della Pietra v. State*, 526 N.E.2d 1, 3 (N.Y. 1988) ("[T]he Attorney-General is *without any prosecutorial power* except when specifically authorized by statute.").

23. See N.Y. EXEC. LAW § 63(10) (McKinney, Westlaw through L. 2021) (empowering the attorney general to "[p]rosecute every person charged with the commission of a criminal offense in violation of any of the laws of this state against discrimination because of race, creed, color, or national origin, in any case where in his judgment, because of the extent of the offense, such prosecution cannot be effectively carried on by the district attorney of the county wherein the offense or a portion thereof is alleged to have been committed, or where in his judgment the district attorney has erroneously failed or refused to prosecute."); *id.* § 63(2) (empowering the governor to "require" the attorney general to "attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement"); *id.* § 70 (providing that, "[w]henever the governor shall advise the attorney-general that he has reason to doubt whether in any county the law relating to crimes against the elective franchise is properly enforced, . . . the attorney-general shall assign one or more of his deputies to take charge of prosecutions under the election law."); *id.* § 70-a(1)(a) (establishing "within the department of law a state-wide organized crime task force" charged with, among other things, "conduct[ing] investigations and prosecut[ing] organized crime activities carried on either between two or more counties of this state or between this state and another jurisdiction"). I address these provisions below in Part IV.

24. EXEC. § 60(a) (McKinney, Westlaw through L. 2021) ("The head of the department of law shall be the attorney-general. . .").

tor . . . for the protection of people with special needs”²⁵ In particular, the statute authorized the special prosecutor to “prosecute offenses involving abuse or neglect . . . committed against vulnerable persons by custodians”²⁶

In time, the special prosecutor duly appointed by the governor brought criminal charges against three defendants in three unrelated cases. Each prosecution charged the defendant with having sexually abused a vulnerable person in the defendant’s care.²⁷ The defendants moved to dismiss the indictments against them, arguing that the statute effected an unconstitutional assignment of the prosecutorial power.²⁸ In each case, the trial court agreed with the defendant’s argument, and the Appellate Division affirmed.²⁹

The Court of Appeals granted the State leave to appeal and argue that the statute had no constitutional infirmity.³⁰ Solicitor General Barbara Underwood—arguing on behalf of the Attorney General, who had intervened below³¹—filed a brief urging the court to adopt a saving construction of the statute. She advanced the idea that the statute should be interpreted to include an implicit requirement that, “in order for the special prosecutor to act, the local District Attorney must (1) consent—perhaps even in writing—to the prosecution, and (2) retain the ultimate responsibility for that prosecution.”³²

A. *Separation of Powers Arguments*

The *Viviani* case turned on a separation-of-powers challenge. New York state constitutional law recognizes the importance of separation of powers. Much like its federal analog, the state constitution creates an executive branch, a legislative branch, and a judicial branch.³³ The New York Court of Appeals has highlighted the separation of powers among these “three coordinate and coequal

25. *Id.* § 552(2)(a) (McKinney, Westlaw through L. 2021). The full statutory title of the position was “special prosecutor and inspector general.” *Id.* That individual had the power to “investigate and prosecute” offenses.” *Id.*

26. *Id.*

27. *People v. Viviani*, 169 N.E.3d 224, (N.Y. 2021).

28. *Id.*

29. *See id.* at 228-29. Appeals in all three cases lay to the Third Department, which heard and decided the appeals separately.

30. *See id.* at 229.

31. *See* N.Y. EXEC. LAW § 71(1) (McKinney, Westlaw through L. 2021) (permitting the Attorney General to intervene to defend the constitutionality of a state statute).

32. *Viviani*, 169 N.E.3d at 232.

33. *See* N.Y. CONST., arts. III, IV, VI.

branches of government” as “the bedrock of the system of [state] government.”³⁴

But New York’s separation-of-powers jurisprudence is not limited to guarding the boundaries of the three branches of the government. In the 1913 case, *People ex rel. Wogan v. Rafferty*, the Court of Appeals explained that “the legislature may not transfer” to a different officer “any essential function of [an] office” that is established under the constitution.³⁵ It was under this notion of separation of powers that the Court of Appeals in *Viviani* invalidated the criminal cases brought by a gubernatorially-appointed prosecutor.³⁶ The court explained that the statute “deprives the elected District

34. *In re Maron v. Silver*, 925 N.E.2d 899 (N.Y. 2010).

35. 102 N.E. 582, 582 (N.Y. 1913).

36. *See Viviani*, 169 N.E.3d at 230 (“Here, we must consider whether the creation of the special prosecutor by the Legislature runs afoul of the rule set out in *Wogan*—namely, whether Executive Law § 552 takes an essential function from a constitutional officer and gives it to a different officer chosen in a different manner. We conclude that it does.”).

It bears noting that reliance on the *Wogan* test avoids the issue of whether New York state district attorneys, and for that matter the Attorney General, are executive branch actors. That issue is far from clear. On one hand, the constitutional article that purports to establish the state’s executive branch—Article IV, with the caption “Executive”—establishes only the offices of the Governor and Lieutenant Governor. *See* N.Y. CONST., art. IV. The office of the Attorney General is established under Article V (captioned “Officers and Civil Departments”), *see id.*, art. V, § 1, while the office of the district attorney is established under Article XIII (captioned “Public Officers”), *see id.*, art. XIII, § 13(a). On the other hand, it has been argued that the job of the state attorney general is inherently executive in nature. *See* Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 7-8 (1993); *see also* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2450-55 (2006) (discussing the general division of the executive branch in state governments). And there are sources—including the New York State Senate website and some caselaw—that speak of the Attorney General as part of the executive branch. *See* N.Y. State Senate, *Branches of Government in New York State*, <https://www.nysenate.gov/branches-government-new-york-state> [<https://perma.cc/S36A-N7CU>] (“The State Comptroller and the Attorney General are the other two elected officials who serve in the Executive Branch.”); *People ex rel. Spitzer v. Grasso*, 836 N.Y.S.2d 40, 51 (App. Div. 2007) (“As an elected representative of the executive branch, the Attorney General unquestionably is entitled to deference from the judiciary in the exercise of his powers.”), *aff’d*, 893 N.E.2d 105 (2008). Finally, at least one commentator has argued that New York state district attorneys are inherently executive branch actors. *See* Robert M. Pitler, *Superseding the District Attorneys in New York City—The Constitutionality and Legality of Executive Order No. 55*, 41 FORDHAM L. REV. 517, 545 (1973) (“The constitutional history of New York State demonstrates that a district attorney, despite his local election in the county in which he serves, is a state executive officer performing a state function and is therefore subject to the exercise of the governor’s executive power.”).

