1993

Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions

John Devlin
Louisiana State University Law Center, john.devlin@law.lsu.edu

TOWARD A STATE CONSTITUTIONAL ANALYSIS OF ALLOCATION OF POWERS: LEGISLATORS AND LEGISLATIVE APPOINTEES PERFORMING ADMINISTRATIVE FUNCTIONS

*John Devlin**

The three-part division of sovereign authority among largely independent legislative, executive, and judicial branches, and the competing principle of "checks and balances" among those branches, have been and remain cornerstones of the American system of government, both state and federal. As any graduate of a junior high school civics class can attest, few propositions are regarded as so basic. But, as any constitutional lawyer can also attest, few propositions are so difficult to define or apply consistently to actual issues of governmental organization.

It is no novel insight to note that the burgeoning administrative bureaucracy, both federal and state, poses special and perhaps ultimately insoluble problems for traditional "distribution of powers" analysis.[1] In exercising the powers delegated to them, administrative agencies and officials typically exercise all three types of powers, and are responsive to some degree of control by each of the constitutional branches.[2] Thus administrative agencies and officials fit poorly, if at all, into the three-part conceptual framework underlying the federal and state constitutions.[3] These conceptual problems have been exacerbated by

---

* Associate Professor of Law, Paul M. Hebert Law Center of the Louisiana State University. Thanks to my colleagues at L.S.U. for their helpful comments at a roundtable discussion of some of the ideas presented herein, to Kevin Sneesby, Christina Fletcher, and David Hilburn for their research assistance, and to Lisa, *sine quam non*.

1. With apologies for what may seem like unnecessary jargon, this article will use the descriptive phrase "separation of powers" solely for so much of the American theory of governance as posits that the legislative, executive, and judicial branches ought be kept distinct and independent. Where the theory is meant in its broader sense—incorporating "checks and balances" as well as pure "separation" principles—the phrases "allocation of powers" or "distribution of powers" will be used.

2. *See generally* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 574-95 (1984) (discussing both legal theories and practical politics of joint presidential and congressional influence on federal agencies); Frank R. Anderson et al., *A Symposium on Administrative Law: The Uneasy Constitutional Status of Administrative Agencies*, 36 AM. U. L. REV. 277 (1987) (addressing various aspects of issue).

3. The doctrinal difficulties posed by the growth of multi-function federal administrative agencies have been repeatedly noted by Justices and commentators, usually with dismay. See, for example, the often cited lament of Justice Jackson:

> [Federal administrative agencies] have become a veritable fourth branch of Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three dimensional thinking. . . .
>
> Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-

the massive growth of administrative agencies, in both numbers and power, on both the state and federal levels.

The bulk of scholarly discussion on the distribution of powers in the administrative context has focused on conflicts between Congress and the President over control of federal agencies, where cases such as *Buckley v. Valeo*,[4] *INS v. Chadha*,[5] *Bowsher v. Synar*,[6] and *Morrison v. Olson*[7] have engendered a large body of commentary.[8] However, as the federal government has shifted responsi-

---

of-powers scheme of the Constitution. The mere retreat to the qualifying phrase "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to cover a disordered bed.

Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting). Particular government functions may be very difficult to assign to a particular Montesquieuian category. *See infra* note 91. Instead, chameleon-like, they may appear in different guises, depending on which official is performing that function. *See* Freytag v. Commissioner, 111 S. Ct. 2631, 2655 (1991) (Scalia, J., concurring in part and concurring in the judgment) (quoting Bowsher v. Synar, 478 U.S. 714, 749 (1986) (Stevens, J., concurring)).

Some state court judges have likewise noted the impossibility of applying pure separation of powers theory to the real world of the state administrative bureaucracy:

> [S]trict application of the separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power including legislative, executive and judicial powers often blended together in the same administrative agency. The courts today have come to recognize that the political philosophers who developed the theory of separation of powers did not have any concept of the complexities of government as it exists today.

State *ex rel.* Schneider v. Bennett, 547 P.2d 786, 791 (1976); *see also* Opinion of the Justices, 309 N.E.2d 476, 478 (Mass. 1974) (noting growth of administrative agencies "has sometimes tended to obscure admittedly indistinct boundary lines between the three branches" and administrative activities cannot always be readily classified as executive, legislative, or judicial in nature).

Other state courts and judges have, however, steadfastly resisted the emergence of what they see as an extra-constitutional "fourth branch" of government, and have insisted that administrative officials and actions be clearly located in one or another of the traditional branches. *See, e.g.*, Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 916-17 (Ky. 1984) (declaring unconstitutional attempt to designate legislatively dominated LRC as "independent" agency with executive powers, on grounds that "[t]here is, simply put, no fourth branch of government" and that such legislative organ can exercise only legislative powers); Herman Bros., Inc. v. Louisiana Pub. Serv. Comm'n, 564 So. 2d 294, 298 (La. 1990) (Cole, J., concurring) (noting "absurdity of the Commission's plenary authority argument, the continued pursuit of which exhibits constitutional illusions of being a fourth branch of government").

4. 424 U.S. 1 (1976).

5. 462 U.S. 919 (1983).

6. 478 U.S. 714 (1986).

7. 487 U.S. 654 (1988).

8. The commentary is far too numerous to catalogue. For a partial and somewhat eclectic sample, see generally Rebecca L. Brown, *Separated Powers & Ordered Liberty*, 139 U. PA. L. REV. 1513, 1515-16 (1991) (agreeing that courts should address separation of powers issues only when branches of government pose threat to integrity of institutional process); Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, & Administrative Government*, 57 U. CHI. L. REV. 357, 391-98 (1990) (criticizing courts' reliance on original intent); E. Donald Elliott, *Why Our Separation of Powers Jurisprudence is So Abysmal*, 57 GEO. WASH. L. REV. 506, 530-31 (1989) (criticizing current jurisprudence for failing to distinguish between interpretation and literalism); Richard J. Pierce, Jr., Morrison v. Olson, *Separation of Powers & the Structure of Government*, 1988

bilities and discretion to the states, state administrative agencies have come to approach their federal counterparts in size and power.[9] Thus, the issues posed by these battles for influence on the machinery of government have become salient on the state level as well.

The institutional arrangements by which state legislatures may attempt to assert effective influence over the process of administering state government are many and varied. Legislatures may attempt to draft statutes "tightly" so as to leave little room for administrative discretion,[10] or may assert authority to re-

---

SUP. CT. REV. 1, 9-20 (reviewing current theories on separation of powers); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 475-79 (1987) (arguing that courts should review separation of powers issues by considering ideals of administrative process); Robert L. Stern, *The Separation of Powers Cases: Not Really a Mess*, 31 ARIZ. L. REV. 461 (1989); Peter L. Strauss, *Formal & Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 490-96 (1987) (advocating functional analysis); Paul R. Verkuil, *Separation of Powers, the Rule of Law & the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305-07 (1989) (advocating rule of law analysis).

9. *See generally* ALAN ROSENTHAL, GOVERNORS AND LEGISLATORS: CONTENDING POWERS 1, 167-213 (1990) (describing both expansion of state regulatory activity and resulting struggles between governors and legislatures over effective control of this expanding government).

10. At one time, the so-called "nondelegation" doctrine required both Congress and state legislatures to draft statutes in precisely this fashion. That doctrine was ultimately rooted in separation of powers concerns, in that it was intended to prevent Congress from transferring its core lawmaking functions to executive or quasi-executive bodies. The doctrine purported to require legislative bodies, state or federal, to determine conclusively in advance all significant issues of policy, and allowed administrative officials only very limited discretion to "fill up the details" or apply clear statutory standards to particular cases. *See, e.g.*, United States v. Grimaud, 220 U.S. 506, 517 (1911) (holding statutes granting authority to make administrative rules not improper delegations of legislative power); Buttfield v. Stranahan, 192 U.S. 470, 496-97 (1904) (requiring Congress to legislate as far as is "reasonably practical," and to leave duty of carrying out statutory result to executive); King v. Concordia Fire Ins. Co., 103 N.W. 616, 620 (Mich. 1905) (holding that statute allowing insurance commission to choose policy form was paramount to allowing agency to make law and was therefore unconstitutional).

However, it eventually became apparent, at least to the federal courts, that these formulations were too restrictive, and that a generalist Congress was simply unable to make all of the substantive decisions required by the growing federal government. In J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928), Justice Taft reformulated the responsibility of Congress to provide only some "intelligible principle" sufficient to guide administrators who exercise discretion and reviewing courts who review that exercise. *Id.* at 406-09. Modern federal courts have interpreted this requirement very leniently, permitting very broad delegations of power with only the most minimal of statutory guidelines. *See, e.g.*, Touby v. United States, 111 S. Ct. 1752, 1756 (1991) (upholding delegation to Attorney General of authority to add drugs temporarily to schedules of controlled substances); Mistretta v. United States, 488 U.S. 361, 371-74 (1989) (upholding Congress's delegation of sentencing guidelines to independent sentencing commission).

Many state courts have come to conclusions broadly similar to those of the federal authorities. Though the formulation most frequently used by the state courts—that the legislature provide sufficient "standards" for administrative action—is perhaps more susceptible to restrictive interpretations than is the federal "intelligible principle" language, state courts have, on many occasions, permitted broad delegations of authority to state administrative agencies and officials. *See, e.g.*, Warren v. Boucher, 543 P.2d 731, 734 (Alaska 1975) (permitting state officials to determine similarity of proposal and existing act not unconstitutional delegation of judicial power); State v. Arizona Mines Supply Co., 484 P.2d 619, 624-26 (Ariz. 1971) (upholding statute that "reasonably inferred" executive enforcement standards under state's police power); Department of Transp. v. City of At-

view particular agency actions,[11] either through a "legislative veto" annulling that action[12] or through other, less coercive mechanisms of legislative re-

---

lanta, 398 S.E.2d 567, 571 (Ga. 1990) (upholding statute creating state commission comprised of executive members to approve taking of municipal property); Johnson v. Odom, 470 So. 2d 988, 991-92 (La. Ct. App.) (upholding state advisory committee's enforcement of pesticide regulations on grounds that they involved no agency discretion), *cert. denied*, 476 So. 2d 355 (La. 1985); Sullivan County Harness Racing Ass'n v. Glasser, 283 N.E.2d 603, 606-07 (N.Y. 1972) (upholding "broad" regulatory powers conferred on state commission to regulate harness racing industry); Bauer v. South Carolina State Hous. Auth., 246 S.E.2d 869, 876-77 (S.C. 1978) (holding statute allowing state housing authority to set maximum interest rates and issue notes and bonds, did not vest "unbridled" discretion in agency); Lobelville Special Sch. Dist. v. McCanless, 381 S.W.2d 273, 276 (Tenn. 1964) (upholding agency determinations where statutory guidelines followed in reaching decision); *see generally* Mark N. Mathias, Note, *A Comparison of the Federal and Michigan Approaches to Administrative Rulemaking*, 3 COOLEY L. REV. 135, 139-42 (1985) (tracing development of nondelegation doctrine in Michigan). This lenient approach is not universal, however. Unlike federal courts, which have not struck down a federal statute on nondelegation grounds for almost 60 years, state courts have proven quite willing to declare state delegations unconstitutional for failure to provide sufficient restraints upon administrative discretion. *See, e.g.*, D.P. v. Florida, 597 So. 2d 952, 955 (Fla. Dist. Ct. App. 1992) (prohibiting state agency from "criminalizing" escapes from juvenile residential facilities); Commissioner of Agric. v. Plaquemines Parish Comm'n Council, 439 So. 2d 348, 350 (La. 1983) (holding statute lacking sufficient guidelines gave agency "unfettered" discretion to regulate pesticides); Missouri v. Raccagno, 530 S.W.2d 699, 704 (Mo. 1975) (voiding agency's determination that failure to collect cigarette taxes was unlawful); Chapel v. Commonwealth, 89 S.E.2d 337, 343 (Va. 1955) (holding legislature may not confer broad powers to regulate dry cleaning industry without statutory guidelines); Bulova Watch Co. v. Zale Jewelry Co., 371 P.2d 409, 418-19 (Wyo. 1962) (striking down State Fair Trade Act which left legislative duty of enforcement to judiciary via private parties).

Regardless of the nuances of state nondelegation law, however, statutory draftsmanship is unlikely to prove an effective mechanism for asserting legislative control over administrators. The practical impediments are simply too great. While state legislatures may not be required to deal with quite the same range of issues as Congress, their responsibilities are still far too broad to permit detailed consideration of every issue of state governance. Similarly, it is not possible for statutory drafters to anticipate all of the circumstances that may arise in the future. Thus, delegation of substantial discretion cannot be completely avoided, and the best that a legislature can hope for is to retain some measure of influence on how that discretion is exercised.

11. Mechanisms for legislative review of administrative rulemaking were popular in the states. By the middle of the 1980s, more than two-thirds of the states had some kind of provision for such legislative review. *See* Barbara L. Borden, Comment, *Legislative Review of Agency Rules in Arizona: A Constitutional Analysis*, 1985 ARIZ. ST. L.J. 493, 526 n.275 (1985) (listing 37 state legislative oversight provisions of various types); *see generally* L. Howard Levinson, *Legislative & Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79, 96-105 (1982) (discussing models other than one or two house vetoes).

