INTERPRETING THE SEPARATION OF POWERS IN STATE CONSTITUTIONS

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To understand the separation of powers in the American states, one must be willing to explore the nature of state constitutions, their historical development, and their underlying ideas, without preconceptions derived from familiarity with the separation of powers on the national level. This exclusive focus on the development of state constitutions and the ideas underlying them is fundamental to interpreting the separation of powers in state governments, because the political systems created by these documents are distinct from each other and the Federal Constitution. In addition, American state constitutions and the political systems they created have changed dramatically over the nation's history.[1] The most cursory examination of state constitutions confirms how distinctive state constitutions and governments are. The Federal Constitution restricts the federal government both by imposing prohibitions on the government and by granting the government only limited powers.[2] Under state constitutions, by contrast, the second restriction is largely missing, and thus the states exercise plenary legislative power. The only limits will be the prohibitions

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1. On the development of state constitutions over time, see generally Daniel J. Elazar, *The Principles and Traditions Underlying Constitutions*, 12 PUBLIUS 11 (1982), G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998), and TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

2. Thus, the Federal Constitution enumerates the legislative powers of Congress and limits Congress to those "legislative Powers herein granted." U.S. CONST. art. I, § 1. The limited powers conferred on the Federal Government are confirmed by the Tenth Amendment. The Constitution also prohibits what the Government can do in Article I, Section 9, in the Bill of Rights, and in various subsequent amendments.

inserted into state constitutions.[3] This in turn has encouraged a proliferation of such prohibitions, not only on *what* state governments can do but also on *how* the governments may do them.[4] Does this affect the operation of state government? Clearly it does.

Put differently, despite the superficial similarities, state governments are not merely miniature versions of the national government—or at least need not be. As Justice Oliver Wendell Holmes observed in *Prentis v. Atlantic Coast Line Co.*, the Federal Constitution does not impose separation-of-powers restrictions on the states.[5] Thus, insofar as the text, history, and animating ideas of state constitutions are distinctive, they can afford a basis for state-specific institutional arrangements and relationships. This may sound familiar, particularly to anyone who has followed the scholarly and judicial debates over the new judicial federalism.[6] State courts *may* follow federal precedent in interpreting state provisions dealing with the structure and operation of state government, just as they *may* follow federal precedent in interpreting state declarations of rights. However, state courts are under no obligation to do

3. The plenary character of state legislative power has long been recognized. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 175–79 (8th ed. 1927) (discussing the character of state legislative power and listing supporting cases). For indications that the situation may be more complicated than it initially appears, see Walter F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201, 205–06 (1915) and Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178–79 (1983).

4. *See, e.g.*, NEB. CONST. art. III, § 14; N.M. CONST. art. IV, §§ 15–21. For an overview of these limitations and their genesis, see CHARLES CHAUNCEY BINNEY, RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS 6–7 (1894).

5. 211 U.S. 210, 225 (1908). *Prentis* involved the constitutionality of the Virginia State Corporation Commission exercising legislative and executive, as well as judicial powers. Similarly, in *Bush v. Gore*, 531 U.S. 98 (2000), Chief Justice Rehnquist in his concurrence noted that "in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law." *Id.* at 112 (Rehnquist, C.J., concurring).

6. The new judicial federalism refers to the reliance by state courts on state declaration of rights to provide greater protection for rights than is available under the Federal Constitution. *See* G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS 63 (1994) (offering an overview of the development of the new judicial federalism). For discussion of the debates over the legitimacy of the new judicial federalism, see generally Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984), and TARR, *supra* note 1, at 201-05. For a comprehensive survey of state rulings interpreting state declarations of rights, see JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES (2d ed. 1996).

so. There is no more reason for a lockstep jurisprudence in interpreting the structural provisions of state constitutions than a lockstep jurisprudence in interpreting their rights guarantees.[7] In fact, Robert Schapiro of Emory University has argued persuasively that there is even less reason to follow the federal lead in interpreting structural provisions.[8] Whether it is appropriate to follow the federal lead in any particular instance will depend on how well federal doctrine fits the quite different institutional and political context in the states. And, of course, speaking of "the federal lead" raises crucial preliminary questions: Are the federal courts in fact leading? And if they are, are they leading in a direction that one wishes to travel?[9]