Attorneys of an essential function of their constitutional office . . . by vesting concurrent discretionary power in a different officer, appointed by the Governor,” and that, consequently, it “runs afoul of the rule set out in *Wogan*.”³⁷

The Court of Appeals then rebuffed the argument that section 552 was consistent with other statutes that authorize shifts of prosecutorial authority away from district attorneys. Most of these statutes vest the shifted prosecutorial power in the attorney general or somewhere else within the Department of Law. For example, Executive Law section 63(2) empowers the governor to “require[]” the attorney general or one of his or her deputies to prosecute criminal proceedings “as shall be specified in such requirement.”³⁸ Executive Law § 70-a establishes “within the department of law a statewide organized crime task force” charged with, among other things, “conduct[ing] investigations and prosecut[ing] organized crime activities carried on either between two or more counties of this state or between this state and another jurisdiction.”³⁹ While such delegations reduce the prosecutorial authority of district attorneys, they redirect that authority to actors who traditionally enjoy

37. *Viviani*, 169 N.E.3d at 230.

38. N.Y. EXEC. LAW § 63(2) (McKinney, Westlaw through L. 2021). Another subdivision of the same statute directs the attorney general, “[u]pon request of the governor, comptroller, secretary of state, commissioner of transportation, superintendent of financial services, commissioner of taxation and finance, commissioner of motor vehicles, or the state inspector general, or the head of any other department, authority, division or agency of the state,” to investigate and prosecute offenses “in violation of the law which the officer making the request is especially required to execute or in relation to any matters connected with such department.” *Id.* § 63(3); see *People v. Gilmour*, 773 N.E.2d 479, 483 (N.Y. 2002) (holding that, “[a] request made by the counsel of a department does not satisfy the requirements of Executive Law § 63(3) where there is no indication that the request was made at the express behest of the department head,” but otherwise upholding the statute). And yet another subdivision affords the attorney general discretion (without the governor’s action) to assume prosecutorial powers with respect to discrimination cases. See N.Y. EXEC. L. § 63(10) (empowering the attorney general to “[p]rosecute every person charged with the commission of a criminal offense in violation of any of the laws of this state against discrimination because of . . . race, creed, color, [or] national origin, . . . in any case where in his judgment, because of the extent of the offense, such prosecution cannot be effectively carried on by the district attorney of the county wherein the offense or a portion thereof is alleged to have been committed, or where in his judgment the district attorney has erroneously failed or refused to prosecute”).

39. EXEC. § 70-a(1)(a) (McKinney, Westlaw through L. 2021).

some criminal prosecutorial power—the attorney general or other actors within the Department of Law.⁴⁰

Other statutes do not shift prosecutorial authority from a district attorney to the attorney general or Department of Law, but instead shift authority from one district attorney’s office to another. A provision of the Judiciary Law calls for a central narcotics prosecutor for the five counties comprising New York City to be an assistant district attorney on the staff of one of the five district attorneys’ offices.⁴¹ Such a statute is unproblematic from a separation-of-powers perspective.

One statute vests prosecutorial authority not in the district attorney, attorney general, or Department of Law, but in a private attorney. A provision of the County Law empowers the superior court, in a case where the local district attorney is unavailable or precluded from appearing, to appoint a private attorney in that district attorney’s stead.⁴² But the Court of Appeals has explained that the statute is “designed narrowly by its terms and by its purpose to

40. See *Gilmour*, 773 N.E.2d at 481 (“From New York’s earliest history, the scope of the Attorney General’s powers has involved ‘splitting of the prosecution with local prosecuting officers.’” (quoting K.T.W. SWANSON, *THE BACKGROUND AND DEVELOPMENT OF THE OFFICE OF ATTORNEY GENERAL IN NEW YORK STATE* 163 (1954))).

41. See N.Y. JUD. LAW § 177-c (McKinney, Westlaw through L. 2021). Technically the statute applies to “[t]he district attorneys of the counties wholly contained in a city having a population of one million or more.” *Id.*

42. See N.Y. COUNTY LAW § 701(1) (McKinney, Westlaw through L. 2021). The statute also allows the court to appoint a district attorney from another county. The statute provides in full:

Whenever the district attorney of any county and such assistants as he or she may have shall not be in attendance at a term of any court of record, which he or she is by law required to attend, or are disqualified from acting in a particular case to discharge his or her duties at a term of any court, a superior criminal court in the county wherein the action is triable may, by order:

- (a) appoint some attorney at law having an office in or residing in the county, or any adjoining county, to act as special district attorney during the absence, inability or disqualification of the district attorney and such assistants as he or she may have; or
- (b) appoint a district attorney of any other county within the judicial department or of any county adjoining the county wherein the action is triable to act as special district attorney, provided such district attorney agrees to accept appointment by such criminal court during such absence, inability or disqualification of the district attorney and such assistants as he or she may have.