12. While some arguments for the viability of state legislative vetoes have been made, *see, e.g.*, William J. Pohlman, Comment, *The Continued Viability of Ohio's Procedure for Legislative Review of Agency Rules in the Post-Chadha Era*, 49 OHIO ST. L.J. 251, 268-72 (1988), state courts have uniformly struck down mechanisms that purport to give the legislature broad power to overrule administrative regulations without presentment to the governor, on grounds that such arrangements violate state constitutional mandates regarding the mechanics of law making, separation of powers, or both. Courts have so held regardless of whether the veto was to be exercised by particular legislative committees, *see, e.g.*, Opinion of the Justices, 431 A.2d 783, 786-89 (N.H. 1981) (expressing opinion that legislative veto not unconstitutional per se but could be if it allows small groups in House or Senate to exercise control over executive functions); State *ex rel.* Barker v. Manchin, 279 S.E.2d 622, 630-36 (W. Va. 1981) (voiding veto power of 12-person legislative committee regulating mine safety), or by the legislature as a whole. *See, e.g.*, State v. A.L.I.V.E. Voluntary, 606 P.2d 769,

view.[13] Alternatively, or in addition, legislatures may use their powers of appropriation[14] or various non-statutory means[15] to pressure administrators to reach

---

775-79 (Alaska 1980) (voiding statutory provision by which vote of both Houses could annul agency regulation of lotteries); Opinion of the Justices, 429 N.E.2d 1019, 1022 (Mass. 1981); General Assembly of N.J. v. Byrne, 448 A.2d 438, 443-47 (N.J. 1982) (voiding legislative veto provisions in Legislative Oversight Act on grounds it impeded executive enforcement of law); Commonwealth v. Sessoms, 532 A.2d 775, 778-82 (Pa. 1987) (distinguishing *Chadha* on ground that agency at issue not charged with execution of laws, but nevertheless concluding legislative disapprovals must be presented to governor). However, more limited legislative vetoes have sometimes been upheld. *See, e.g.*, Enourato v. New Jersey Bldg. Auth., 448 A.2d 449, 451 (N.J. 1982) (holding legislature's authority to veto narrowly-defined class of building projects sufficiently within scope of legislative oversight of executive action); Opinion of the Justices, 266 A.2d 823, 826 (N.H. 1970) (approving proposed amendment requiring committee authorization of certain state personnel salary changes); *see generally* Scott Welman, Comment, *Joint Committee on Administrative Rules: The Missouri Legislature's Disregard for the Missouri Constitution*, 58 UMKC L. REV. 113, 113-16 (1989) (criticizing use of legislative veto in Missouri); Richard Lee Slater, Note, *Oklahoma's Legislative Veto: Combat Casualty in Separation of Powers War*, 12 OKLA. CITY U. L. REV. 129, 147-59 (1987) (examining historical uses of legislative veto in Oklahoma).

At least two states, Connecticut and Iowa, have enacted constitutional amendments authorizing legislative vetoes passed by both houses of the legislature. ROSENTHAL, *supra* note 9, at 184.

13. Actual and proposed mechanisms usually involve some form of legislative committee generally charged with the responsibility of reviewing proposed administrative rules and regulations. They differ, however, as to the consequences of legislative disagreement. Committees may have the power to suspend rules temporarily pending possible modification by ordinary statute; to require the agency to reopen the rulemaking process in order to consider proposed changes; to publish an "objection" that has the effect of reversing the ordinary presumption of validity if the rule is challenged in court; or simply to make recommendations for legislative action to the legislature as a whole, which again must be accomplished by ordinary statute. *See generally* ROSENTHAL, *supra* note 9, at 184-93 (describing various methods of legislative control); Ran Coble, *Executive-Legislative Relations in North Carolina: Where We Are & Where We Are Headed*, 25 WAKE FOREST L. REV. 673, 690-93 (1990) (discussing various incarnations of North Carolina Administrative Rules Review Committee); Philip P. Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237, 1259-67 (1986) (arguing legislative suspension of administrative rules violates separation of powers); Levinson, *supra* note 11, at 79-105 (comparing federal and state models for legislative veto powers); David S. Neslin, Comment, *Quis Custodiet Ipsos Custodes?: Gubernatorial & Legislative Review of Agency Rulemaking Under the 1981 Model Act*, 57 WASH. L. REV. 669, 680-82, 686-96 (1982) (critiquing various mechanisms of legislative review included in 1981 Model State Administrative Procedure Act).

At least two states have agreed with Professor Frickey that a mechanism that allows a legislative committee unilaterally to suspend an administrative rule violates separation of powers principles. *See* Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 917-19 (Ky. 1984) (striking down statute requiring committee approval of agency regulations); State *ex rel.* Stephan v. Kansas House of Representatives, 687 P.2d 622, 634-38 (Kan. 1984) (striking down statute allowing legislature to adopt, modify, or revoke administrative rules and regulations without governor's approval). In contrast, South Dakota's State Constitution specifically permits a suspensive legislative veto. S.D. CONST. art. III, § 30.

14. This power of appropriation is significant because all state constitutions require legislative appropriation as a precondition to spending money. While the process of setting the budget is, in most cases, dominated by the governors, *see generally* ROSENTHAL, *supra* note 9, at 131-62, the need for administrators to appeal to legislative appropriations committees for actual funding of those budget requests, and the ever-present threat to use that power to retaliate against administrators who displease the legislature, are powerful tools. ROSENTHAL, *supra* note 9, at 175, 181. Such power is not without limits however. The role of governors in crafting initial budget requests and the power held by many to reduce or veto particular budgetary line items gives the governors a similar club to

results compatible with legislative policy preferences. Finally, legislatures may use their power to structure state government to vest administrative duties in themselves or in officials that the legislature may appoint.

Though each of these mechanisms is important and worthy of comparative study, this article will focus solely on the last method of asserting influence listed above—legislative efforts to vest themselves or their appointees with administrative powers. Such efforts clearly present a number of challenges to constitutional theory. Obviously, attempts by legislatures to vest executive authority in their members or appointees may violate traditional principles of separation of policymaking and policy-executing powers on several grounds.[16] Moreover, depending on how these efforts are structured, they may fall afoul of state constitutional provisions vesting specific powers and duties in the governor,[17] restricting the length of legislative sessions,[18] or barring legislators from holding particular offices.[19] Various courts that have been called upon to decide these issues have, not surprisingly, reached divergent conclusions as to the constitutionality of such efforts by legislatures. However, as will be developed below, those differ-

---

hold over the heads of administrators. *See generally* Coble, *supra* note 13, at 678-87 (1990) (describing legal battles that eventually vindicated governor's power to prepare budget recommendation free of legislative influence, and legislature's responses); Antonia C. Moran, Note, *Expenditure Control: Balancing the Constitutional Powers in Connecticut*, 20 CONN. L. REV. 953, 1008-27 (1988) (tracing growth of gubernatorial power over budget and over state administrative agencies in modern era).

15. *See* ROSENTHAL, *supra* note 9, at 173-76 (discussing oversight and intervention by standing committees and individual legislators). As Professor Rosenthal summarizes:

> Although the governor is the chief administrator, it is not unusual for the head of a department to spend as much time relating to the legislature as to the governor and the governor's staff. Nor is it unusual for those at the top of the ladder in career service to spend more time trying to pacify the legislature than trying to figure out what the governor might want to do. The governor's concern is episodic, the legislature's — through one house or the other, a single committee or several, and any number of individual members — is continuous. Some legislator is always on the bureaucracy's back. Moreover, "bureaucrats fear legislators" because legislators are "important, abrasive, insistent and vindictive."

Id. at 173-74 (quoting WILLIAM T. GORMLEY, JR., TAMING THE BUREAUCRACY 221 (1989)).

16. A number of constitutional objections may be raised. The mere exercise of a power of appointment may itself be considered essentially "executive" in nature and thus beyond a legislator's legitimate authority. Performance of administrative functions by individual legislators may violate state "incompatibility" clauses. Finally, any attempt to exercise indirect control over the administration of laws through appointment of administrators may violate basic allocation of powers principles by impermissibly joining lawmaking and law-applying power or by infringing on the ability of the executive branch to carry out its constitutionally assigned duties. *See infra* notes 129-221 and accompanying text.

17. Two types of such provisions that can be found in many state constitutions are those granting the governor general power to appoint administrative officials, and those vesting the governor with a duty to see that the laws are faithfully executed. *See infra* notes 65-66, 74-77, 115-19, 135-36 and accompanying text.

18. *See infra* notes 83-84, 211-14 and accompanying text.

19. Common clauses barring legislators from holding particular offices are of two types: "incompatibility" provisions which bar a legislator from holding executive office or exercising executive authority while simultaneously retaining his legislative seat; and "ineligibility" provisions which bar a legislator from occupying an office which has had its pay or benefits increased during that legislator's term. Only the first type of clause raises true distribution of powers issues. *See infra* notes 120-31 and accompanying text.

ences do not seem to be the result of differences in constitutional texts or history, but rather of the real debate over how distribution of powers principles common to all American constitutions should be applied to state governance.

This ongoing debate regarding the emerging state constitutional law of separation of powers has been obscured by the relative lack of scholarly commentary discussing these issues in a specifically state constitutional and comparative context. With few exceptions, commentary on state constitutional separation of powers questions has tended to focus on particular states viewed in isolation;[20] comparisons between the states and the federal government have generally been limited to a restricted range of separation of powers issues.[21] This paucity of analysis directed at the consequences of the pervasive differences between federal and state governments for purposes of allocation of powers analysis has had unfortunate results. In particular, it has led some state courts to rely excessively on federal precedents, or otherwise to fail to focus on the relevant differences between states and the federal government with respect to these issues.

The thesis of this article is that there are systematic differences between the federal government and the states with respect to their constitutions and their place in the American scheme of government, and that these differences make the development of an independent theory of state constitutional allocation of governmental powers both possible and desirable. While a full articulation of such a theory is surely beyond the scope of any single article,[22] the effort here will be to look at a particular set of issues, that is, those posed by the performance of administrative functions by legislators or legislative appointees, as a first step toward sketching what an independent state-based approach might entail. Accordingly, Part I sets the stage by briefly laying out basic principles and current federal law, and then argues that the structural differences between states

---

20. One major exception to this sweeping generalization is exemplified in Professor Bruff's analysis of selected separation of powers issues under the Texas Constitution, which paid careful attention to relevant differences between state and federal governments. *See generally* Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337 (1990). Other pieces taking a broader comparative view include Scott M. Matheson, Jr., *Eligibility of Public Officers and Employees to Serve in the State Legislature: An Essay on Separation of Powers, Politics, and Constitutional Policy*, 1988 UTAH L. REV. 295; and John V. Orth, *Forever Separate and Distinct: Separation of Powers in North Carolina*, 62 N.C. L. REV. 10-14 (1983) (comparing jurisdiction decisional law on separation of powers).

21. *See, e.g.*, Louis Fisher & Neil Devins, *How Successfully Can the State's Item Veto be Transferred to the President?*, 75 GEO. L.J. 159, 188-95 (1986) (discussing item veto provision of Balanced Budget and Emergency Deficit Control Act of 1985); Levinson, *supra* note 11, at 85-86 (discussing various models of legislative and executive veto power); Neil C. McCabe, *Four Faces of State Constitutional Law: Challenges to Speedy Trial and Speedy Disposition Provisions*, 62 TEMP. L. REV. 177, 209-14 (1989) (discussing implications of state speedy trial provisions for federal Speedy Trial Act).

22. Any complete theory of allocation of powers under state constitutions would clearly require consideration of a host of issues. Some, including the related issues of the non-delegation doctrine, legislative vetoes and their less coercive variants, and informal legislative oversight over administration, have already been mentioned. *See* discussion *supra* notes 11-13. Other important issues include: (1) the scope of the governor's powers to oversee the state administrative process and, in particular, the relations between governors and other statewide elected officials; (2) line item vetoes, and the other infinite permutations on the theme of shared control of state budgeting; and (3) the host of problems involved in state judicial review of administrative action.

and the federal government are so significant that they preclude reliance on federal law as a guide to the resolution of state separation of powers problems. Part II focuses on state court decisions and argues that the structural similarities among states are sufficient for them to be considered together as part of a unified field of inquiry. Part II then briefly surveys and critiques relevant state constitutional texts and decisions dealing with the power of legislators or legislative appointees to exercise administrative functions. It finally attempts to sketch the possible outlines of a state-based approach, arguing that the "pragmatic" approach of the better reasoned state cases is both compatible with the original beliefs and intentions of the founding generation, and appropriate in light of specific policy concerns posed by state-level governmental innovation.

