

THE SEPARATION OF POWERS AND STATE CONSTITUTIONS^S

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In this paper, I examine the nature of state constitutions, how those constitutions developed, and the ideas underlying them, with an eye to how these factors might affect the structure and operation of state governments. A focus on the development of state constitutions and their underlying ideas is crucial to understanding the separation of powers in the states, because the political systems created by these documents are distinctive. A quick example: The Federal Constitution restricts the federal government both by prohibitions on what the government can do and by granting the government only limited powers. Under state constitutions, in contrast, that second restriction is missing--the states exercise plenary legislative power--and thus the only limits will be the prohibitions inserted into state constitutions. This in turn has encouraged a proliferation of such prohibitions, not only on what state governments can do but also on how they do what they can do. Does this affect the operation of state government? Obviously it does.

Put differently, despite obvious surface similarities, state governments are not merely junior versions of the national government--or at least they need not be. As Justice Oliver Wendell Holmes observed in *Prentis v. Atlantic Coast Line R.R.*, the Federal Constitution does not impose separation-of-powers restrictions on the states. 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 debates over the new judicial federalism. 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, they are under no obligation to do so. There is no more reason for a lockstep jurisprudence in interpreting the structural provisions of state constitutions than there is for a lockstep jurisprudence in interpreting their rights guarantees. 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. 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 a crucial preliminary question: are the feds in fact leading and, if so, where they are leading us?)

There is a suspicion, sometimes well-founded, that scholars insist things are complex so as to make their services indispensable. But in this instance the situation is even more complicated than my distinction between federal and state constitutions might suggest. State constitutions are not all the same--one size

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does not fit all--and the constitutional history of Arizona or Alabama is very different from that of, say, Massachusetts or Montana. Interstate differences in size, in history, and in demographics have fueled claims that the states have distinct political and legal cultures. I suspect that those claims are true. But whether or not they are, what is undeniable 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. Even within specific states, one can trace how the constitutional text has changed over time to reflect shifting political ideas. 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.

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, one must take this into account and create a synthesis that blends 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 idea of transformative "constitutional moments" in the development of the Federal Constitution and in Akhil Amar's discussion of how Reconstruction altered the understanding of the Bill of Rights. What is novel is that, given the frequency of constitutional change in the states, this task of synthesis is for interpreters of state constitutions the rule rather than the exception.

Let me give some concreteness to this discussion. Both federal and state constitutions agree with Montesquieu in positing three branches of government--legislative, executive, and judicial--each invested with a distinct function. The institutions created at the national and state levels have a surface similarity: state legislature and Congress, governor and president, state supreme court and U.S. Supreme Court. But when one presses further, one finds that this apparent unanimity about the structure of government and the separation of powers evaporates.

The Federal Constitution offers what might be termed a relaxed version of the separation of powers. The major concern in 1787 was to ensure that "ambition check[ed] ambition" and, more specifically, to introduce checks on the legislative branch which, as James Madison warned in Federalist No. 51, "necessarily predominates" in republican governments. In order to facilitate checks and balances, Madison proposed a rather lax 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." Obviously, this definition affords considerable leeway for a sharing or blending of powers.

Most early state constitutions reflect a quite different perspective. The separation of powers was not designed to balance power among the branches of government. Power tended to be concentrated in the legislature, the only branch whose members were directly elected by the people, and to state constitution-makers this seemed altogether appropriate. It seemed preposterous to worry that a legislative assembly composed of one's friends and neighbors, one that met briefly and was subject to annual popular election, would impinge on the other branches of government or endanger liberty.

It seemed preposterous, of course, only until the states had the experience of an untrammelled legislature. By the 1830s, this experience 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 as likely to transfer those powers directly to the people as to the other branches of state government. Under 18th-century constitutions, the legislature typically appointed governors, other executive officers, judges, and local officials. When 19th-century constitution-makers took these powers from the legislature, they gave them to the people themselves, not to another branch of government. This movement to direct popular election dramatically changed the character 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.