Id.

fill emergency gaps,”⁴³ and “should not be expansively interpreted.”⁴⁴

In the end, the Court of Appeals concluded that the statute at issue in *Viviani* went far beyond other New York statutes that diverted prosecutorial authority from district attorneys: “[T]here is simply no analogy . . . to Executive Law § 552’s creation of a state-wide prosecutor, appointed by the Governor, with concurrent prosecutorial authority over a set of enumerated crimes.”⁴⁵

B. Consent Arguments

The Court of Appeals turned next to the argument advanced by Solicitor General Barbara Underwood, on behalf of the attorney general, that the court should adopt a saving construction of section 552. Solicitor General Underwood argued that the statute should be read to include an implicit requirement that the appropriate district attorney approve of, and supervise, the special prosecutor’s prosecution.

The Court of Appeals rejected the solicitor general’s argument, reasoning that section 552’s particular statutory structure was inconsistent with the proposed saving construction. The statute emphasized the concurrent nature of jurisdiction over prosecution of crimes.⁴⁶ The notion that local district attorneys approved of, and retained supervision over, prosecutions undertaken by the special prosecutor was belied by the statute.

To be sure, the Court of Appeals has endorsed the maintenance of prosecutions for minor offenses by individuals outside the local district attorney’s office with the district attorney’s acquiescence. In *People v. Van Sickle*, the court upheld the prosecution for third-degree assault by a complaining witness.⁴⁷ And, in *People v. Soddano*, the Court upheld a state trooper’s taking the helm of a prosecution for a speeding ticket.⁴⁸ As the *Soddano* court explained, “District Attorneys, of course, retain the ultimate, nondelegable responsibility for prosecuting all crimes and offenses, but they may allow appearances by public officers or private attorneys so long as

43. *People v. Leahy*, 531 N.E.2d 290, 291 (N.Y. 1988).

44. *Id.* at 292 (“To allow the Special District Attorney to investigate and prosecute another or other cases arising out of an incident would violate the statute and the order of appointment and would change the character of the statutory limitation on this extraordinary authority.”).

45. *People v. Viviani*, 169 N.E.3d 224, 232 (N.Y. 2021).

46. *See id.* at 232-34.

47. 192 N.E.2d 9, 9 (N.Y. 1963).

48. 655 N.E.2d 161 (N.Y. 1995).

they are kept aware of all the criminal prosecutions in the county”⁴⁹

But the *Viviani* court explained that the requirement that district attorneys retain “ultimate responsibility” over prosecutions in their counties “was a limit or check on what authority the District Attorney could delegate under the controlling statutes,”⁵⁰ and thus “was not intended as a restriction on the Legislature or as justification for reading that language into other laws.”⁵¹ Thus, the court noted that its decision “does not affect that process for delegation of authority by the local District Attorney”⁵² at the same time that it rejected the viability of the solicitor general’s proposed interpretation. (Judge Rivera accepted the solicitor general’s proposed construction, but concurred in the result because the record did not show the requisite district attorney consent.⁵³)

While the Court of Appeals invalidated the provisions in the statute designed to delegate prosecutorial authority to the special prosecutor, it concluded that other provisions that the legislature would want left intact were properly severable from the invalidated provisions.⁵⁴ The court preserved provisions that vested non-prosecutorial functions in the special prosecutor, as well as provisions that allowed the special prosecutor to cooperate with, without interfering with, district attorneys’ efforts to protect against abuse or neglect of vulnerable persons.⁵⁵ However, it struck down the provisions that provided the special prosecutor with concurrent prosecutorial authority.⁵⁶

III. CRITIQUING *VIVIANI*: HISTORICAL PRACTICE, ACCOUNTABILITY, AND THE SOLICITOR GENERAL’S PROPOSED SAVING CONSTRUCTION

In order to understand how secondary prosecutor regimes can be constructed to withstand separation-of-powers attacks, it is imperative to assess the Court of Appeals’ legal arguments in *Viviani*.

49. *Id.* at 162.

50. *Viviani*, 169 N.E.3d at 233.

51. *Id.*

52. *Id.* at 233 n.5, 236 (Stein, J., concurring) (“The Court’s decision in the instant appeals does not limit or overrule *Soddano* and *Van Sickle*”).

53. *See id.* at 236-43 (Rivera, J., concurring).

54. *See id.* at 234.

55. *See id.* at 234-35.

56. *See id.* at 235.

In fact, the *Viviani* court reached the correct conclusion with respect to the statute, and the facts, there at issue. That said, there are a few critiques worth highlighting.

A. *Problems with the Viviani Court's Reasoning*

First, the application of the *Wogan* test—that the legislature may not transfer the essential function of a constitutional officer to a different officer—strikes an odd note in *Viviani*. After all, while district attorneys are indeed officers whose existence the state constitution demands, the constitution offers no delineation of their duties, obligations, and responsibilities. The determination of whether a delegation of power is impermissible becomes murky when the constitution does not identify an essential function against which to judge it.

Second, the Court of Appeals' attempt to define the limits that separation of powers imposes on the legislature is somewhat circular. In the absence of any express constitutional limit, the court adverted to historical practices that defined the district attorney's "essential function."⁵⁷ Obtaining constitutional limits from historical practices has been the subject of criticism, even in the context of the federal Constitution; history, after all, can be contested and interpreted differently.⁵⁸ But the *Viviani* opinion's reasoning raises issues beyond even these: It seeks in large measure to divine limits on legislative power to allocate prosecutorial authority circularly, by examining the history of legislative action to allocate prosecutorial power. One is left questioning why the precise limits lie where they do. In short, the court's approach fails to elucidate where these limits originate and how far they stretch.