I. DECLARING INDEPENDENCE: ON THE PERSUASIVE AUTHORITY OF FEDERAL PRECEDENT TO ISSUES OF SHARED CONTROL OF STATE ADMINISTRATIVE ORGANS

A. Basic Concepts and Federal Analysis

The principle of separation of powers is not explicitly stated in the Federal Constitution, but is instead implicit in the clauses that "vest" the legislative, executive, and judicial powers of the federal government in Congress, the President, and the federal courts, respectively.[23] It is clear that the founders intended to separate the powers of the new national government into three branches, but that they did not embrace any "pure" concept of separation of powers. Rather, the government they created was a compromise between two somewhat inconsistent approaches, partially embodying both the conceptual distinctions drawn by Montesquieu and others among different types of power, and the English tradition of "mixed government," characterized by a system of checks and balances among different governmental institutions.[24] These competing principles have given rise in the federal cases to two distinct lines of analysis. One line, which may be referred to as the "formalist" or "conceptual" approach, requires classi-

23. U.S. CONST. art. I, § 1, art. II, § 1 & art. III, § 1. Despite the lack of an explicit statement in the Federal Constitution, it has never been doubted that some form of separation was intended. *See* Springer v. Philippine Islands, 277 U.S. 189, 201 (1928) (noting while some state constitutions expressly provide for separation of powers, and others, like the Federal Constitution, do not, principle is "implicit in all"). Indeed, one of the major motivations for the creation of the Constitution was the perceived need to improve the efficiency of the federal government by removing day-to-day administrative tasks from the purview of the original Congress established by the Articles of Confederation. *See* Myers v. United States, 272 U.S. 52, 115-16 (1926) (quoting James Madison, ANNALS OF CONGRESS 581 (Joseph Gales ed., 1789)).

24. The fullest account of the emergence and interaction of these two concepts can be found in M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 21-118 (1967) tracing the development of such doctrines from classical times to the British Constitution in the late eighteenth century. *See also* W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 24-27 (1965) (describing emergence of British notion of mixed government, and distinguishing it from concept of separation of powers); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 214 (1989) (tracing evolution of separation of powers doctrine during constitution-making period in U.S.); Matheson, *supra* note 20, at 304-05 (describing separation of powers theories in United States during revolutionary period).

fication of governmental functions as either "executive," "legislative," or "judicial" in nature, and assigns plenary control accordingly.[25] Under this analysis, mechanisms by which the executive and legislative branches may share control of administrative organs are always suspect and usually prohibited.[26] The other line of analysis, which can be referred to as the "functionalist" or "checks and balances" approach, focuses on the need to preserve a dynamic balance of effective power among the constitutional branches, and usually involves an essentially ad hoc inquiry into the effect of a particular institutional arrangement on the autonomy and core functions of those branches.[27] Under this approach, novel institutional arrangements mixing conceptually distinguishable personnel

---

25. This conceptual approach is generally labeled "formalist." Statements of the principle can be found in federal cases stretching back many years, including the following classic formulations:

> [T]he Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division in principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.

Myers v. United States, 272 U.S. 52, 116 (1926), *overruled by* INS v. Chadha, 462 U.S. 919 (1983).

> It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. . . .
>
> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928). The Supreme Court has continued to employ this type of analysis in many, but not all, recent cases. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 715 (1986) (officer subservient to Congress may not be assigned "executive" powers); Buckley v. Valeo, 424 U.S. 1, 142 (1976) (only officials appointed by President in accordance with Appointments Clause may perform "executive" duties).

26. *See, e.g.*, *Bowsher*, 478 U.S. at 734 (striking down, on formalist grounds, statute vesting "executive" authority to trigger automatic budget cuts in official ultimately responsible to Congress); INS v. Chadha, 462 U.S. 919, 954 (1983) (declaring unconstitutional all "legislative vetoes" of administrative decisions); *Buckley*, 424 U.S. at 140-41 (striking down statute granting executive enforcement authority to Commission comprised mainly of congressional officers or appointees).

The classic statement of the consequences of such formalist analysis for any attempt by Congress to share in or oversee the administration of its laws can be found in Justice Burger's peroration in *Bowsher*:

> [A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation. [citation omitted] By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and intruded into the executive function. The Constitution does not permit such intrusion.

478 U.S. at 733-34.

27. This approach is generally labeled "functionalist." The principle seems to have been implicit in Humphrey's Executor v. United States, 295 U.S. 602, 631-32 (1935), which held that Congress could limit the power of the President to remove members of "independent" regulatory agencies exercising quasi-legislative and quasi-judicial powers. However, the principle received its

or functions, or limiting the President's effective control of administrative officials, are permissible so long as they preserve that dynamic balance between the branches and do not threaten the ability of any branch to carry out its core responsibilities.[28]

It is a gross understatement to say that the United States Supreme Court's analysis of separation of powers issues has been the subject of intense scholarly criticism. The Court's reasoning and results have been variously described as "an incoherent muddle,"[29] "abysmal,"[30] and a "mess."[31] The critique has resulted only in part from the inherent shortcomings of the two lines of analysis sketched above—that government operations often cannot realistically be cate-

---

first clear statement from Justice Jackson, who clearly rejected definitional approaches and emphasized that the powers of the constitutional branches often mix and overlap:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based upon isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Although no single canonical statement of what this analysis requires has yet been articulated, its core elements can be gathered from a number of statements in the opinions of its adherents. As applied to problems of government structure, the essential inquiry was formulated in terms of preserving the "balance" among the branches, ensuring that no branch was hindered in carrying out its core functions, and preventing any branch from unduly aggrandizing itself at the expense of another. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 380-83 (1989) (defending "flexible" approach to separation of powers concerns and defining essential issue as whether proposed arrangement will "undermine authority and independence of one or another coordinate Branch, the extent to which [a provision of law] prevents [a branch] from accomplishing its constitutionally assigned functions," or whether it "impermissibly threatens the institutional integrity of" one of the branches); Morrison v. Olson, 487 U.S. 654, 689-91, 693-94 (1988) (defining inquiry variously as whether Congress has "unduly" interfered with President's exercise of executive power and constitutional duty to "take care that the laws be faithfully executed," as whether the case presents "an attempt by Congress to increase its own powers at the expense of the Executive Branch," or whether case poses "a danger of congressional usurpation of Executive Branch functions"); Bowsher v. Synar, 478 U.S. 714, 770 (1986) (White, J., dissenting) (defining whether there is "a genuine threat of encroachment or aggrandizement of one branch at the expense of the other" (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)); INS v. Chadha, 462 U.S. 919, 1000 (1983) (White, J., dissenting) ("[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents [one of the branches] from performing its constitutionally assigned functions. . . . [and] whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.") (quoting Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977)).

28. *See, e.g.*, *Mistretta*, 488 U.S. at 380-412 (1989) (finding no constitutional violation in Congress's creation of United States Sentencing Commission as body composed of both judicial and nonjudicial appointees, charged with quasi-legislative functions, and located within judicial branch); Morrison v. Olson, 487 U.S. 654, 693-97 (1988) (holding Congress may secure independence of special counsel charged with investigating executive branch misconduct by depriving executive of both power to choose such counsel and power to remove them, except for good cause).

29. *See* Brown, *supra* note 8, at 1517 & n.10 (listing impressive roster of articles highly critical of Court's analysis, or lack thereof).

30. Elliott, *supra* note 8, at 506.

31. Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988).

gorized in the way that the formalist theory requires,[32] and that the balancing test which lies at the core of the "functionalist" approach often leads to ad hoc and apparently unprincipled decisions.[33] The depth of the critique reflects the Court's apparently unpredictable vacillations between those approaches, and its failure to articulate a clear and convincing theory to undergird its decision to apply a particular approach in a particular case.[34]

Nonetheless, despite these problems of theory, the outline of the current distribution of powers between Congress and the President is becoming tolerably clear, at least as applied to specific issues regarding control and staffing of the federal administrative bureaucracy. Federal government agencies are created by Congress, under organic acts which determine not only the agencies' existence, but also their composition, mission, powers, and level of independence.[35] Congress may delegate substantial power and discretion to agencies or officials, provided only that Congress articulate by statute some "intelligible principle" on which officials and reviewing courts may rely to ensure that the policies established by the legislative branch are being followed.[36] Congress may and does exercise various forms of informal supervision over agencies and officials

---

32. *See, e.g.*, Brown, *supra* note 8, at 1523-27 (warning of consequences of formalist approach); Sargentich, *supra* note 8, at 437-38 (discussing reasons for growing disenchantment with formalist approaches); Pierce, *supra* note 8, at 2-6 (critiquing Justice Scalia's formalist "vision" in *Morrison v. Olson*).

The problems here go deep. The first requirement of any "categorical" analysis is to define the relevant categories clearly. However, the Court's attempts to define and distinguish the concepts of "legislative," "executive," and "judicial" power have not to date proven particularly helpful in resolving hard cases. Thus, for example, in INS v. Chadha, 462 U.S. 919, 952 (1983), Chief Justice Burger, writing for the majority, held that the action by one branch of Congress to reverse a deportation decision was "legislative" in nature because all congressional acts fall presumptively into that category, because that "had the purpose and effect of altering the legal rights, duties, and relations of persons," and because Congress could have achieved the same result by statute. *Id.* at 952-53. In contrast, Justice Powell, concurring, would have classified the same act as "judicial" in nature because it did not enact a general rule, but rather applied that rule to a particular person. *Id.* at 964-65. In any case, both definitions are clearly overbroad. Many undoubtedly executive and judicial acts—such as awarding a government contract or judicial construction of a statute—surely affect individuals' rights and duties, and could just as surely be accomplished by legislation. Likewise, many clearly executive decisions—such as deciding which applicant will be awarded a valuable license—involve application of general criteria to individuals.

33. *See, e.g.*, Sargentich, *supra* note 8, at 439-44 (discussing two models of functionalist understanding of separation of powers problems); *see generally* Carter, *supra* note 8, at 357-64 (criticizing recent functionalist decisions in *Morrison* and *Mistretta*).

34. *See, e.g.*, Brown, *supra* note 8, at 1530-31 (noting Court's failure to articulate any consistent set of extrinsic values that would explain ultimate purposes to be served by separation of powers); Bruff, *supra* note 20, at 1342-43 ("The Supreme Court's rationale for choosing one approach over the other in a particular case . . . is ultimately obscure—perhaps even to the Justices."); Elliott, *supra* note 8, at 530-32, (arguing Court's narrow literalism has obscured core concepts that should inform separation of powers analysis). *But see* Stern, *supra* note 8, at 461-64 (finding Court's divergent approaches persuasive).

35. The constitutional authority for Congress's power to create these structures of government is found in the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18.

36. *See supra* note 10 and accompanying text.

charged with carrying out such delegated duties,[37] but may not overrule particular administrative acts by any means short of full and formal legislation.[38]

Although staffing of the federal administrative bureaucracy has been held to be essentially an "executive" function,[39] Congress may impose some limits on the President's discretion in both the hiring and firing of certain officials. For purposes of appointment, the Federal Constitution divides officials into three categories: high ranking "officers of the United States" who may be appointed only by the President, subject to the Senate's "advice and consent;"[40] "inferior"

---

37. See generally R. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS § 3.1 (1985) which lists the various mechanisms by which this informal oversight can be exercised:

> Congress has a wide variety of means, both statutory and non-statutory, by which it can seek to control agency discretion. . . . Appropriations can be wielded to punish or reward agencies and restrictions can be placed on the use of appropriated funds. Congress can also shape administrative decisions indirectly by applying political pressure through the use of committee reports, through budgetary, oversight, or investigatory hearings and hearings on the nominations of administrators, and through direct communications with administrators. The effectiveness of this last group of controls can be increased by requiring that agencies report to Congress before they act, by utilizing the General Accounting Office to investigate agency conduct, and by employing the Congressional Budget Office to consider the economic effects of government programs.

Id. at 43; *see also* Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 227-44 (1984)) (discussing oversight methods, interest group pressures, and internal agency characteristics); Strauss, *supra* note 2, at 591-96 (discussing internal and external procedures as well as inter-governmental relationships).

38. *See* INS v. Chadha, 462 U.S. 919, 954 (1983) (Congress may not overrule decision of executive officer exercising delegated authority through anything short of formal statute). While the narrow holding of *Chadha* involves only the requirements of bicameralism and presentment, Justice Burger's opinion appears to presume a very restrictive view of the role of Congress in overseeing the administration of the laws:

> Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

Id. at 954-55; *see also* Bowsher v. Synar, 478 U.S. 714, 733-34 (1986) (limiting role of Congress to the enactment of legislation, not active participation in its execution). The Court's insistence on an across-the-board condemnation of the legislative veto in all cases, regardless of context, drew considerable critical commentary. *See generally* Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 791-92 (1983) (criticizing court for failure to distinguish between use of vetos in regulatory context and executive-congressional relations).

39. *See* Myers v. United States, 272 U.S. 52, 161, 164 (1926) (holding power to appoint and remove government officials "is in its nature an executive power" and constitutional limitations of general proposition are to be strictly construed).