There is a suspicion, sometimes well-founded, that scholars are in love with complexity or that they insist things are complex so as to make their services indispensable. But in this instance the situation is even more complicated than my initial distinction between federal and state constitutions might suggest. State constitutions are not all the same, and the constitutional history of Arizona or Alabama is very different from that of, say, Massachusetts or Montana.[10] Interstate differences in size, in history, and in

7. "Lockstep jurisprudence" refers to a decision by state courts to defer to federal judicial interpretations, that is, to interpret state constitutional provisions in the same way that federal courts—and particularly the U.S. Supreme Court—have interpreted analogous provisions of the Federal Constitution. For a defense of the lockstep approach, see Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98 (1988). For criticism of the lockstep approach, see Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997), and Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343 (1993). For a thoughtful judicial perspective on state constitutional jurisprudence generally, see Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1995).

8. *See* Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79 (1998).

9. To speak of "the federal lead" is, of course, to simplify matters somewhat. Use of that phrase assumes that a state court, faced for the first time with the interpretation of a state constitutional provision, has available to it a U.S. Supreme Court interpretation of an analogous provision. Neither the absence of state precedent nor the presence of federal precedent is assured.

10. Massachusetts, for example, has had a single constitution, the nation's oldest constitution, adopted in 1780. *See* Massachusetts Citizen Information Service, *Historical Sketch*, *at* http://www.state.ma.us/sec/cis/cismaf/mf2.htm (last visited Mar. 1, 2003). Montana adopted its initial constitution in 1889, but replaced it with a modern constitution in 1972. *See The Blessings of Liberty: Montana's Constitutions*, *at* http://www.his.state.mt.us/departments/Library-Archives/exhibits/constitution.html (last visited Mar. 1, 2003). Arizona retains its original constitution,

demographics have fueled claims that the states have developed distinct political and legal cultures.[11] I suspect that those claims are true.[12] Whether or not they are, what is indisputable is that today's state constitutions were established at various points in the nation's history, reflecting the political ideas reigning at those particular points in time, and that this in turn has affected the institutions that were created and the relationships established among them.[13] Even within specific states, one can trace how the constitutional text has changed over time to reflect shifting political ideas. A comparison of the antebellum, Reconstruction, and post-Reconstruction Louisiana constitutions illustrates this; so does a comparison of the "copper collar" Montana Constitution of 1889 and its successor in 1972.[14] Virtually every state's constitution reflects similar changes in orientation. As a result, those interpreting state constitutions must be prepared to act as constitutional geologists, examining the textual layers from various eras in order to arrive at their interpretations.[15]

Consider how this might affect the interpretation of state provisions involving the structure and operation of state government. Even if a state's initial constitution embodied a particular understanding of the separation of powers at the time of its adoption, constitutional amendments and constitutional revision may have introduced provisions reflecting a distinct and perhaps inconsistent constitutional vision. Thus, in interpreting the state constitution,

adopted in 1912. *See The Arizona Constitution*, http://www.uapress.arizona.edu/samples/mccund-ch1.pdf (last visited Mar. 1, 2003). Alabama has had six constitutions, with its most recent adopted in 1901, but it is currently contemplating replacing it. *See An Overview of Alabama's Six Constitutions*, *at* http://www.legislature.state.al.us/misc/history/constitutions/constitutions.html (last visited Mar. 1, 2003). For information on that reform effort, see the web site of the Alabama Citizens for Constitutional Reform (ACCR) at www.constitutionalreform.org.

11. *See* DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (3d ed. 1984).

12. This issue has produced considerable debate among state constitutional scholars. *See, e.g.*, James Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219 (1998); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389 (1998).

13. For data on the dates of adoption of state constitutions, see COUNCIL OF STATE GOVERNMENTS, 34 BOOK OF THE STATES 14–15 (2002). For discussion of state constitutional development and the ideas underlying it, see generally TARR, *supra* note 1, chs. 3–5.