B. *The Absence of Reliance on Democratic Accountability*

The Court of Appeals could have bolstered its reasoning by invoking notions of democratic accountability. In *New York v. United States*, Justice Sandra Day O'Connor's opinion for the United States Supreme Court held that a federal statute that obligated states either to take title of and dispose of radioactive wastes within their borders, or to adopt regulations designed by the federal govern-

57. See *supra* text accompanying notes 35-37.

58. Compare, e.g., *United States v. Watson*, 423 U.S. 411, 418-23 (1976) (discussing historical practices to support the constitutionality of warrantless arrests in public), and *id.* at 429 (Powell, J., concurring) (lauding the majority opinion's historical analysis, explaining that "logic sometimes must defer to history and experience"), with *id.* at 442 (Marshall, J., dissenting) (arguing that reliance on historical practice "is not substitute for reasoned analysis").

ment, was an unconstitutional “commandeering” by the federal government of state governments.⁵⁹ In so doing, Justice O’Connor emphasized the danger that commandeering can mislead voters as to which government—state or federal—is taking an action and, indeed, which government has responsibility for the problem in the first place:

[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.

But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.⁶⁰

To be sure, the Supreme Court in *New York v. United States* was addressing questions of vertical separation of powers. Indeed, in the federal system, the question raised in *Viviani* could not give rise to concerns of democratic accountability, since the district attorneys (U.S. Attorneys in the federal system) are appointed by the president, not elected;⁶¹ only the president is elected.⁶²

Nevertheless, the concerns that animated Justice O’Connor’s opinion in the *New York* case also arise in the context of New York’s Executive Law § 552. In New York, the governor is elected state-

59. 505 U.S. 144, 174-77 (1992).

60. *Id.* at 168-69; see also *Nat’l Fed’n of Ind. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012) (plurality opinion) (“Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system.”).

61. See Nash, *supra* note 7, at 155 (describing the appointment system, including very limited exceptions).

62. See U.S. CONST., art. II, § 1.

wide, and the district attorney is elected by voters in the county in which the district attorney serves. Here, then, there is an analogous risk of confusion over which official bears responsibility for action (or inaction). In this sense, Executive Law § 552 may leave voters who are dissatisfied over prosecutorial records—whether those who think there have been too many or too few prosecutions (or, too few successful prosecutions)—uncertain as to whether the Governor or district attorney is to blame.

Note, moreover, that the constitutional rule prohibiting “double jeopardy” furthers confusion over which official bears responsibility for prosecutorial action, inaction, or failure. The federal Constitution’s Double Jeopardy Clause prohibits government prosecution of the same individual for the same crime more than once.⁶³ Since the Supreme Court has incorporated the Double Jeopardy Clause against the states,⁶⁴ the Clause prohibits New York from conducting multiple prosecutions of the same person for the same crime.

But the prosecutorial power of the local district attorneys and the prosecutorial power drawn upon by the special prosecutor under Executive Law § 552 both derive from the state’s prosecutorial power. Hence, a prosecution commenced by the local district attorney precludes a subsequent prosecution by the special prosecutor, and a prosecution commenced by the special prosecutor precludes a subsequent prosecution by the local district attorney. (Indeed, in a situation where both the local district attorney and the special prosecutor are contemplating prosecutions, one can imagine the prosecutors “racing” to swear in the jury in order to trigger criminal jeopardy,⁶⁵ thus precluding the other prosecutor from moving forward.) Voters, however, might not understand this dynamic; they might wonder why, for example, where a special prosecutor’s case has resulted in acquittal, the local district attorney does not pursue her own prosecution.

Two points here are worthy of note. First, seen through the lens of democratic accountability, the solicitor general’s saving con-

63. See U.S. CONST., amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . .”).

64. See *Benton v. Maryland*, 395 U.S. 784, 793-96 (1969).

65. See *Martinez v. Illinois*, 572 U.S. 833, 839 (2014) (“There are few if any rules of criminal procedure clearer than the rule that ‘jeopardy attaches when the jury is empaneled and sworn.’” (quoting *Crist v. Bretz*, 437 U.S. 28, 35 (1978))); N.Y. CRIM. PROC. LAW § 40.30 (McKinney, Westlaw through L. 2021); see also 7 LAWRENCE K. MARKS ET AL., N.Y. PRAC., N.Y. PRETRIAL CRIMINAL PROCEDURE § 2:2 (2d ed. 2021) (noting that the New York statute follows federal law).

struction argument takes on additional value. The notion that the local district attorney must consent to, and retain control over, any prosecution makes it easier for local voters to know who ultimately bears responsibility for the prosecution.⁶⁶ And it clarifies the confusion otherwise cast by the Double Jeopardy Clause by identifying a single prosecutor who bears responsibility. In other words, the saving construction offered by the solicitor general furthers democratic accountability.

The *Viviani* court did not reject the notion that hinging the special prosecutor's ability on the local district attorney's consent furthers democratic accountability. The court did not dismiss the saving construction as unjustifiable; it simply concluded that the statute itself did not admit to that construction.⁶⁷

Second, even with consent in place, the choice to vest prosecutorial authority in a gubernatorial appointee is odd. Even if they appreciate their local district attorneys as primary prosecutors, voters presumably understand that the attorney general has some role in law enforcement. In theory, state voters may have at least some familiarity with assessing the attorney general's prosecutorial decisions and successes. But the same cannot be said of the governor.

In sum, the *Viviani* decision leaves open the possibility of the legislature "fixing" the statute by explicitly calling for such consent. The legislature should take up that invitation, but vest secondary prosecutorial authority in the office of the attorney general rather than in the office of the governor.

IV. BEYOND *VIVIANI*: THE FUTURE OF SECONDARY PROSECUTORS

The Court of Appeals' decision in *Viviani* raises the broader question of when "secondary prosecutors" might be appropriate. I turn to that question in this Part. The inquiry involves both doctrinal and normative considerations. I first set out a taxonomy of secondary prosecutors by settings. I then consider lessons we can draw from the taxonomy.