40. U.S. CONST. art. II, § 2, cl. 2. The hard question, of course, is defining the class of "officers of the United States" who must be approved by the Senate. The Court has attempted to define the term, but without notable success. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 126 (1976) ("[A]ny ap-

administrative officials who may be appointed by the President, by the courts, or by heads of departments, as Congress may choose;[41] and mere "employees," the appointment of whom is not governed by the Constitution.[42] Congress may prescribe the qualifications of appointees[43] and may, within limits, restrict the President's authority by conferring the power to appoint certain inferior officers on heads of departments or on the courts.[44] However, members of Congress may not personally serve on administrative organs,[45] nor may congressional appoin-

---

pointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States.' "); *see generally* Morrison v. Olson, 487 U.S. 654, 671 (1988) ("The line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn.").

41. U.S. CONST. art. II, § 2, cl. 2.

This category of "inferior officers" has proven as difficult to describe or define as its converse. Without attempting a comprehensive definition, the Court in *Morrison* held that independent counsel appointed to investigate executive branch misconduct under the federal Ethics in Government Act of 1978, though independent of any direct control by superior authority, nonetheless "clearly falls on the 'inferior officer' side of that line." *Morrison*, 187 U.S. at 671. The Court pointed to three factors as supporting this conclusion: that the independent counsel was removable (though only under limited circumstances) by the Attorney General who was thus a "higher ranking" official; that the counsel had "limited duties" and was "limited in jurisdiction" to a single investigation; and finally that she was "limited in tenure" in that her appointment would terminate when the particular investigation was completed. *Id.* at 671-72; *see also* Freytag v. Commissioner, 111 S. Ct. 2631, 2641 (1991) (holding "special trial judges" appointed to assist regular judges of United States Tax Court also "inferior" officers, appointment of whom can be vested in Chief Judge of Tax Court).

42. *Freytag*, 111 S. Ct. at 2640; Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) (per curiam).

43. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 412 (1989) (upholding United States Sentencing Commission against distribution of powers challenge). Though the organic statute vested ultimate power to appoint the seven Commissioners in the hands of the President, it significantly restricted his choices: "At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. No more than four members of the Commission shall be members of the same political party." *Id.* at 368 (quoting 28 U.S.C. § 991(a) (1988)).

44. U.S. CONST. art. II, § 2, cl. 2; *see also Morrison*, 487 U.S. at 675-76 (noting Congress's discretion with respect to such appointments is broad, limited only by general allocation of powers concerns and as yet ill defined notion that there ought to be no "incongruity" between functions of appointing authority and power to appoint particular official).

45. *See, e.g.*, Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2308 (1991) (individual members of Congress could not serve, even "in their individual capacities" on body created to oversee operation of certain D.C. area airports); Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928) (Congress could not authorize Philippine legislature to appoint two officers of that legislature to sit on boards of directors supervising certain public corporations in territory).

The constraint on such "dual officeholding" imposed by the implicit general principle of separation of legislative and executive power is supplemented by other federal constitutional provisions explicitly excluding a member of Congress from occupying an office the benefits of which have been raised during the member's term, or from simultaneously occupying both an executive "office" and a legislative seat:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

tees or others subject to congressional control exercise significant "executive" functions.[46] Congress may not retain for itself the power to remove any administrative officials by any means other than impeachment,[47] and may not restrict the President's power to remove certain officials carrying out purely executive functions.[48] Congress is permitted, however, to grant some degree of security in office—by limiting either who may exercise that removal power or the grounds on which it may be exercised, or both—to inferior officers not appointed by the President or whose duties are only "peripheral" to the core of the President's powers,[49] or to the so-called "independent" agencies that also exercise quasi-judicial or quasi-legislative functions.[50]

U.S. CONST. art. I, § 6, cl. 2.

These provisions were considered highly important by the founders, as security against repetition of what they considered to be the corrupt and undemocratic practice of eighteenth century British ministries in securing the support of members of Parliament through appointment of those members to lucrative offices. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 143-48 (1969); Matheson, *supra* note 20, at 308. Perhaps surprisingly, these restrictions have been very seldom litigated. The only case raising incompatibility issues to reach the United States Supreme Court, in which plaintiffs asserted that sitting members of Congress could not constitutionally hold commissions in the Armed Forces Reserve, was dismissed without reaching the merits. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). The single recent lower court case to address the issue stands only for the unexceptional proposition that the incidental exercise by Congress of a particular power that might be considered "executive" in nature does not convert members of Congress into federal officeholders in violation of U.S. CONST. art I, § 6. Atkins v. United States, 556 F.2d 1028, 1067 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

46. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 733-34 (1986) (Congress could not vest "executive" functions in Comptroller General because that official removable by Congress by means other than impeachment); *Buckley*, 424 U.S. at 120-43 (Federal Election Commission could not exercise any executive or quasi-judicial powers because majority of Commissioners either legislative officers or legislative appointees); *see also Springer*, 277 U.S. at 199 (Philippine legislature could not retain authority to appoint members of Board of Directors of certain public corporations).

47. *Bowsher*, 478 U.S. at 722-23.

48. *See, e.g.*, Myers v. United States, 272 U.S. 52, 176 (1926) (holding unconstitutional statute that purported to limit President's authority to remove postmasters), *overruled by* INS v. Chadha, 462 U.S. 919 (1983). In Morrison v. Olson, 487 U.S. 654 (1988), the court significantly limited *Myers* by holding that although "there are *some* 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role," that category does not include all officers wielding purely executive powers. *Id.* at 690-91.

49. *See, e.g.*, *Morrison*, 487 U.S. at 691-92 (holding Congress may limit grounds on which "independent counsel" appointed to investigate and prosecute government officials suspected of criminal violations may be removed). Although the counsel's functions were purely executive in nature, and "[a]lthough the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act," the Court professed itself unable to "see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branches to require as a matter of constitutional law that counsel be terminable at will by the President." *Id.*; *see also* United States v. Perkins, 116 U.S. 483, 485 (1886) ("[W]hen Congress, by law, vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest.").

50. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (holding Congress could limit President's removal authority by providing Commissioners of Federal Trade Commission be appointed for fixed ter s and removed only for cause). To distinguish *Myers*, the Court relied on the Commission's role as an "independent" agency and its exercise of quasi-judicial and quasi-legislative functions. *See* Wiener v. United States, 357 U.S. 349, 356 (1958) (holding Congress

In sum, the allocation of federal governmental authority reflected in recent case law does not take an expansive view of the powers of Congress. To be sure, the Court has recognized the possibility of "independent" agencies[51] and has permitted some degree of infringement on executive branch autonomy where necessary to uncover misconduct within that branch.[52] However, the Court has in other contexts tended to confine Congress to a single role—that of passing statutes of general effect and future applicability. The bulk of federal decisions have, in effect, supported the centralization of power in the President by striking down most efforts by Congress to construct formal mechanisms by which it might exercise oversight over the most dynamic aspect of government, the burgeoning administrative bureaucracy.

B. The Limited Relevance of Federal Precedents to State Distribution of Powers Issues

One of the enduring issues in state constitutional law is the extent to which state courts interpreting state constitutions may rely on precedent from other jurisdictions, and in particular on precedent from federal courts interpreting the Federal Constitution, as persuasive authority. While most judicial and scholarly analysis of these questions has focused on cognate federal and state guarantees of individual rights,[53] the underlying methodological issue applies as well to

---

may limit President's power to replace members of War Claims Commission, body exercising quasi-judicial authority).

51. *See, e.g.*, *Humphrey's Executor*, 295 U.S. at 629. The Court's rhetorical support for this concept has not been constant, however.

52. *See, e.g.*, *Morrison*, 487 U.S. at 691-92 (upholding good cause provision limiting President's ability to control independent executives and counsel); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 454 (1977) (upholding statute limiting former President's control over papers and tape recordings he created while in office); United States v. Nixon, 418 U.S. 683, 713 (1974) (holding executive privilege did not shield President from obeying subpoena to produce evidence for use in criminal trial).

53. The revival of interest in state constitutional interpretation was sparked in large part by a reaction to decisions of the Burger Court cutting back on criminal procedural protections and individual rights. *See, e.g.*, Ronald K. L. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. vi, vii-xiv (1984) (tracing development of that revival); Earl M. Maltz et al., *Selected Bibliography on State Constitutional Law, 1980-89*, 20 RUTGERS L.J. 1093 (1989) (noting great majority of articles listed concern criminal procedure or individual rights). Not surprisingly, in light of this genesis, virtually all of the important scholarly articles debating issues of interpretive methodology and the persuasiveness of federal precedent—whatever substantive position they may have taken—likewise focused on the interaction of federal and state rights guarantees. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (discussing impact of Supreme Court decisions under Fourteenth Amendment on state constitutional interpretation); Ronald K. L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 322-39 (1986); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 387-92 (1980) (discussing how state courts and lawyers have approached constitutional claims in areas where Supreme Court has been both active and inactive); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 434-48 (1988) (exploring role federalism plays in state constitutional analysis); 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,

problems of governmental structure and the distribution of powers among the branches of state government. The consensus that has emerged from that debate can be readily stated, if not always so readily applied: State courts always have the power to interpret state constitutional provisions independently. In certain circumstances, such as where the substance of a state constitutional provision was derived from a foreign source,[54] or shares historical and functional similarities with similar provisions of the Federal Constitution or of the constitutions of other states, relevant precedent from those other jurisdictions is entitled to respectful attention and may be relied upon. However, particularly when the text or drafting history of a state constitutional provision differs significantly from federal or sister state cognates, where the issue involves some unique aspect of local history or culture which differs from that of the rest of the nation, where well established local precedent points toward a different conclusion, or where there is some flaw in the reasoning or result of the proffered foreign precedent, reliance may be inappropriate.[55]

To some extent, a lengthy argument for the independence of state allocation of powers analysis from its federal counterpart may seem like an exercise in battering down an open door. Those courts that have squarely addressed the issue have concluded, correctly, that the divergences between federal and state constitutions are too great to permit much reliance.[56] Nonetheless, many state courts continue to rely heavily on federal cases analyzing the proper distribution of powers between the President and Congress for guidance in resolving conflicts between their own governors and legislatures, at least in the sense of treating federal precedents as very persuasive, and as establishing the conceptual catego-

---

403-04 (1984) (asserting state constitutional claims must be evaluated "upon state constitutional analysis and not upon misplaced reliance upon Supreme Court federal constitutional interpretations").

54. *See generally* John M. Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived from Federal Sources*, 3 EMERGING ISSUES STATE CONST. L. 195, 226-44 (1990) (tracing derivation of state constitutional protections of autonomy privacy from federal sources, and arguing such rights should therefore be interpreted in accord with interpretation given such rights by federal courts at time they were adopted into state law).

55. *See generally* Collins & Galie, *supra* note 53, at 325 (noting state courts generally feel need to point to some non-result oriented factor to justify divergence from federal precedent); Williams, *supra* note 53, at 385-89 (noting criteria developed by state courts to justify rejecting Supreme Court interpretation of similar federal constitutional question); Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 171 (1986-87) (emphasizing state courts should independently evaluate constitutional rights based on state constitution's text, history, and state social interpretation before analyzing any federal constitutional claims). State courts have occasionally articulated a similar set of factors as governing the degree to which they will rely on foreign precedent in interpreting state constitutions. *See, e.g.*, State v. Gunwall, 720 P.2d 808, 812-13 (Wash. 1986) (en banc) (discussing reliance on federal precedent); People v. Tisler, 469 N.E.2d 147, 153 (Ill. 1984) (same).

56. *See, e.g.*, Parcell v. Kansas, 468 F. Supp. 1274, 1277 (D. Kan. 1979) (holding plaintiff's reliance on Buckley v. Valeo, 424 U.S. 1 (1976), misplaced and federal and state distribution of powers cases cannot be used interchangeably), *aff'd*, 639 F.2d 628 (10th Cir. 1980). The court noted that *Buckley* was bottomed on the Appointments Clause contained in Article II, § 2 of the Federal Constitution and that the Kansas constitution contains no equivalent. *Id.*

ries and modes of analysis that the state courts employ in analyzing their own state constitution.[57]

The temptation to rely on this well-developed body of federal precedent is undeniably strong. Governments in all states are organized similarly to their federal counterpart, sharing both the familiar tripartite allocation of powers among functionally differentiated legislative, executive, and judicial branches, and some degree of interbranch "checks and balances" designed to afford each branch sufficient opportunities to control the excesses of the others.[58] Moreover, many of the specific questions that have confronted state courts in this area, for example, whether legislators may appoint members of administrative bodies, or the propriety of the legislative veto mechanism, are broadly similar to the problems that have been considered in recent federal distribution of powers cases. Yet another, and probably the most important, factor is the tendency of contemporary American lawyers to think about all issues of constitutional law in terms of categories and conceptual constructs originating in federal cases. Federal cases and the web of scholarly commentaries that have grown up around them provide lawyers, scholars, and state courts with an extensive and familiar set of precedents and ready-made analytical tools lying readily available for use in analyzing state distribution of powers issues—tools that we are all predisposed to use by the still ingrained tendency of American law schools to teach constitutional law solely in terms of the analyses articulated by federal courts interpreting the Federal Constitution.[59]

Despite its obvious temptations, however, reliance on federal law does not lead to happy results in state allocation of powers cases, as the Louisiana experience in *State Board of Ethics for Elected Officials v. Green*[60] amply demonstrates. In its successive opinions in *Green*, the Louisiana Supreme Court considered the makeup and powers of the Louisiana Board of Ethics for Elected

---

57. *See, e.g.*, Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 293-96 (Ind. 1958) (citing several federal cases); Tucker v. State, 35 N.E.2d 270, 280-83 (Ind. 1941) (relying extensively on Myers v. United States, 487 U.S. 654 (1988), and commentators on Federal Constitution, to hold that power to name officials inherently "executive" in nature); Board of Ethics For Elected Officials v. Green, 540 So. 2d 1185, 1190-93 (La. Ct. App. 1989) (citing several federal cases); Alexander v. State, 441 So. 2d 1329, 1336 (Miss. 1983) (referring to federal sources as having "authoritatively" addressed issues of separation of powers analysis); State v. Bailey, 150 S.E.2d 449, 452-54 (W. Va. 1966) (extensively discussing and following federal precedents).