14. *See generally* LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 1–24 (2001); LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE 3–12 (1991).

15. *See* TARR, *supra* note 1, at 201–05.

one must account for historical development and synthesize the distinct constitutional visions of several generations of constitution-makers. This understanding of the interpreter's task is not novel—it finds parallels at the national level in Bruce Ackerman's discussion of transformative constitutional moments in the development of the Federal Constitution[16] and in Akhil Amar's elaboration of how Reconstruction altered the meaning of the Bill of Rights.[17] However, given the frequency of constitutional change in the states, the task of synthesis for interpreters of state constitutions is the rule rather than the exception.

More concretely, both federal and state constitutions agree with Montesquieu in positing three branches of government—legislative, executive, and judicial—each invested with a distinct function.[18] The institutions created at the national and state levels also have a surface similarity: state legislature and Congress, governor and president, state supreme court and U.S. Supreme Court.[19] But when one proceeds below the surface, one finds that these apparently analogous structures of government and separations of power quickly evaporate.

The Federal Constitution offers what might be termed a relaxed version of the separation of powers.[20] The major concern in 1787 was to introduce checks on the legislative branch which, as James Madison warned in *Federalist No. 51*, "necessarily, predominates" in republican governments.[21] In order to facilitate checks and balances, Madison in *Federalist No. 47* proposed a rather lax

16. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

17. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

18. *See* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993) (discussing the distinctiveness of state provisions).

19. There are deviations from even this surface similarity. Whereas the Federal Constitution vests the legislative power in a bicameral legislature, Nebraska has a unicameral legislature, and 23 states divide the legislative power between a bicameral legislature and the people acting directly through the initiative. *See* COUNCIL OF STATE GOVERNMENTS, *supra* note 13, at 68, 239. Whereas the Federal Constitution establishes a unitary executive, most state constitutions create a multiple executive. *Id.* at 141–42. Finally, although the Federal Constitution vests final appellate authority in a single supreme court, Texas and Oklahoma each divide this authority between the supreme court and the court of criminal appeals. *Id.* at 203–06.

20. *See generally* W. B. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965); Malcolm P. Sharp, *The Classical Doctrine of the "Separation of Powers"*, 2 U. CHI. L. REV. 385 (1935).

21. THE FEDERALIST 350 (Jacob E. Cooke ed., Wesleyan Univ. Press 1961).

definition of what constitutes a violation of the separation of powers: "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department."[22] Obviously, this definition affords considerable leeway for a sharing or blending of powers.

Most early state constitutions reflected a quite different sensibility.[23] Typically the separation of powers was not designed to balance power among the branches of government. Power tended to be concentrated in the legislature, in most instances the only branch whose members were directly elected by the people; to state constitution-makers this seemed altogether appropriate.[24] It seemed preposterous to worry that a legislative assembly composed of one's friends and neighbors, which met briefly and was subject to annual popular election and perhaps to instruction by the representatives' constituents, would impinge on the other branches of government or endanger liberty.[25]

This notion continued to seem preposterous, of course, only until the states had the experience of an untrammeled legislature. By the 1830s, experience with a predominant legislature had prompted a reconsideration of the relationship among the branches of state government. The states might at this point have instituted a system of checks and balances based on the model provided by the Federal Constitution, or they might have relaxed the system of separation of powers to transfer legislative powers into the hands of the executive or judicial branches. For the most part, they did neither. Although states did transfer some powers from the legislature to the executive, they were more likely to transfer those powers directly to the people than to the other branches of state government. Under eighteenth-century constitutions, the legislature typically appointed governors, other executive officers, judges, and local officials.[26] When nineteenth-century constitution-makers took these powers from the legislature, they gave them to the people themselves, not to another branch of government.[27] This movement to direct popular election dramatically changed the character

22. *Id*. at 325–26.

23. *See generally* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (1980) (discussing the separation of powers under early state constitutions); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969) (same).

24. *See* TARR, *supra* note 1, at 82–90.

25. *See generally id*.

26. *See id*. at 86–90.