66. See *supra* notes 18-19 and accompanying text.

67. Even Judge Rivera, who accepted the solicitor general's argument, did not reach a different conclusion in the *Viviani* case, since the record provided no evidence of consent on the part of the district attorneys. See *supra* text accompanying note 53.

A. *Taxonomy of Secondary Prosecutors*

What is a secondary prosecutor?² A secondary prosecutor allows for more prosecutions to take place than the sitting district attorney is willing to, or can, undertake. In different settings, there are different actors who may favor a secondary prosecutor—sometimes including the district attorney herself, and sometimes not.

Table 1 presents a taxonomy of situations where a secondary prosecutor might be appropriate. It also categorizes each situation with respect to the likely cooperation or acquiescence of the local district attorney.

TABLE 1: Taxonomy of secondary prosecutors.

Justification for secondary prosecutor	Likelihood of DA approval
Lack of resources	High
Low priority/lack of political will	Neutrality/ambivalence
Affirmative refusal of DA to prosecute	Likely none
Need for coordination across jurisdictions	Likely
Lack of expertise	Likely
Necessity	Irrelevant

Consider first the setting where the local district attorney would like to pursue certain prosecutions but lacks the resources to do so.⁶⁸ Here, one would expect the district attorney to welcome the opportunity to have anybody—or at least anyone capable of obtaining a favorable result—handle the prosecution. And, accordingly, one would expect the district attorney to grant any requisite consent. Examples of this include the practice (noted above) of allowing state troopers and interested parties to prosecute minor offenses.⁶⁹

68. I assume an overall resource constraint that forces the district attorney to choose among competing initiatives.

69. Other jurisdictions are more open to allowing private individuals to pursue prosecutions. See Nash, *supra* note 7, at 159; Peter Kendall, *A Prosecutor Says No to a Rape Charge, so a College Student Calls Her Own Grand Jury*, WASH. POST (May 19, 2021), https://www.washingtonpost.com/national/a-prosecutor-says-no-to-a-rape-charge-so-a-college-student-calls-her-own-grand-jury/2021/05/18/2ea9a130-b766-11eb-a5fe-bb49dc89a248_story.html?fbclid=IWAR1f_WXduyY7ROPY0b

A second setting is where the district attorney considers a certain set of prosecutions to be low-priority, or otherwise lacks the political motivation to pursue such prosecutions. Perhaps, for example, the district attorney is not opposed to such prosecutions, but has higher priorities. Or, more cynically, perhaps the district attorney's supporters and campaign contributors are more interested in other types of prosecutions. In such instances, even if the district attorney has resources to pursue a prosecution, he or she would be neutral or ambivalent about doing so. It follows that the district attorney might be neutral or ambivalent about granting consent for someone else to pursue a prosecution. In order to avoid this quandary, one might expect to see statutes that do not require consent. An example of a statute falling under this setting would include a statute authorizing the attorney general to prosecute criminal offenses in violation of antidiscrimination laws where "prosecution cannot be effectively carried on by the district attorney" or where in the attorney general's "judgment the district attorney has erroneously failed or refused to prosecute."⁷⁰ Another is a statute providing that "the attorney-general shall assign one or more of his deputies to take charge of prosecutions under the election law" in the event that "the governor shall advise the attorney-general that he has reason to doubt whether in any county the law relating to crimes against the elective franchise is properly enforced."⁷¹ (These statutes can also be seen to fall within—and indeed may effectively fall within—the next setting.)

The next setting—more extreme than the last one—is one where the district attorney affirmatively declines to undertake prosecutions with respect to certain persons, or under certain statutes. A statute that applies in this setting empowers the governor to "require" the attorney general to maintain criminal prosecutions in a

7Uz8jr1AHbHf4KUIokhMzEug-koXIQvC6Hrjh-mg0 [https://perma.cc/TTY3-KVEK].

70. N.Y. EXEC. LAW § 63(10) (McKinney, Westlaw through L. 2021) (empowering the attorney general to "[p]rosecute every person charged with the commission of a criminal offense in violation of any of the laws of this state against discrimination because of race, creed, color, or national origin, in any case where in his judgment, because of the extent of the offense, such prosecution cannot be effectively carried on by the district attorney of the county wherein the offense or a portion thereof is alleged to have been committed, or where in his judgment the district attorney has erroneously failed or refused to prosecute").

71. *Id.* § 70 (providing that, "[w]henver the governor shall advise the attorney-general that he has reason to doubt whether in any county the law relating to crimes against the elective franchise is properly enforced, . . . the attorney-general shall assign one or more of his deputies to take charge of prosecutions under the election law").

county “as shall be specified in such requirement.”⁷² The statute makes clear that the local district attorney is displaced to whatever extent deemed appropriate by the attorney general.⁷³ Indeed, so clear is it that the statute contemplates displacement of the local prosecutor that it specifies that, “[i]n all such cases all expenses incurred by the attorney-general, including the salary or other compensation of all deputies employed, shall be a county charge.”⁷⁴ It should come as no surprise that the statute does not call for district attorney assent.

The next setting is one where there is a benefit to be had from coordinating prosecutions across jurisdictions. An example of a statute falling here is the statute that allows for a joint narcotics prosecutor for the five counties comprising New York City.⁷⁵ One would expect consent from the relevant district attorneys to be forthcoming here.

Another setting where one would expect consent to be forthcoming is one where local district attorneys are less likely to have relevant expertise. The statute authorizing the joint New York City narcotics prosecutor is an example here, as well.⁷⁶ One might think that narcotics prosecutions might benefit from a single narcotics prosecutor with expertise in the area (and expertise to be gained as she continues to serve in the position), as well as expertise about the sizeable narcotics trade that doubtless thrives across New York City’s counties.