58. These similarities are not accidental; rather, they reflect the fact that the drafters of the various state constitutions, though operating over a time span of more than 200 years, have always shared a common intellectual heritage both with each other and with the framers of the Federal Constitution. *See generally infra* notes 73-74 and accompanying text.

59. *See* Daniel R. Gordon, *The Demise of American Constitutionalism: Death by Legal Education*, 16 S. ILL. U. L.J., 75-82, 89 (1991) (decrying tendency to see all constitutional issues in terms of federal constitutional analysis and advocating revisions to standard constitutional law courses and casebooks as necessary remedy).

60. 540 So. 2d 1185 (La. App. Ct.) (*Green I*), *aff'd*, 545 So. 2d 1031 (La. 1989) (*Green II*), *aff'd in part, rev'd in part*, 566 So. 2d 623 (La. 1990) (*Green III*). The *Green* decision was briefly noted and critiqued for its ultimate departure from formalist principles in Elizabeth Vaughan Baker, Note, *Usurping the Executive Power: State Board of Ethics for Elected Officials v. Green*, 51 LA. L. REV. 911 (1991).

Officials, the administrative agency that administers the Louisiana Campaign Finance Disclosure Act.[61] The Board was composed of five persons: two elected by the State House of Representatives, two elected by the State Senate, and one chosen by the Governor.[62] The Act authorized the Board to perform both traditionally "quasi-legislative" and traditionally "executive" functions, and specifically gave the Board power to bring civil enforcement actions against violators of the Act.[63] In 1988 the Board brought a civil action alleging that Louisiana's then-recently elected Commissioner of Insurance had knowingly falsified campaign finance reports.[64] In response, Commissioner Green argued that the Board's civil suit represented an assertion of executive authority by a legislatively dominated entity in violation of the allocation of power provisions of the Louisiana Constitution.[65]

In its initial opinion, the Louisiana Supreme Court reaffirmed the results of prior Louisiana jurisprudence by adopting the "formalist" analysis articulated by the United States Supreme Court in *Buckley v. Valeo*[66] and held, by a bare four to three majority, that an entity composed largely of legislative appointees could not constitutionally exercise the executive power to initiate prosecutions.[67]

---

61. LA. REV. STAT. ANN. §§ 18:1481-1532 (West Supp. 1993). The Board, for these purposes, sits as the "Supervisory Committee on Campaign Finance Disclosure" and exercises the powers of that supervisory committee. *Id.* §§ 18:1511.1-1511.2.

62. *Id.* § 42:1132. The Senate and House may choose any non-civil servant. The Governor's appointee must be a former judge of one of the Louisiana courts.

63. Louisiana statutes gave the Board authority to: adopt rules and regulations necessary to effectuate the purposes of the Act; render advisory opinions; receive and maintain the documents and reports that the Act requires candidates to file; investigate potential violations of the Act; forward information to the appropriate district attorney regarding possible criminal violations of the Act; and bring civil suits to collect civil penalties for violations of the Act. LA. REV. STAT. ANN. §§ 18.1511.2-1511.6.

64. The allegations in the case were particularly lurid. The suit against Green claimed that he had falsified his returns to conceal that over $2 million in loans to his campaign had come from the owners of Champion Insurance, a troubled company that soon thereafter became embroiled in bankruptcy and criminal charges of fraud. *Green I*, 540 So. 2d at 1186.

65. Louisiana's constitution is explicit regarding separation of powers: "vesting" legislative, executive, and judicial power in the state legislature, governor, and courts respectively, LA. CONST. art. III, § 1, art. IV, § 1, art. V, § 1; explicitly reaffirming that such powers shall not be mixed, LA. CONST. art. II, § 1; and specifically forbidding any person "holding office in" any department from exercising power belonging to any other department. LA. CONST. art. II, § 2. Though the point was not discussed in *Green*, the Louisiana Constitution also grants the Governor power to appoint and remove members of executive boards and commissions in the executive branch, but limits that power to positions not otherwise provided for "by law:"

> (H) Appointments
>
> (1) The governor shall appoint . . . the members of each board and commission in the executive branch whose election or appointment is not provided by this constitution or by law.
>
> * * *
>
> (I) Removal Power. The governor may remove from office a person he appoints, except a person appointed for a term fixed by this constitution or by law.

LA. CONST. art. IV, § 5.

66. 424 U.S. 1 (1976).

67. *Green II*, 545 So. 2d at 1031 (opinion of then Judge Pike Hall, sitting by designation in

On rehearing, that opinion was vacated and the court issued a second opinion, again by a bare majority, which cited *Morrison v. Olson*.[68] In this second opinion, the *Green* court found that the legislature exercised no actual "control" over its appointees, and concluded that the challenged Act therefore did not violate the state separation of powers principles after all.[69] That opinion too was vacated, only to be reinstated, still by only a four to three majority, after the ascension of the Louisiana Supreme Court's then newest member, Justice Pike Hall.[70]

The decision in *Green* is noteworthy in two related respects. First, all of the court's successive opinions treated federal precedents as persuasive, at least in the sense of establishing the conceptual categories and modes of analysis that the Louisiana court could and did employ in analyzing its own state constitution. The successive decisions differed only as to *which* federal cases should be followed, not as to whether such reliance would be proper. Second, while the *Green* court articulated a rationale for its ultimate decision—the legislature's lack of ongoing "control" of its appointees—that rationale appears to be more related to debates among members of the Federal Supreme Court regarding purported distinctions between *Buckley* and *Morrison* than to any pre-existing Louisiana analysis. Despite three tries, the Louisiana Supreme Court failed to root its rationale in *Green* in either a persuasive body of Louisiana precedent or a broader context of distribution of powers analysis under the state constitution.[71]

---

place of Justice Lemmon, joined by Justices Marcus, Watson, and Cole). Prior to *Green*, only one Louisiana case had addressed these issues directly. In Guidry v. Roberts, 335 So. 2d 438 (La. 1976), the Louisiana Supreme Court had considered the original version of the Louisiana Campaign Finance Disclosure Act. The court there relied heavily on the federal decision in Buckley v. Valeo, 424 U.S. 1 (1976), in holding that the state constitution would permit committees composed of legislative appointees to receive reports and to review them for compliance with law, but that such a committee could *not* constitutionally exercise the executive authority to determine whether violations would be prosecuted. The court reached this latter conclusion without directly deciding the separation of powers issue presented, ruling instead that the statute, giving the Board sole discretion whether to refer a case for prosecution, violates LA. CONST. art. V, § 26(B), which gives local district attorneys "charge of every criminal prosecution by the state in his district."

68. 487 U.S. 654 (1988).

69. State Board of Ethics for Elected Officials v. Green, 559 So. 2d 480, 482-83 (La. 1990) (opinion of Justice Lemmon, joined by Chief Justice Dixon and Justices Dennis and Calogero). The *Green* court did not directly rely upon *Morrison* for the "legislative control" test that was ultimately adopted. However, in the absence of any firm state constitutional basis for that "control" test, *see infra* note 71, the conclusion appears inescapable that the Louisiana court was at least heavily influenced by the Federal Court's analysis in *Morrison*. In *Morrison*, the Court emphasized Congress's inability to remove—and thus, its lack of practical control over—Special Prosecutors as support for its conclusion that the office was not so constituted as to interfere impermissibly with the President's ability to carry out his constitutional duties and thus, did not violate federal separation of powers principles. Morrison v. Olson, 487 U.S. 654, 685-86 (1988) (distinguishing Bowsher v. Synar, 478 U.S. 714 (1986)).

70. *Green III*, 566 So. 2d at 623 (opinion of Justice Lemmon, joined by Chief Justice Calogero and Justices Dennis and Hall), *denying rehearing and reinstating opinion originally published at* 559 So. 2d 480, *rev'g* 540 So. 2d 1185 (1989). Justice Hall's position on these issues apparently changed between the time he authored the court's original opinion and his eventual joining in the court's final opinion.

71. The operative distinction that the *Green* court ultimately adopted—that performance of executive functions by legislative appointees only violates separation of powers principles when the

The problems the Louisiana courts encountered in *Green* were neither isolated nor accidental. Rather, they were typical of difficulties encountered by many state courts confronting distribution of powers issues and resulted from the court's failure to consider fundamental divergences between federal and state governments and constitutions—divergences that suggest that relevance of federal models to issues of state constitutional law is questionable to say the least. Several considerations suggest that state courts should not put much reliance on federal analysis when interpreting their own state charters: the intrinsic weaknesses of federal precedents; origins at different historical periods; structural differences; differing pragmatic concerns; and the lessened importance of "tyranny" concerns in a federal system.

1. The Intrinsic Weaknesses of Federal Precedents

As noted above, current Federal Supreme Court decisions on the distribution of governmental powers are distinguished neither by the consistency of their results nor by the depth and persuasiveness of their analyses.[72] It may be, as noted above, that the competing functionalist and formalist approaches, which have polarized decisionmaking in the United States Supreme Court, each have intrinsic validity in that each is rooted in one of the two streams of thought that went into the American distribution of powers tradition. The federal cases, however, continue to provide no theoretically coherent way to reconcile these competing principles and no rationale that can explain why the Court chooses either approach over the other in particular cases. Thus, federal analyses are unlikely to provide any firm grounding for a convincing and consistent state constitutional analysis.

2. Origins at Different Historical Periods

The Federal Constitution and state constitutions are generally creatures of very different historical periods. Very few state charters date from the revolutionary era; most were drafted during the gilded age or later.[73] Such latter-day

---

legislature also exercises "control" of those appointees—was at best weakly supported in prior Louisiana law. The single precedent that the *Green* court cited for that proposition, State *ex rel.* Guste v. Legislative Budget Comm., 347 So. 2d 160 (La. 1977), is scarcely on point. In *Guste*, the Louisiana Supreme Court faced the very different question of whether a statute empowering the Governor to pick 24 of the 28 members of a legislative committee impermissibly infringed upon the independence of the legislature. *Id.* at 165. In holding that it did not, the *Guste* court focused not on the issue of "control" but rather on the essential information gathering and advisory nature of the committee. *Id.* Thus, while both *Guste* and the last of the *Green* opinions shared a rejection of the "formalist" analysis, they shared little else. More troubling, neither *Guste* nor *Green* ultimately made much attempt to explain *why* the particular analyses they espoused were the proper approach to the difficult constitutional issues presented.

72. See *supra* notes 29-34 and accompanying text for a discussion of the Supreme Court's analysis of separation of powers issues.

73. Only three current state constitutions date from the eighteenth century: Massachusetts, drafted in 1780; New Hampshire, drafted in 1784; and Vermont, drafted in 1793. Aside from the Maine Constitution, drafted in 1820, all of the rest date from times two generations or more removed from 1787. As Professor Bruff has pointed out, the Federal Constitution is a product of the Enlight-

constitutions, drafted by people who experienced the governmental irresponsibility and corruption resulting from initial experiments with untrammelled legislative authority,[74] contain few broad or conceptually pure grants of authority to any branch. Unlike the very short and open-textured Federal Constitution, state constitutions generally seem drafted so as to restrain all branches' potential for mischief—by incorporating a large number of specific mandates and prohibitions and by allowing each branch strengthened powers to oversee and control the excesses of the others.[75] While reformers have tried to push for state constitutions that are closer to the federal model, their efforts have been largely inef-

---

enment, and reflects that era's "qualified optimism about the power of government to improve society" by creating a federal government whose powers could freely grow to meet new needs. Bruff, *supra* note 20, at 1338-39. In contrast, the latter part of the nineteenth century was a time of public scandal and disillusionment with government on all levels. Thus, the Texas Constitution of 1876, like many drafted at about that time or thereafter, was intentionally drafted to be "long, specific and confining," and intended to shackle the powers of all three branches of the state government. *Id*.