The states during the 19th 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. 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. Others established procedural requirements--that all bills be referred to committee, that their titles reflect their contents, etc.--hoping that greater transparency in the legislative process would deter abuses or at least increase accountability for them. Still other states 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. Many states even limited the frequency and duration of legislative sessions, hoping thereby to afford legislators less opportunity to do harm.

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 and inserting procedural and substantive restrictions on the legislative process into the state constitution--can be found at the national level. Both the Founders of 1787 and those crafting state constitutions in the 19th century confronted the problem of legislative predominance. Their solutions to this problem were, however, quite different.

These 19th-century solutions continue to affect us even at the dawn of the 21st century, because once enshrined in state constitutions, they have tended to remain there. A couple examples may serve to clarify this. During the early 19th century, overzealous--and sometimes corrupt--state legislators plunged their states into a sea of debt while seeking to promote economic development. State constitution-makers responded by imposing debt ceilings and by restricting the power of legislatures to lend the credit of the state. These reforms, once adopted, have remained fixed in state constitutions, constraining more recent efforts to promote economic development. During the 20th century, many states found these limitations too constraining, and they were forced to devise mechanisms, such as borrowing via non-guaranteed bond, to circumvent the restrictions.

A second example: Congress engages in continuing oversight over the operations of the executive branch--the forthcoming Enron hearings will be merely another chapter in the never-ending story. One reason congressional oversight is effective is that Congress remains always--or almost always--in session. During the 19th century, however, state constitution-makers restricted the duration and frequency of legislative sessions, so that most of the time state legislatures are not in session. One unanticipated consequence of this reform has been to reduce the ability of state legislatures to exercise influence through informal oversight mechanisms. 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.

Let me return to the more general understanding of the separation of powers at the national level and in the states. There is of course 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. (Parenthetically, I find this omission quite interesting, because by 1787 the practice of constitutionalizing the separation of powers was already well established in the states.) Whatever the reason for the omission, it introduced an important textual difference between state and federal constitutions, and such textual differences matter in determining the interbranch 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. Currently, 40 state constitutions contain express separation-of-powers requirements.

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 Administrative, 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."

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 power is legislative, executive, or judicial and then ensuring that it is exercised by the appropriate branch. In undertaking this analysis, states need not follow the federal lead. For one thing, 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. Most create several executive-branch offices, grant their occupants powers, and provide for their election by the people. In addition, the states have constitutionalized various agencies: the Florida Constitution, for example, creates and empowers the Game and Fresh Water Fish Commission, and the Arizona Constitution, the Corporation Commission.

In addition, one must ask whether the definition of what is "executive" or "legislative" is the same at the state level as at the federal level, or even the same from state to state. A couple examples might serve to indicate why the issue is worth considering.

We tend to think of control over spending as a key legislative function--the executive has "the sword" and the legislature "the purse." Yet 43 states have instituted an item veto, and 10 states allow governors to reduce as well as veto items. In addition, several state constitutions mandate that the governor submit a budget to the legislature and that this budget form the basis for legislative deliberations. It is fair to say that these constitutional innovations, introduced during the 20th century, have transformed control over spending from a legislative power to a shared power. This shift, 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, raise questions about whether the states in making these changes are likewise changing their understanding of what powers are "legislative," "executive," or "judicial."

A further observation: in his dissent in *Morrison v. Olson*, Justice Antonin Scalia insisted that the conduct of a criminal prosecution is a purely executive power. And so it may be 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 Attorney General and District Attorneys are found in the judiciary articles of those constitutions?

Let me return to the Indiana separation-of-powers provision: The provision 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. Having said this, the provision recognizes that exceptions to a strict separation 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 lodges that choice in the constitution. On the other hand, the provision restricts pragmatic flexibility in designing institutional arrangements. The only departures from a strict separation of powers are those expressly contained in the constitution.

I conclude with neither a bang nor, I hope, a whimper. What I have attempted to show is that 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. In fact, the very nature of those branches has also changed. The American states require a separation-of-powers jurisprudence that reflects these realities.