A final setting is one driven by necessity: The local district attorney is unavailable or disqualified from appearing and conducting prosecutions. Here, a statute (noted above) empowers the courts to appoint in the district attorney’s stead a private attorney or a district attorney from another county.⁷⁷ The consent of the district attorney is irrelevant.⁷⁸

72. *Id.* § 63(2).

73. *Id.* (explaining that in such cases, “the attorney-general or his deputy . . . shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform”).

74. *Id.*

75. *See supra* note 41 and accompanying text.

76. *See id.*

77. *See supra* note 42 and accompanying text.

78. *In re Schumer v. Holtzman*, 454 N.E.2d 522 (N.Y. 1983), is illustrative. There Elizabeth Holtzman, a former member of Congress and a newly-elected district attorney had taken it upon herself to appoint a special district attorney (David Trager, then the Dean of Brooklyn Law School and subsequently a federal district judge for the Eastern District of New York) to investigate and potentially prosecute

B. *Lessons from the Taxonomy*

The taxonomy of secondary prosecutors allows us to see how the law ideally would deploy district attorney consent to preserve democratic accountability over the prosecutorial process. Only where prosecutorial consent is irrelevant (where the prosecutor is unavailable or disqualified) or predictably not forthcoming (where the prosecutor is unwilling or unable to prosecute justice might be seen to demand) is consent not required. In those settings, it is important to balance accountability against the potentially greater need to ensure the availability of a viable prosecutor. (That said, people might debate how strong the “need” really is in any given setting.)

Note that the taxonomy also speaks to the divide in New York (and many other states) between localized and centralized control over prosecutorial discretion. New York state defaults to local control. And, except for the appointment of a special prosecutor when the district attorney is unavailable or disqualified, New York statutes demand (in the absence of district attorney consent) affirmative action by some statewide officer—the governor or the attorney general.

Considering Executive Law § 552—the statute at issue in *Viviani*—in the context of the taxonomy presented in Table 1, the district attorneys’ failure to prosecute those who abuse vulnerable

Charles Schumer (now the senior Senator from New York), who had been elected to Holtzman’s former congressional seat, concerning Schumer’s “allegedly improper use of State employees during the congressional campaign.” *Id.* at 523. Holtzman “believed she might be accused of bias or the appearance of bias against petitioner based upon past political differences with him and because she thought some of her former congressional staff might be witnesses in such an investigation.” *Id.* On this basis, she asked then-Governor Mario Cuomo to remove her from the matter under Executive Law § 63(2); when he refused, she named the special district attorney.

Upon Schumer’s petition, the Court of Appeals invalidated the appointment of the special district attorney since it was not authorized by law: Such a transfer of power could be effective only if it had been accomplished by executive order (under section 63(2)) or by court order (under County Law § 701); since it was not, it was invalid. *See id.* at 525.

Beyond that, however, the Court of Appeals rejected Schumer’s argument that the court was obligated to name a special prosecutor to proceed in Holtzman’s stead: “The courts, as a general rule, should remove a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence . . . and the appearance of impropriety, standing alone, might not be grounds for disqualification. The objector should demonstrate actual prejudice or so substantial a risk thereof as could not be ignored.” *Id.* at 526 (citations omitted).

individuals is likely the result of (i) a lack of resources, (ii) a lack of political will, or (iii) a lack of expertise. Consistent with the solicitor general's argument, three of these settings typically call for—and anticipate the ready availability of—district attorney consent for an outside prosecutor. This suggests that it would be valuable for the legislature to redraft Executive Law § 552 to incorporate the solicitor general's suggestion of requiring consent. It seems, however, that it would be easier—and certainly more in keeping with practice under other statutes—to vest prosecutorial authority with the attorney general or the Department of Law, rather than a prosecutor appointed by the governor.⁷⁹

V. THE INTERPLAY BETWEEN PROGRESSIVE PROSECUTORS AND SECONDARY PROSECUTORS

The focus that the taxonomy of secondary prosecutors in the previous Part draws upon local democratic accountability and prosecutorial control raises an issue at the forefront of many conversations about public prosecutors today: the progressive prosecutor. Progressive prosecutors are prosecutors elected on a platform of not pursuing prosecutions of lower-level crimes, and taking steps to remedy what they perceive to be the disproportionate effects of the criminal justice system on people of color.⁸⁰ While fuller discus-

79. It seems perhaps that the decision to vest prosecutorial power in a gubernatorial appointee (as opposed to the Attorney Section or more generally in the Department of Law) was based at least in part on the fact that section 552 vested the prosecutorial power in tandem with investigative power, *see supra* note 25. The fact that the investigative power remains intact in a gubernatorial appointee after the decision in *Viviani*, *see supra* text accompanying note 55, may argue in favor of once again vesting prosecutorial power in a gubernatorial appointee (but subject to district attorney consent) were the statute reenacted. But the standard path seems to be vesting prosecutorial power in the attorney general or the Department of Law; and if housing the investigative and prosecutorial power in the same place is important, then it seems that the legislature could simply shift the investigative power to the attorney general or Department of Law.