74. The original revolutionary era state constitutions often paid lip service to the principle of separation of powers, but were noteworthy more for the clear predominance of their respective legislatures over the other branches of state government. *See generally* Casper, *supra* note 24, at 216-19 (discussing early separation of powers concepts); Matheson, *supra* note 20, at 309-14 (noting states in 1776 gave only verbal recognition of concept of separation of powers in constitutions, which resulted in powerful legislature and correspondingly weak executive); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 547 (1989) (noting "lack of effective checks on the powerful unicameral assembly" established by initial Pennsylvania Constitution, is result of contemporary political culture which stressed largely unalloyed democratic majoritarianism). For discussion of the early constitutions of particular states, all of which reflected some degree of legislative hegemony, see, e.g., JAMES L. UNDERWOOD, THE CONSTITUTION OF SOUTH CAROLINA, VOLUME I: THE RELATIONSHIP OF THE LEGISLATIVE, EXECUTIVE AND JUDICIAL BRANCHES 7-26 (1986) (explaining South Carolina's legislative hegemony in power politics as being attributed to control of key government appointments and influence in financial policy); ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 4-5 (1990) (noting New Jersey's 1776 Constitution provided for little in way of separation of powers, extending even to legislative election of governor); Moran, *supra* note 14, at 955-62 (noting dominant position of legislature under Charter that served Connecticut as constitution until 1818); Orth, *supra* note 20, at 5-6 (noting North Carolina's founding fathers committed to principle of separation of powers, but Constitution of 1776 nevertheless granted predominance of legislature over other branches by providing for election of Governor, Members of Council of State, Attorney General, State Treasurer, State Secretary, and all Judges by General Assembly). The primary exception to this early tradition of legislative dominance was New York, where a relatively strong executive was created at the outset. PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 3-6 (1991) ("[T]he New York constitution of 1777 provided for the strongest executive in the American states, giving her the longest term with reeligibility, direct popular election, and a share with the judiciary in the veto power.").

Later constitutions were enacted largely in an effort to control what were perceived as the excesses of state governments in general, and state legislatures in particular. *See, e.g.*, Bruff, *supra* note 20, at 1338-39 (discussing Gilded Age disillusion with government in general); Moran, *supra* note 14, *passim* (tracing gradual growth of executive power in Connecticut, in response to legislative incapacity); Sheryl G. Snyder & Robert M. Ireland, *The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and Historical Analysis of* L.R.C. v. Brown, 73 KY. L. J. 165, 167-68 (1984-85) (noting "desire to control legislative excesses constituted the principal reason" for calling Kentucky Constitutional Convention of 1890).

75. *See, e.g.*, Bruff, *supra* note 20, at 1338-39 (noting transition in context of Texas Constitution); LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE 9-16 (1990)

fective. Most state constitutions continue to be long, detailed, and characterized by many specific restrictions on the political branches.[76]

3. Structural Differences

While it is true that all constitutions in the American tradition share certain basic similarities of form, there are enough structural differences between the Federal Constitution and state constitutions to make state reliance on federal distribution of governmental power precedents suspect. For example, state constitutions do not grant, but merely allocate, pre-existing reserved sovereign powers. Unlike the branches of the federal government, the state legislatures are not limited, even in theory, to any listing of enumerated powers. Thus they wield, in theory as well as in fact, sovereign authority to set up the organs of state government in any fashion not clearly forbidden by the people.[77] As another example, one might note that federal analyses have often been based, at least in part, on the observation that the framers of that document intended to create a "unitary executive."[78] Most states, in contrast, authorize multiple independently elected

---

(discussing Louisiana Constitution); LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION: A REFERENCE GUIDE 16-17 (1990) (discussing Tennessee Constitution).

76. An example of this continuing tendency can be found in Louisiana. Culminating a process of increasing detail in successive constitutions, the Louisiana Constitution of 1921 was, already when adopted, a long, detailed, and confusing "mish-mash of organic and statutory law," that both continued prior restraints on the ability of the legislature to govern and added new ones. Mark T. Carleton, *History of Louisiana Constitutions*, in LEWIS E. NEWMAN, ED., FOCUS ON CC/73 7 (Baton Rouge: LSU Institute of Government Research, 1973). So detailed and dedicated to protection of special interests was that constitution that virtually any significant (and many an insignificant) change in government policy required constitutional amendment. By 1970, that constitution had grown to an unwieldy monster of some 250,000 words, including 536 amendments. A revolt of the voters, who in 1970 rejected *all 53* proposed amendments (!), led to calls for a constitutional convention, which met in 1973 and 1974. The result of that convention, the Louisiana Constitution of 1974, was an improvement, but only a modest one. At 30,000 words, it is still quite long. The restraints it places upon the political branches—particularly in requiring that taxes can only be enacted by two-thirds vote, LA. CONST. art. VII, § 2, and in dedicating much of the state's revenue to specific purposes—have contributed significantly to the state's chronic fiscal crises. *See generally* Hargrave, *supra* note 75, at 12-19 (discussing impact of constitution's strict provisions).

The Louisiana Constitution is not alone. While multiplication of examples could consume many pages, I cannot resist a brief reference to the Alabama Constitution, which, as of 1990, contained 287 sections and 534 amendments. The more recent amendments include one empowering the legislature to authorize the Jefferson County Commission to "prohibit the overgrowth of weeds and the storage and accumulation of junk, inoperable automobiles and other litter," (but only if the legislature so votes by a three-fifths majority), and another permitting bingo games by charitable groups in Calhoun County. ALA. CONST. amends. 497, 508.

77. Several courts have relied upon this concept of the inherent powers of state legislatures to support arguments that the legislature, as holder of the sovereign power of the people, has authority to divest the governor of the power to appoint certain administrative officials, or to appoint those officials itself. See *infra* notes 144-45 for a discussion of cases relying on the inherent powers of state legislatures. Congress, in contrast, wields only delegated powers. Its powers over the appointment process are thus strictly delimited by the terms of the appointments clause of article II, § 2 of the Federal Constitution.

78. The "unitary executive" argument, briefly stated, starts from the text of the Federal Constitution, which vests federal executive authority only in a single President and imposes on that President alone the duty to make sure "that the Laws be faithfully executed." U.S. CONST. art. II, §§ 1,

statewide executive officers,[79] thus diffusing executive power and weakening ar-

---

3. From these texts and from the founders' goals of assuring energy and accountability in the executive branch, the "unitary executive" argument concludes that the President must retain the power to direct the activities of all administrative officials (except those who, like judicial clerks or congressional staffers, labor solely for another branch). Though the Federal Supreme Court seldom uses the phrase, some such concept seems to have undergirded a number of decisions, from *Myers* to *Chadha* and *Bowsher*. *See generally* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1165-68 (1992) (discussing variations on theory); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 1000-13 (1993) (discussing framers' view of President's role as Chief Administrator).

The decision in *Morrison*, which permitted "independent counsel" investigating executive misconduct to be insulated from direct presidential control, 487 U.S. at 705-15, has been decried by some as a rejection of this principle, at least in the strong form proposed by Justice Scalia. *See* Calabresi & Rhodes, *supra* this note, at 1208-09 (*Morrison* signals "arguably irreversible" rejection of any strong version of unitary executive position); Lee S. Lieberman, Morrison v. Olson: *A Formalistic Perspective on Why the Court was Wrong*, 38 AM. U. L. REV. 313, 335-42 (1989). However, such claims seem to be at least somewhat overstated. *Morrison* did not go much beyond Humphrey's Executor v. United States, 295 U.S. 602 (1935), in limiting the President's authority to control the methods and results of federal administration. While the cases were theoretically distinguishable, in that the independent counsel in *Morrison* exercised only executive-type powers, the fact remains that the situation presented in *Morrison*—the evident need to promote the perception and reality of justice by insulating the person investigating the executive branch from control by that branch—is very unusual, to say the least. While the purity of the federal "unitary executive" theory may have been sullied, it seems quite unlikely that the theory or result of *Morrison* will extend much beyond its facts.

79. *See, e.g.*, ALA. CONST. art V, §§ 112, 116 (providing for separate statewide election of Governor, Lieutenant Governor, Attorney General, State Auditor, Secretary of State, State Treasurer, Superintendent of Education, and Commissioner of Agriculture and Industries). Although the list of statewide elected officials varies from state to state, most provide for several such independently elected executives. *See* ARIZ. CONST. art. V, § 1; ARK. CONST. art. 6, § 3; CAL. CONST. art. V, § 11; COLO. CONST. art. IV, § 1; CONN. CONST. art. Fourth, § 4; DEL. CONST. art. III, § 21; FLA. CONST. art. IV, §§ 4 & 5; GA. CONST. art. V, § III, para. 1; IDAHO CONST. art. IV, § 1; ILL. CONST. art. V, § 1; IND. CONST. art. 6, § 1; KAN. CONST. art. 1, § 1; KY. CONST. § 91; LA. CONST. art. IV, § 3; MICH. CONST. art. V, § 21; MINN. CONST. art. V, § 1; MISS. CONST. art. 5, §§ 133 & 134; MO. CONST. art. IV, § 17; NEB. CONST. art. IV, § 1; NEV. CONST. art. 5, § 19; N.M. CONST. art. V, § 1; N.Y. CONST. art. V, § 1; N.D. CONST. art. V. § 13; OHIO CONST. art. III, § 1; OKLA. CONST. art. VI, § 4; OR. CONST. art. VI, § 1; R.I. CONST. art. VIII, § 1; S.C. CONST. art. VI, § 7; S.D. CONST. art. IV, § 7; TEX. CONST. art. IV, §§ 1 & 2; UTAH CONST. art. VII, § 1; VT. CONST. ch. II, §§ 47-49; WASH. CONST. art. III, § 3; W. VA. CONST. art. VII, § 1; WIS. CONST. art. VI, § 1; WYO. CONST. art. IV, § 11.

A few states—primarily those with the oldest constitutions—go beyond this and provide for election of some executive officers by the legislature. ME. CONST. art. V, pt. 2, § 1; pt. 3, § 1 (providing for legislative election of Secretary of State and Treasurer respectively); MASS. CONST. pt. 2, Ch. 2, § IV, art. I, [§ 80] (providing for legislative election of Secretary, Treasurer and Receiver General, Commissary General, Notaries public, and Naval officers); N.H. CONST. pt. 2, art. 67 (providing for legislative election of Secretary of State and Treasurer); TENN. CONST. art. VII, § 3 (providing for legislative election of Treasurer or Treasurers and Comptroller of Treasury).

Relatively few states follow the federal pattern and provide for a unitary executive. Interestingly, however, several of the more recent state constitutions, including those of Alaska, Hawaii, and New Jersey, fall into this group. ALASKA CONST. art. III, § 8 (providing only elected officials are Governor and Lieutenant Governor, who run together on single ticket); HAW. CONST. art. V, § 6 (providing heads of all principal departments will be nominated by Governor and confirmed by Senate); IOWA CONST. art. IV, §§ 1-3 (providing similar provision as Alaska); MD. CONST. art. II

guments that derogations from gubernatorial authority violate the founders' vision.[80]

4. Differing Pragmatic Concerns

The pragmatic concerns that should inform distribution of powers analysis on the state level are also significantly different from those that are operative on the federal level. Some of these pragmatic concerns relate to the ability of state legislatures to fulfill their role as a co-equal leg of the tripod that sustains increasingly complex state governments. To cite but one example, Congress is in session for the bulk of each year and is endowed with a large and professional staff.[81] It thus enjoys a substantial institutional capacity to gather information on a continuous basis and to deal with emergencies as they arise. In marked contrast, many state legislatures meet for only short and intermittent sessions, and the legislators themselves are often only part-time politicians with other livelihoods that require attention.[82] State legislative staffs are smaller and less regimented than their federal counterparts.[83] These realities have a number of practical consequences. Most obviously, state legislatures must often make special arrangements to deal with sudden funding needs or similar problems that

§ 18 (same); N.J. CONST. art. V, § IV, ¶ 3 (similar provision to Hawaii). The Pennsylvania and Virginia executives are almost unitary, with the constitutions of both states providing for popular election of the Governor, Lieutenant Governor, and Attorney General only. PA. CONST. art. 4, § 5; VA. CONST. art. 5, § 15.

80. Independent election by the people gives those elected state executive officials far greater autonomy, and far greater control over their departments, than any federal official enjoys. And that autonomy is exactly what the framers of those state constitutions intended to achieve. *See* Michael B. Holmes, Comment, *The Constitutional Powers of the Governor and the Attorney General: Which Officer Controls Litigation Strategy When the Constitutionality of a State Law is Challenged?* 53 LA. L. REV. 209 (1992) (arguing in event of conflict, independently elected Louisiana Attorney General, and not Governor, authorized to determine what position state will take in litigation). Thus, even under the broadest reading of *Morrison* and *Humphrey's Executor*, the President retains far greater control over the processes and results of the federal administrative machine than governors typically enjoy over their respective state executive branches.

81. These staff members are of several types. Each congressional committee has a professional staff, each officer of Congress has an office staff, and each member of Congress has a personal staff. Some idea of the total size of these staffs may be gleaned from the 1992 Congressional Staff Directory, which lists in excess of 17,000 names in its "Individual Index." 1992 CONGRESSIONAL STAFF DIRECTORY / 2 (Ann L. Brownson ed., 1992). In addition, Congress has created a number of administrative agencies, such as the Congressional Budget Office, which also lend expertise and assistance to Congress.