27. *See id*. at 121–22.

of state institutions. Whereas initially only the legislature could claim to speak for the people, the election of executive officials and judges gave those branches equal claim to represent the people, and this produced a very different political dynamic.[28] To a considerable extent that same dynamic operates today.

The states during the nineteenth century also responded to legislative abuses by imposing constitutional restrictions on the process and substance of legislation that were unlike anything found at the national level.[29] Some states required extraordinary majorities to adopt certain types of legislation, under the assumption that it would be difficult to marshal such majorities for dubious enterprises.[30] Others established procedural requirements—that all bills be referred to committee, that their titles reflect their contents, etc.—with the expectation that greater transparency in the legislative process would deter abuses or at least increase accountability for them.[31] Many states also imposed substantive prohibitions on legislative action, banning the granting of divorces, the lending of state credit, the enactment of special or local laws, and on and on.[32] A number of states even limited the frequency and duration of legislative sessions, hoping thereby to afford legislators less opportunity to do harm.[33]

For present purposes, what is striking is that neither of these solutions—extending direct election to all branches of government in order to give them a democratic pedigree or inserting procedural and substantive restrictions on the legislative process into the state constitution—exists in the Federal Consitution. The Foun-

28. *See id.* at 122; Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 HISTORIAN 337 (1983).

29. An examination of Article I of the Federal Constitution reveals little about how the process of legislation is to proceed, save that all laws must be presented to the President—the so-called Presentment Clause (U.S. CONST. art. 1, § 7, cl. 3). The limitations on the substance of federal law contained in Article 1 are largely implicit, flowing from the negative implications of having an enumeration of powers.

30. *See, e.g.*, MISS. CONST. of 1832, art. VII, § 8; N.Y. CONST. of 1821, art. VII, § 9. Such requirements are not exclusively the product of nineteenth-century constitution makers. *See, e.g.*, COLO. CONST. art. X § 20 (Colorado's Taxpayer's Bill of Rights, adopted in 1992).

31. For an enlightening discussion of these procedural limitations, see Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797 (1987).

32. *See generally* BINNEY, *supra* note 4.

33. By 1900, 33 states limited the length of legislative sessions, and only six state legislatures met annually. *See* JAMES QUAYLE DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS FROM 1776 TO THE END OF THE YEAR 1914, 186–87 (1915).

ders of 1787 and those crafting state constitutions in the nineteenth century confronted the problem of legislative predominance. The devised solutions were, however, quite different.

These nineteenth-century solutions continue to affect the American states even at the dawn of the twenty-first century, because most states continue to operate under constitutions promulgated in the nineteenth century.[34] Even for states that adopted new constitutions during the twentieth century, the old structural provisions, once enshrined in state constitutions, have tended to remain.[35] By way of example, during the early nineteenth century, overzealous—and sometimes corrupt—state legislators plunged their states into a sea of debt while seeking to promote economic development, and after the Panic of 1837 several states were obliged to default on their debts.[36] State constitution-makers responded by imposing debt ceilings and by restricting the power of legislatures to lend the credit of the state.[37] These reforms, once adopted, have typically remained fixed in state constitutions, constraining more recent efforts to use state resources to promote economic development. During the twentieth century, many states found these limitations too constraining, and they were forced to devise mechanisms, such as borrowing via bonds not guaranteed by the full faith and credit of the state, in order to avoid the restrictions.[38] When these mechanisms were challenged, state courts frequently legitimated the circumvention of the constitutional restrictions.[39]

Nineteenth-century reforms also created different inter-branch dynamics that continue to the present day. At the national level, Congress engages in continuing oversight over the operations of the executive branch—the recent hearings following the collapse of Enron were merely another chapter in a never-ending story. One

34. *See* COUNCIL OF STATE GOVERNMENTS, *supra* note 13, at 14–15.

35. This is part of a general pattern, in that "new" state constitutions change only part of the constitutions they succeed.

36. On the overoptimistic efforts to promote economic development and their disastrous aftermath, see generally L. RAY GUNN, THE DECLINE OF AUTHORITY: PUBLIC ECONOMIC POLICY AND POLITICAL DEVELOPMENT IN NEW YORK 1800–1860 (1988).