80. For media coverage, *see*, for example, Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS (Aug. 19, 2019), <https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286> [<https://perma.cc/VU67-QHBC>]; Cheryl Corley, *Newly Elected DAs Vow to Continue Reforms, End Policies Deemed Unfair*, NPR (Nov. 26, 2020), <https://www.npr.org/2020/11/26/938425725/newly-elected-das-vow-to-continue-reforms-end-policies-deemed-unfair> [<https://perma.cc/366S-J5GK>].

sion of the topic must (and does) lie elsewhere,⁸¹ it is worth noting that local democratic accountability and local prosecutorial primacy make progressive prosecutors a realistic possibility. At the same time, the fact that criminal laws are promulgated and subject to revision by the state legislature (with the assent of the governor, unless a veto has been overridden) creates the possibility of a conflict between a local progressive prosecutor and statewide interests that may lie elsewhere.⁸² Such conflicts recently arose in Florida and Pennsylvania,⁸³ and seem likely to spread with the election of more progressive prosecutors.⁸⁴

New York Executive Law § 63(2) allows for statewide officials to limit the progressive tendencies of a local prosecutor: The governor can “require” the attorney general to assume prosecutorial responsibilities. Other states offer similar opportunities for state officials to supersede local prosecutors.⁸⁵

81. For discussion, see, for example, *Symposium on Progressive Prosecution: Legal, Empirical, and Theoretical Perspectives: When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719 (2020); *Symposium, Prosecutorial Elections: The New Frontline in Criminal Justice Reform*, OHIO ST. J. CRIM. L. 1 (2021); Kay L. Levine, *Should Consistency Be Part of the Reform Prosecutor’s Playbook?*, 1 HASTINGS J. CRIME & PUNISHMENT 169 (2020).

82. See Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 565 (2020) (“[T]ensions [between local and statewide interests] have occasionally risen to the surface, as when governors or state attorneys general have sought to remove jurisdiction over certain cases from local prosecutors whom they believe are not duly enforcing the state’s laws.”).

83. See Tyler Quinn Yeagain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 97-98 (2018) (discussing effort by the Florida Governor, approved by the state supreme court, to remove a progressive district attorney from a case because of a stated blanket refusal to invoke the death penalty); Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, THE INTERCEPT (July 8, 2019), <https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/> [<https://perma.cc/2SUQ-92NW>].

84. See Yeagain, *supra* note 83, at 107-10 (predicting the election of more progressive prosecutors based on shifting public opinion and campaign financing by interest groups); Nicholas Goldrosen, *The New Preemption of Progressive Prosecutors*, 2021 U. ILL. L. REV. ONLINE 150, 151-52 (cataloging such legislative proposals across several states).

85. See Yeagain, *supra* note 83, at 110-26 (offering a fifty-state survey).

Another option for a state legislature seeking to curb a progressive prosecutor’s discretion is something common in other countries but not the United States: The legislature could also consider implementing a strategy more common in other countries: adding language mandating prosecution to criminal statutes, although this strategy leaves prosecutors with the ability to manipulate the triggers for mandatory prosecution (for example, to conclude that the evidence is insufficient to warrant prosecution). For discussion, see for example, Kay Levine & Mal-

A famous example of this in New York—and perhaps a precursor to the current proliferation of progressive prosecutors—occurred when Governor George Pataki assumed office and followed through on a campaign promise to restore New York’s death penalty.⁸⁶ When a police officer was killed in the Bronx, Governor Pataki urged then-Bronx District Attorney Robert Johnson to seek the death penalty for the alleged gunman.⁸⁷ While D.A. Johnson announced his intent to invoke the time period afforded him under New York’s death penalty law to decide whether to seek capital punishment,⁸⁸ Governor Pataki—citing D.A. Johnson’s stated opposition (including in campaign statements) to capital punishment⁸⁹—acted under Executive Law § 63(2) to remove D.A. Johnson from the case and replace him with then-Attorney General Dennis Vacco.⁹⁰

D.A. Johnson, as well as voters and taxpayers in the Bronx, sued, seeking to restore D.A. Johnson to the criminal case,⁹¹ but the Court of Appeals ultimately upheld Governor Pataki’s action. The court first explained that, as a general matter, actions taken by a governor by Executive Order pursuant to a “valid grant of discretionary authority” are “largely beyond judicial review.”⁹² Moreover, the invocation of Executive Law § 63(2) does not by its terms require a reason.⁹³ Second, to whatever extent the judiciary could require the governor to provide a reason and examine that reason,

colm Feeley, *Prosecution*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 210, 213 (Neil J. Smelser & Paul B. Baltes eds., 2015).

86. See James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Seeks Justice Served*, N.Y. TIMES (Mar. 8, 1995) (“Gov. George E. Pataki fulfilled one of his central campaign vows today by signing a death penalty bill into law . . .”), <https://www.nytimes.com/1995/03/08/nyregion/death-penalty-in-new-york-reinstated-after-18-years-pataki-sees-justice-served.html> [https://perma.cc/6938-X2FD].

87. See Clifford Krauss, *Shootout in the Bronx: The Overview – 3 Men Held in Killing of Officer, Bringing Calls for Death Penalty*, N.Y. TIMES (Mar. 16, 1996) <https://www.nytimes.com/1996/03/16/nyregion/shootout-bronx-overview-3-men-held-killing-officer-bringing-calls-for-death.html> [https://perma.cc/XME7-J4SW].

88. See *In re Johnson v. Pataki*, 691 N.E.2d 1002, 1011-12 (N.Y. 1997) (Smith, J., dissenting).

89. See *id.* at 1003 (describing the Governor’s order as noting that “the District Attorney’s statements, correspondence and swift rejection of the death penalty option in prior death-eligible cases indicated that the District Attorney had adopted a ‘blanket policy’ against imposition of the death penalty”); *id.* at 1011 (Smith, J., dissenting) (describing in greater detail D.A. Johnson’s statements).

90. *Id.* at 1003; *id.* at 1012 (Smith, J., dissenting).

91. *Id.* at 1004.