82. *See, e.g.*, Snyder & Ireland, *supra* note 74, at 174 (noting weaknesses of legislature under current Mississippi Constitution).

83. During the last several decades, many legislatures have begun to meet more frequently and for longer sessions, and have increased the number and professionalism of their staffs. Rosenthal, *supra* note 9, at 44-46. Nonetheless, these structural problems to effective "informal" oversight of administrative agencies remain important. Many state constitutions still limit the length and frequency of legislative sessions. And, while special sessions and similar mechanisms may provide some additional scope, they too are limited in length and subject matter. Legislative staffs of even the largest states rarely top 1000 individuals in total, as compared to the many thousands of staff assistants, many of whom have deep and specialized expertise, who assist Congress.

may arise when the legislature is out of session,[84] or to acquire the expertise required to confront the executive branch. As will be seen below, certain innovative mechanisms that several state legislatures have created in an effort to deal with these institutional problems—mechanisms such as "State Finance Councils"[85] and "Legislative Research Committees"[86]—have produced a significant amount of state constitutional case law and doctrine that has no federal equivalent.

Less obvious but equally important, this "part-time" aspect of many state legislatures has specific relevance for issues concerning the methods by which legislatures exercise their authority to oversee state level administrative bodies. Like Congress, state legislatures are frequently required, by force of circumstance if not by choice, to delegate large measures of discretion over important and politically salient issues to administrative bodies. However, while state administrators may have of late become somewhat more responsive to legislators, intermittent sessions and limited staffs still tend to make state legislators far less able than members of Congress to exercise influence through informal oversight mechanisms, such as hearings or direct contact with administrators.[87] Thus, judicial decisions that have the effect of cutting off mechanisms of direct legislative influence on administrative agencies—for example, decisions forbidding legislative vetoes of administrative rules or precluding the legislative branch from appointing administrative officials—may well have a different effect on state legislatures than they have on Congress. For Congress, the effect may only be a substitution of one method of oversight for another. For state legislatures, the result may be the substantial elimination of any effective oversight at all.

5. Tyranny Concerns and the Federal "Safety Net"

Finally, and most fundamentally, the states and the federal government differ crucially with respect to the most basic issue of all—the purposes meant to be served by the distribution of governmental powers. Framers,[88] schol-

---

84. Most state constitutions provide for special sessions in the event of real emergencies. However, such mechanisms clearly do not provide any secure basis for legislative acquisition of expertise, or of responding to any but the most pressing of crises.

85. See *infra* notes 211-14 and accompanying text for a discussion of such mechanisms.

86. See *infra* notes 226-28 and accompanying text for a discussion of such mechanisms.

87. *See, e.g.*, Bruff, *supra* note 20, at 1346 (discussing relatively "weaker" ties between state administrative and political branches).

88. The classic statement is James Madison's frequently quoted lines from Federalist No. 47, and his exposition of Montesquieu:

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that . . . the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny.

THE FEDERALIST NO. 47, at 261-62 (James Madison) (M. Chadwick ed., 1987). To be sure, Madison went on in Federalist No. 48 to argue that a system of judiciously mixed powers and "checks and balances" among the branches, rather than any absolute conceptual separation, was the best way to avoid that tyranny. But this does not derogate from the fact that it was the tyranny that could result from the concentration of power that the founders and their critics both feared.

ars,[89] and the Supreme Court[90] all agree that the primary reason governmental powers were separated on the federal level was and remains to preclude the tyranny that could result if those governmental powers, and in particular the powers to make and to execute the laws, were combined in a single set of hands. Moreover, avoidance of such a concentration of power is itself an instrumental value. While concentration of power may have other negative consequences as well, it is the potential of such a "tyrannical" government to oppress individuals—to enforce unfair laws in an arbitrary or discriminatory fashion—that was and remains the core concern.[91] On these propositions there can be little dis-

---

89. As Professor Redish and a co-author recently put the point, both colorfully and from the heart:

> [W]e believe that the separation of powers provisions of the Constitution are tremendously important, not merely because the Framers imposed them, but because the fears of creeping tyranny that underlie them are at least as justified today as they were at the time the Framers established them. For as the old adage goes, "even paranoids have enemies." It should not be debatable that, throughout history, the concept of representative and accountable government has existed in a constant state of vulnerability. This has been almost as true in the years since the Constitution's ratification as it had been prior to that time.

Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 453 (1991).

90. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.' ") (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)); INS v. Chadha, 462 U.S. 919, 960-61 (1983) (Powell, J., concurring) (quoting FEDERALIST No. 47); United States v. Brown, 381 U.S. 437, 443 (1965):

> This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.

Even when arguing that a novel scheme for mixing powers does *not* violate distribution of powers principles, Justices base their argument on the anti-tyranny principle—arguing that there is no real danger of tyranny in the issue at hand. *See, e.g.*, Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 111 S. Ct. 2298, 2317 (1991) (White, J., dissenting) ("It is absurd to suggest that the Board's power represents the type of 'legislative usurpatio[n] . . . which, by assembling all power in the same hands . . . must lead to the same tyranny', that concerned the Framers.") (quoting FEDERALIST No. 48 (James Madison)); Mistretta v. United States, 488 U.S. 361, 380-81 (1989) (noting some overlap of powers foreseen by founders and would not violate their anti-tyranny concerns).

91. The view that separation of powers is primarily a means to the end of securing the liberty of the individual is explicit in Montesquieu. Book 11 of *The Spirit of the Laws*, in which Montesquieu sets out his analysis of the separation of governmental powers, is entitled, "On the laws that form political liberty in its relation with the constitution." In Chapter six, after distinguishing the three types of governmental power, Montesquieu justified that separation precisely because of its tendency to secure individual liberty:

> Political liberty in a citizen is that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have his liberty the government must be such that one citizen cannot fear another citizen.
>
> When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.
>
> Nor is there liberty if the power of judging is not separate from legislative power and

pute. However, it is important to note that the distribution of powers principle serves other related but distinguishable purposes as well. Despite the Supreme Court's occasional disclaimers,[92] one of these other goals was what the framers hoped would be an increase in energy and efficiency in government administration—an increase to be gained primarily by the centralization of executive authority in a single person separate and apart from Congress.[93] Other identified purposes served by the distribution of powers include the increase in political accountability that results from having responsibility for particular functions clearly placed in particular hands,[94] and the prevention of any branch abdicating its core responsibilities.[95] Nonetheless, in interpreting the Federal Constitu-

---

> from executive power. If it were joined to legislative power, the power over life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.

MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds. & trans., 1989); *see also* FEDERALIST, *supra* note 88, at 261-62 (Madison) (tyranny results from concentration of power); Redish & Cisar, *supra* note 89, at 453 (concerns about tyranny valid even today).

92. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 944 (1983) ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."); United States v. Brown, 381 U.S. 437, 443 (1965) ("[s]eparation of powers not instituted to promote governmental efficiency").

93. THE FEDERALIST NO. 70 (Alexander Hamilton). *See generally* Arthur Selwyn Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 588-89 (1973) (discussing importance of efficient executive to founders and persistence of that theme in subsequent distribution of powers analysis).

94. *See, e.g.*, THE FEDERALIST NO. 68, at 371 (Alexander Hamilton) (M. Chadwick ed., 1987) (asserting importance of having executive head dependent only upon people for his reelection, and therefore accountable to people for his conduct of office); THE FEDERALIST NO. 70, at 385 (Alexander Hamilton) (M. Chadwick ed., 1987) (emphasizing need for single executive, to assure he would be politically responsible for acts).

95. This point was most recently and forcefully made by Justice Scalia, dissenting in *Mistretta*, and arguing that delegation of the power to set criminal sentencing guidelines to a special agency, including a judge, violated the requirements of separation of powers in part because it enabled Congress to avoid its duty to make certain hard decisions:

> By reason of today's decision, I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.'s , with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, "no-win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. This is an undemocratic precedent that we set—not because of the scope of the delegated power, but because its recipient is not one of the Three Branches of Government.

Mistretta v. United States, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting). As Justice Scalia glancingly noted, the concerns he expressed are allied to the concerns that underlie the non-delegation doctrine, which is itself an aspect of distribution of powers. While the non-delegation has fallen into desuetude in the federal courts, its principles have not been entirely forgotten. *See, e.g.*, American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.) (insisting that allowing Secretary of Labor to determine certain health and safety standards constitutes unconstitutional delegation of congressional legislative authority to executive branch); Industrial Union Dep't. v. American Petroleum Inst., 448 U.S. 607, 671-88 (1980) (Rehn-

tion, the specter of a totalitarian concentration of power remains real, and the need to articulate a body of doctrine that cannot be used to justify such a threat to individual liberty remains a crucial constraint on interpretation. Other goals of distribution of power can be given only a secondary role.

State governments, however, are in a different position. Whatever may have been the case when state constitutions were originally drafted, states today do not operate in a legal vacuum, but rather are subject to the restraining influence of paramount federal law. This pervasive background of federal law is especially salient in the area of individual rights, providing a "floor" beneath which protection of individual liberties may not fall. In particular, the Federal Bill of Rights and, to a lesser extent, the Federal Civil Rights[96] and Voting Rights[97] statutes, provide a potentially significant degree of protection against anti-democratic or oppressive acts by state authorities. To be sure, the Federal Supreme Court has never yet held that any combination of state governmental powers constituted, in itself, a violation of any of the substantive protections of federal constitutional or statutory law. To the contrary, the question of whether or how the legislative, executive, and judicial powers of the state shall be separated or mixed has been held to remain a matter of state law alone.[98] However,

---

quist, J., concurring) (arguing that challenged statutory provision should have been voided on nondelegation grounds because Congress had avoided rather than resolved fundamental but difficult and politically divisive choice regarding how to balance workplace safety and cost concerns).

96. 42 U.S.C. §§ 1981-88, 2000-2000h-6 (1988 & Supp. 1991). These statutes are primarily directed against discrimination because of race or similar factors rather than against autocracy per se. Nonetheless, they at least provide some potential protection against those "tyrannies" that are intended to or have the effect of discriminating against a protected group in society.

97. 42 U.S.C. §§ 1971, 1973-1975f (1988 & Supp. 1993). As with the Civil Rights statutes, the voting rights laws are directed only to a limited range of oppressive acts; here, racial discrimination. However, some of the processes that the voting rights acts set up—such as requiring prior approval within the federal court system before a proposed change in state voting laws may function to deny an individual the right to vote—could well be an obstacle in the path of our hypothetical state tyrant.

98. *See, e.g.*, Dreyer v. Illinois, 187 U.S. 71, 83 (1902) (criminal's federal due process rights not violated when sentenced in accord with Illinois Indeterminate Sentence Act, even if combination of functions given to Illinois Board of Pardons under Act would have violated federal distribution of powers principles). While the result in *Dreyer* is doubtless correct—the combination of functions complained of was minor at worst, and closely analogous to what the Federal Supreme Court upheld in *Mistretta*—the *Dreyer* Court's language is unfortunate because of the absolute tone of its rejection of the possibility of a federal constitutional violation arising out of a combination of functions on the state level:

> Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty.

Id. at 84. While this may have been an accurate statement of the law of federal-state relations as they stood at the turn of the century and under the facts of the *Dreyer* case, the expansion of the substantive role of the Fourteenth Amendment that has taken place since that time makes *Dreyer* seem subject to limitation at least. *But see* Robert M. O'Neil, *The Separation of Powers in a Federal System*, 37 EMORY L.J. 539 (1988) (defending *Dreyer* principle).

it is difficult to imagine that truly egregious or liberty-threatening violations of the separation principle would not—precisely because of the combination of incompatible governmental functions—violate the federally protected substantive rights of citizens. For example, if a state were to combine prosecutorial and judicial functions in a single person, surely anyone convicted would have a viable claim that her rights under the Due Process Clause of the Fourteenth Amendment had been violated.[99] Thus, to the extent that federal law provides a reliable safeguard against tyrannical oppression of the individual, arguments that strict application of the doctrine on the state level are necessary to achieve this same instrumental result become correspondingly weaker.

An interesting, though as yet speculative, alternative ground for federal protection of individual liberty against despotic concentration of state governmental power is raised by the recent resurgence of interest in the Guarantee Clause of the Federal Constitution.[100] That clause is the only element of the Federal Constitution that directly speaks to the several states' internal processes of governance. While it is not entirely clear what the framers meant by the concept of "republican" government, we can at least have some confidence about what that concept emphatically did *not* permit—that is, monarchy, aristocracy, or any similar form of centralization of powers in any individual or group.[101] The relationship between these concerns and the anti-tyranny and anti-centralization purposes of the separation of powers principle is readily apparent, and has led at least a few courts and commentators to argue that the

---

99. The argument proposed here seems compatible with post-*Dreyer* analysis from the Supreme Court. For example, in Tenney v. Brandhove, 341 U.S. 367 (1951), the Court held the question of whether the work of a state legislative investigating committee should be enjoined depended on whether the subject matter of that investigation "may fairly be deemed within its province." *Id.* at 378. As Professor O'Neill has pointed out, this language clearly implies that the Court *may* determine what is the proper "province" of a state legislature, at least where, as in *Tenney*, "[t]he individual rights at stake were of a high constitutional order." O'Neill, *supra* note 98, at 545.