37. *See, e.g.*, N.Y. CONST. of 1846, art. 7, § 9; *see also* A. JAMES HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT (1963) (providing an overview of these provisions).

38. *See* HEINS, *supra* note 37, at 14.

39. For discussion of judicial participation in the evasion of these limitations in New York, see PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE, 170–81, 189–204 (1991).

reason congressional oversight is effective is that Congress is almost always in session. During the nineteenth century, however, framers of state constitutions restricted the duration and frequency of legislative sessions, so that most of the time state legislatures are not in session.[40] One unanticipated consequence of this reform has been to reduce the ability of state legislatures to exercise influence through informal oversight mechanisms—one cannot oversee when one is not present. This has compelled the states to seek alternative means of asserting control. It is perhaps not surprising, therefore, that both the legislative veto and legislative appointment of officials performing executive functions, although prohibited at the national level, survive in many states.[41]

Returning to the problem of comparing the separation of powers at the national level and in the states, note there is no express recognition of the separation of powers in the Federal Constitution—the principle must be inferred from the specific grants and limitations found in the document.[42] This omission is historically interesting, because by 1787 the practice of constitutionalizing the separation of powers was already well established in the states.[43] Whatever the reason for the omission, it created an important textual difference between state and federal constitutions, and such textual differences matter in determining the inter-branch distribution of power. Moreover, this textual difference has persisted. Most states subsequently admitted to the Union likewise constitutionalized the separation of powers, and states have retained their separation-of-powers provisions, usually without modification, even when they have replaced their early constitutions.[44] As of 1998, forty state constitutions contained express separation-of-powers requirements.[45]

Indiana's current provision may be taken as representative. It reads: "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Ad-

40. *See generally* Williams, *supra* note 31.

41. On the legislative veto, see L. Harold Levinson, *The Decline of the Legislative Veto: Federal/State Comparisons and Interactions*, 17 PUBLIUS 115 (1987); on legislative appointment of executive officials, see Devlin, *supra* note 18, at 1242–50.

42. The doctrine has nonetheless been viewed as implicit in the Federal Constitution from the outset. *See* William Seal Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 AM. POL. SCI. REV. 32 (1928).

43. *See, e.g.*, MASS. CONST. of 1780, declaration of rts., art. 30; VA. CONST. of 1776, declaration of rts., § 5.

44. *Compare* N.J. CONST. of 1776, *with* N.J. CONST. of 1844, *and* N.J. CONST. of 1947.

45. TARR, *supra* note 1, at 14.

ministrative, and the Judicial: and no person, charged with official duties under one of those departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."[46]

Several things about this provision are noteworthy. The text suggests that for each branch of government there is a corresponding identifiable function; powers are not quasi-legislative or quasi-judicial, but legislative, executive, or judicial. This encourages an interpreter to employ what is usually referred to as the formalist approach to the separation of powers—that is, identifying whether a particular power is legislative, executive, or judicial and then ensuring that it is exercised only by the appropriate branch.[47] In undertaking this analysis, states need not follow fully the federal designation of which powers are legislative, executive, or judicial, although doubtless one would expect considerable agreement between nation and state on this matter. After all, the three branches of state government differ considerably from their federal counterparts.

This is particularly true of state executive branches. Whereas the Federal Constitution creates a unitary executive, most state constitutions do not. Rather, many state constitutions create several executive-branch offices, expressly grant their occupants various powers, and provide for their separate election for each office by the people.[48] For example, as of 2002, thirty-eight states elected their attorney general, thirty-six their secretary of state, and thirty-six their treasurer.[49] In addition, states have constitutionalized various agencies: the Florida Constitution, for example, creates and empowers a Game and Fresh Water Fish Commission, and the Arizona Constitution, a Corporation Commission.[50]

In interpreting state constitutions, one must also not assume that the definition of what is "executive" or "legislative" is the same at the state level as at the national level, or even stable from state to state. For example, we tend to think of control over spending as a

46. IND. CONST. art. III, § 1.

47. *See* Richard J. Pierce, Jr., Morrison v. Olsen*, Separation of Powers, and the Structure of Government*, 1988 SUP. CT. REV. 1 (1988) (discussing the formalist approach to the separation of powers, focusing primarily on rulings by the United States Supreme Court); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (same).