92. *Id.*

93. See *id.* at 1005.

the court held that the governor had provided an adequate reason: “[T]he challenged Executive Order expresses the Governor’s executive judgment that there was a threat to faithful execution of the death penalty law that supported this particular superseder.”⁹⁴

It seems, in short, that—normative arguments to the contrary notwithstanding⁹⁵—Executive Law § 63(2) provides the basis for a secondary prosecutor who might counter (at least in some cases) a progressive prosecutor’s tendencies.⁹⁶ By requiring the governor to initiate any action and by vesting responsibility for prosecution not in the governor’s office but in the attorney general, the statute essentially assures that a local district attorney will only be displaced where the governor prefers how the attorney general would deal with the prosecution at issue to the preferences of the district attorney. One can thus expect the statute would be used to curb a progressive prosecutor only where both the governor and attorney general are considerably less progressive than the district attorney.⁹⁷

94. *See id.* at 1007.

95. For example, Professor Ronald Wright describes the “critique” that progressive prosecutors “invade the legislature’s role when they make prospective categorical judgments about which crimes are worth prosecuting and which are not,” Ronald F. Wright, *Prosecutors and Their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823, 836–37 (2020), and responds to it (in part) thus:

[I]t ignores traditional practices of local chief prosecutors, who commonly formulate general guidance for their line prosecutors about when to decline charges. For decades, prosecutor offices have issued policy guidance to line prosecutors, including policies that instruct prosecutors to decline charges for “joyriding” or to ignore theft or destruction of property cases that fall below a designated level of property loss. The policies are prospective and categorical. If categorical declinations are not part of the prosecutor’s job, that would be news to the prosecutors themselves.

Id. at 836-37 (footnotes omitted).

96. *See* Goldrosen, *supra* note 84, at 153 (“The preemption of progressive prosecutors is, in many respects, simply state legislators turning the weaponry of the new preemption toward a new target.”). Florida has issued similar holdings with respect to analogous statutes. *See* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 199 (2019); Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 619–20 (2020) (discussing the New York and Florida statutes and cases).

97. From a social science perspective, one would say that the statute affords the governor the power to “set the agenda” by choosing between having the prosecution conducted by the local district attorney or the attorney general. Theory predicts that the governor will select the actor with ideal point closer to his or her own. *See generally* Thomas Romer & Howard Rosenthal, *Bureaucrats Versus Voters: On the Political Economy of Resource Allocation by Direct Democracy*, 93 Q.J. ECON. 563, 564 (1979).

The availability of a backstop against a progressive prosecutor (even if the backstop will be effective only under certain political alignments) may lead supporters of progressive prosecutors to ask the reverse question: Why is there no backstop available against a local district attorney who enforces the law more strictly than state-wide authorities prefer? One answer here is that nothing in Executive Law § 63(2) precludes its availability where the local district attorney is (from the viewpoint of the governor) *over*-prosecuting. The governor could invoke section 63(2) with the hope and expectation that the attorney general will bring lesser charges, or opt not to prosecute at all.

Beyond that, there are tools to rein in what statewide actors might see as an overzealous prosecutor. For one thing, the state legislature (with the aid of the governor, unless they can override a veto) can restrict the state criminal code. (Note that this form of relief is unavailable in response to a progressive prosecutor: Strengthening the criminal code will be of no effect.) For another thing, the governor has the option of exercising the constitutional “power to grant reprieves, commutations and pardons after conviction. . . .”⁹⁸ Finally, a prosecutor who transgresses legal lines in undertaking prosecutions may subject herself to statutory and constitutional allegations of malicious prosecution.⁹⁹

VI. CONCLUSION

This Essay has analyzed the consistency of secondary prosecutor regimes with separation-of-powers concerns through the lens of the Court of Appeals’ decision in *Viviani*, with particular attention

One might think that the attorney general would exhibit a certain fealty to or camaraderie with the local district attorney as a fellow prosecutor. But the reality is that most attorneys general aspire to higher political office—often governor. *See, e.g.,* Tara Leigh Grove, *Justice Scalia’s Other Standing Legacy*, 84 U. CHI. L. REV. 2243, 2254 (2017). Indeed, such has been the case in the recent past in New York.

98. N.Y. CONST., art. IV, § 4. For a recent example of a promise to pardon upon conviction (albeit in the context of a prosecution originally begun by a progressive prosecutor), *see* Jim Salter & Heather Hollingsworth, *Judge: Case Against McCloskeys Won’t Go Back to Grand Jury*, ASSOCIATED PRESS (Apr. 30, 2021), <https://apnews.com/article/st-louis-mccloskey-guns-b40ea1ee046ed658da2ee7adfd80f07f> [<https://perma.cc/3TPF-8V8Z>] (in case originally brought by progressive prosecutor against couple who brandished weapons toward protesters, noting that “Missouri Gov. Mike Parson has vowed to issue pardons if they are convicted”). Of course, the mere fact that an individual must face trial (even with some assurance of a pardon thereafter if there is a guilty verdict) exacts its own costs.

99. *See* Goldrosen, *supra* note 84, at 154-55.

to the court's reaction to the solicitor general's normatively attractive (if statutorily incompatible) argument. It has critiqued the Court of Appeals' reasoning as relying too heavily on historical practice and too little on the important issue of democratic accountability. In addition, this Essay has offered a taxonomy of secondary prosecutors. The taxonomy suggests that local district attorney consent, which is critical to democratic accountability and was central to the solicitor general's argument in *Viviani*, is—and indeed should be—a regular feature in statutes authorizing secondary prosecutors. However, the taxonomy also indicates that consent is and should be balanced against the need for a secondary prosecutor in some settings. The Essay anticipates that secondary prosecutors may play a role in reining in the effects of progressive tendencies of some prosecutors, though the circumstances in which that can happen are limited.

Finally, it is worth noting that the mere fact that the attorney general—having intervened in the case—did not blindly take up the position that the governor's appointment of the special prosecutor was constitutional. Rather, the attorney general's position—as advanced by the solicitor general—was more nuanced. In other words, the arguments in the *Viviani* case confirm the importance of, and the continuing vitality of, separation of powers even between actors nominally within the same overarching branch of government.