48. *See* THOMAS R. DYE, POLITICS IN STATES AND COMMUNITIES, ch.7 (10th ed. 2000).

49. *See* COUNCIL OF STATE GOVERNMENTS, *supra* note 13, at 161–62.

50. AZ. CONST. art. XV; FL. CONST. art. IV, § 9.

key legislative function—the executive has "the sword" and the legislature, "the purse."[51] Yet by 1987, forty-three states had instituted a budget line-item veto and ten states allowed governors to reduce amounts of items, as well as flatly veto them.[52] In addition, several state constitutions mandate that the governor submit a draft budget to the legislature and that the "executive" budget form the basis for legislative deliberations.[53] It is fair to say that these constitutional innovations, mostly introduced during the twentieth century, have transformed control over spending from a solely legislative power into a shared power, or have articulated different kinds of power under the heading "spending." Like earlier changes transferring the power to appoint certain officials from the legislature to the executive or the power to grant divorces from the legislature to the courts, this shift raises questions about whether these changes are likewise changing the states' understanding of which powers are "legislative," "executive," or "judicial."

The possibility of different definitions of legislative, executive, and judicial powers at the state level is also suggested by comparing federal case law with state constitutions. In his dissent in *Morrison v. Olson*, Justice Antonin Scalia insisted that a criminal prosecution is a purely executive power, a point not seriously challenged by the opinion of the Court.[54] This may be law at the federal level. But is this true in the states? If so, then how can one explain that Louisiana's and Mississippi's provisions dealing with the powers of their attorneys general and district attorneys are found in the judiciary articles of those constitutions?[55]

Return to the Indiana separation-of-powers provision, which indicates that each branch must be confined to its distinctive function—the blending of powers and functions is prohibited—and that there must also be a separation of personnel, so that power is not concentrated in the hands of one or a few persons.[56] Having said this, the provision recognizes that exceptions to a strict separa-

51. This harkens back to *Federalist No. 78*, in which Alexander Hamilton noted that the judiciary "has no influence over either the sword or the purse." *See* THE FEDERALIST, *supra* note 21, at 523.

52. RONALD C. MOE, PROSPECTS FOR THE ITEM VETO AT THE FEDERAL LEVEL: LESSONS FROM THE STATES 4 (1988).

53. A comprehensive survey of the budgetary powers of the governors in the fifty states is provided in Thad Beyle, *The Governors*, *in* POLITICS IN THE AMERICAN STATES 210–16 (Virginia Gray et al. eds., 7th ed. 1999).

54. *See* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

55. *See* LA. CONST. art. V, § 26; MISS. CONST. art. VI, §§ 173–74.

56. This recalls James Madison's recognition in *Federalist No. 47* that the danger of tyranny exists "where the *whole* power of one department is exercised by the

tion of powers are permitted, if *expressly* provided for in the constitution. On the one hand, this confirms that the populace retains the right to allocate any power to whatever branch it chooses, as long as it locates that choice in the text of the constitution. On the other hand, the provision restricts pragmatic flexibility by formally allocating or sharing power among the branches of state government. The only authorized departures from a strict separation of powers are those expressly contained in the constitution.

In sum, with regard to provisions affecting the structure and operation of government, state constitutions are different from the Federal Constitution, as well as from each other. The differences are both textual and philosophical. In addition, state provisions dealing with the distribution of power and the responsibilities of various branches have changed considerably over time. Even the very nature of those branches has also changed. Taken together, these facts confirm that the American states require a distinctive separation-of-powers jurisprudence, one that reflects the distinctive text, history, political theory, and institutional design embedded in state constitutions. Developing such a distinctive jurisprudence will be one of the tasks confronting state judges in the twenty-first century.

same hands which possess the *whole* power of another department." THE FEDERALIST, *supra* note 21, at 325–26.