In subsequent cases, the *Dreyer* principle of state autonomy in allocation of governmental functions has been frequently restated. It has not, however, been used to justify what would otherwise be a violation of basic substantive federal rights. For example, in Sweezy v. New Hampshire, 354 U.S. 234 (1957), the State Attorney General was statutorily clothed with both executive and legislative powers, making him a "one man legislative committee" charged with investigating subversives. The petitioner in the case was charged with contempt for refusing to answer certain of the Attorney General's questions. While the Court refused to rely upon the apparent violation of separation of powers principles as grounds, *id.* at 255, it nonetheless overturned the contempt conviction. Where lower courts have relied on the *Dreyer* principle, the most basic issues of fundamental fairness simply were not at stake. *See, e.g.*, Boyd v. Bulala, 877 F.2d 1191, 1195 (4th Cir. 1989) (holding Virginia's $750,000 statutory cap on medical malpractice violated no federal guarantees—neither right to trial by jury, nor separation of powers, nor right to due process); Ware v. Gagnon, 659 F.2d 809, 812 (7th Cir. 1981) (holding Federal Constitution does not preclude state from vesting power to revoke parole in administrative agency).

100. "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4.

101. *See, e.g.*, THE FEDERALIST NO. 43, at 234 (James Madison) (M. Chadwick ed. 1987) (comparing foreign governments of dissimilar principles and forms); THOMAS M. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 45 (7th ed. 1903) (referring to prohibitions against nobility, monarchies, and aristocracies).

Guarantee Clause can and should function as the ultimate "backstop," ensuring at least a minimal degree of separation of powers in the states.[102] To be sure, the constraints imposed by the Guarantee Clause do not take the form of stringent or legally enforceable rules. On the contrary, the concept of republican government permits a wide range of experimentation by the states,[103] and the clause has been held to be enforceable only by Congress rather than by the courts.[104] Nonetheless, the Guarantee Clause remains available as a potential basis for federal intervention—by the political branches if not by the courts—if a state governmental power were to become so concentrated or oppressive as to constitute a threat to republican principles.

In any event, even if federal law does not outlaw centralization of political power in the states per se, it surely provides significant protection to individuals against many of the potential consequences of such tyranny.[105] At a minimum,

---

102. *See, e.g.*, Fox v. McDonald, 13 So. 416, 420 (Ala. 1893) (noting guarantee of republican form of government properly vests power of selecting officers of government in people, and power to appoint to office not inherently executive function); Comment, *Treatment of the Separation of Powers Doctrine in Kansas*, 29 KAN. L. REV. 243, 246-54 (1981) (discussing framers' intent regarding guarantee clause and separation of powers doctrine at state level).

103. *See* THE FEDERALIST No. 47, at 263-66 (James Madison) (M. Chadwick ed. 1987) (surveying differing degrees and forms of separation of powers in various states and pronouncing them all compatible with liberty); *see generally In re* Advisory Opinion to the Governor (Ethics Commission), 612 A.2d 1, 16-18 (R.I. 1992) (holding amendment to state constitution which withdrew authority to prescribe substantive ethics rules for state officials from legislature and gave power instead to appointed committee, fell within broad range of state governmental structures permitted by Guarantee Clause of Federal Constitution).

104. *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (emphasizing that Congress's determination of whether particular state government is "republican" form binding on every other department of government); Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (arguing, in dicta, determination of whether particular state government "republican" lies with Congress rather than courts; in other words, is a political rather than legal question). Scholars have argued, however, that the courts could use that clause to defend certain important structural features of our system of government, or to vindicate certain individual and political rights of individuals. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988) (arguing guarantee clause could be used to guarantee some degree of autonomy for states against federal regulation); *see also* sources cited *id.* at 22 n.122 (proposing several other applications of the clause).

105. *See, e.g.*, Whalen v. United States, 445 U.S. 684, 688-89 (1980) (noting rule that binds federal courts not to impose consecutive sentences for multiple crimes all arising out of event, unless Congress so authorizes, and rooting that aspect of Double Jeopardy Clause in distribution of powers concerns—that Congress rather than courts shall determine punishments for crimes). In dictum, the court raised—and apparently split—on the issue of whether *Dreyer* might preclude application of the full force of this rule to states. Justice Brennan, for the Court, suggested that *Dreyer* would not prohibit application of at least some federal constitutional standards:

> The Court has held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States. . . . It is possible, therefore, that the Double Jeopardy Clause does not, through the Fourteenth Amendment, circumscribe the penal authority of state courts in the same manner that it limits the power of federal courts. *The Due Process Clause of the Fourteenth Amendment, however, would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law.*

Id. at 689 n.4 (citations omitted) (emphasis added). However, Justice Rehnquist, dissenting, argued

the First Amendment's guarantees of freedom of speech, press, and assembly would likely provide some protection for political activities by opponents of such a state regime; the criminal procedural guarantees of the Fourth, Fifth, and Sixth Amendments would give some protection against official retaliation; and the due process, equal protection, and voting rights guarantees of the Fourteenth and Fifteenth Amendments would give some protection against at least some forms of oppression or electoral manipulation, particularly if they were class-based. In addition, while the Federal Civil Rights and Voting Rights Acts are primarily directed against discrimination because of race or similar factors rather than against autocracy per se, several of their provisions would at least make it difficult for a dictatorial state regime to deal "efficiently" with its opponents. Most important, all of these rights can be vindicated in the federal courts, a system that is by design independent of any control by state authorities. State authorities can potentially be brought to account in many ways in federal court, including through civil actions,[106] criminal actions,[107] and habeas corpus proceedings.[108]

In arguing that we enjoy some external protection from tyranny by state governments, I do not wish to be understood as claiming that state courts should ignore issues regarding the concentration of state governmental powers, or of the potential for abuse inherent in such concentration. One who lives and teaches in the state that Huey Long made famous would never so rashly contend. Rather, the question is one of emphasis. The contentions are two. The first is that federal law provides a "safety net" against that "tyranny"—tyranny in the sense of oppression of individuals by an arbitrary government—that might conceivably result down the road if some mixing of powers were permitted today. The second is that because of that safety net, arguments to the effect that rigid adherence to formal separation of powers is the only sure safeguard against loss of liberty are more relevant and convincing in the context of federal distribution of powers analysis than they are in the context of state analogues. Thus, this difference may justify a somewhat greater degree of flexibility in state constitutional interpretation. By "flexibility," however, I assuredly do not mean that "anything goes." On the contrary, concentration and conflation of governmental powers can produce many bad consequences. My point is only that the unique position of states as actors within a federal system may, rightly understood, free state courts construing state constitutions to concentrate somewhat less on remote and hypothetical concerns about the prevention of oppression, in order to concentrate more on the other concerns that underlie distribution of powers analysis—concerns such as maintaining efficiency, preserving accountability, and preventing any branch from abdicating its responsibilities.

---

that the federal courts can never second-guess states courts as to their reading of state statutes, or state legislative intent. *Id.* at 706 (Rehnquist, J., dissenting).

106. 42 U.S.C. § 1983 (1988).

107. 18 U.S.C. §§ 241, 242 (Supp. 1991).

108. 28 U.S.C. § 2254 (1988 & Supp. 1991).

II. TOWARD A STATE CONSTITUTIONAL ANALYSIS OF DISTRIBUTION OF POWERS: LEGISLATIVE PARTICIPATION IN CHOOSING ADMINISTRATIVE OFFICIALS

A. Is There Such a Thing as State Constitutional Distribution of Powers Law?

For the reasons discussed above, it appears that federal distribution of powers precedents should provide only limited guidance for state courts considering similar issues. However, the converse proposition—that decisions from sister states have validity as persuasive precedents—remains to be established. Certainly the obstacles to a unified state constitutional approach to distribution of powers issues appear formidable. State constitutional texts differ markedly with respect to these issues. These divergences, therefore, must be addressed before any notion of a unified state constitutional approach to these issues can acquire more than superficial validity.

The most immediately striking difference among state constitutional texts concerns their respective guarantees of the separation of governmental powers. Ten state constitutions follow the federal pattern by omitting any express requirement of separation of powers, incorporating that principle instead only by implication from provisions establishing the three branches of the state government and "vesting" each type of power in one of those branches.[109] Twelve states go beyond this to include an express statement that governmental powers shall be separated, either standing alone[110] or coupled with an express prohibition against any department exercising any powers belonging to another, except as otherwise provided elsewhere in the constitution.[111] The remaining state constitutions are even more pointed, coupling an express statement of the separation

---

109. The ten states without express separation of powers provisions are Alaska, Delaware, Hawaii, Kansas, New York, North Dakota, Ohio, Pennsylvania, Washington, and Wisconsin. All ten, however, explicitly vest legislative, executive, and judicial powers in those three branches. ALASKA CONST. art. II, § 1, art. III, § 1, art. IV, § 1, DEL. CONST. art. II, § 1, art. III, § 1, art. IV, § 1; HAWAII CONST. art. III, § 1, art. V, § 1, art. VI, § 1; KANSAS CONST. art. 1, § 3, art. 2, § 1, art. 3, § 1; N.Y. CONST. art. III, § 1, art. IV, § 1, art. VI, § 1 (phrased in terms of creating "unified court system" rather than "vesting" judicial power); N.D. CONST. art. III § 1, art. V, § 1, art. VI, § 1, art. XI, § 26 (explicitly stating three branches are "co-equal"); OHIO CONST. art. II, § 1, art. III, § 5, art. IV § 1; PA. CONST. art. II, § 1, art. IV, § 2, art. V, § 1; WASH. CONST. art. II, § 1, art. III, § 1, art. IV, § 1; WISC. CONST. art. IV, § 1, art. V, § 1, art. VII, § 2.

110. Six states—Connecticut, Mississippi, New Hampshire, North Carolina, Rhode Island, and South Dakota—have provisions that, though variously worded, confine themselves to an expression of the separation the powers principle. CONN. CONST. art. II; N.C. CONST. art. I, § 6; MISS. CONST. art. I, § 1; N.H. CONST. Part First, art. 37; R.I. CONST. art. V; S.D. CONST. art. II. The New Hampshire provision is noteworthy in that it clearly presupposes that the principle will not be imposed in its full conceptual rigor: "In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." N.H. CONST. Part First, art. 37.

111. Six states—Alabama, Arizona, Illinois, Massachusetts, Oklahoma, and Vermont—have provisions of this type. ALA. CONST. art. III, §§ 42 & 43; ARIZ. CONST. art. III; ILL. CONST. art. II, § 1; MASS. CONST. pt. 1, art. XXX; OKLA. CONST. art. IV, § 1; VT. CONST. ch. II, § 5. Again, while these provisions are very differently phrased, the basic content is common.

principle with an additional clause explicitly prohibiting "any person" belonging to or exercising power under any branch from holding any office[112] or exercising any power or function[113] belonging to another. At least one state court has attached importance to these textual differences, refusing to rely on precedent from states whose separation of powers clauses were phrased differently from its own.[114]

Other textual provisions relevant to this analysis also show marked variations from state to state. Virtually all states have constitutional provisions that vest executive authority in the governor and impose upon the governor a duty to see that the laws are faithfully executed. Yet states disagree on what specific powers their respective governors will be given to carry out this duty. Some states vest a general power to make administrative appointments in the governor[115] or specifically debar the legislature from making such appoint-

---

112. Louisiana appears to be the only state with provisions so phrased:

§ 1. THREE BRANCHES

Section 1. The powers of government of the state are divided into three separate branches: legislative, executive, and judicial.

§ 2. LIMITATIONS ON EACH BRANCH

Section 2. Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.

LA. CONST. art. II, §§ 1 & 2.

113. Twenty-seven states have constitutional separation of powers provisions of this type. ARK. CONST. art. IV, § 1; CAL. CONST. art. III, § 3; COLO. CONST. art. III; FLA. CONST. art. II, § 3; GA. CONST. art. I, § II, para. III; IDAHO CONST. art. II, § 1; IND. CONST. art. 3, § 1; IOWA CONST. art. III, § 1; KY. CONST. §§ 27 & 28; ME. CONST. art. III, §§ 1 & 2; MD. CONST. Declaration of Rights, art. 8; MICH. CONST. art. III, § 2; MINN. CONST. art. III, § 1; MO. CONST. art. II, § 1; MONT. CONST. art. III, § 1; NEB. CONST. art. II, § 1; NEV. CONST. art. 3, § 1; N.J. CONST. art. III, para. 1; N.M. CONST. art III, § 1; OR. CONST. art. III, § 1; S.C. CONST. art. I, § 8; TENN. CONST. art. II, § 1; TEX. CONST. art. II, § 1; UTAH CONST. art. V, § 1; VA. CONST. art. III, § 1; W. VA. CONST. art. 5, § 1; WYO. CONST. art. 2, § 1. The Tennessee provision may be taken as typical: "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." TENN. CONST. art. II, § 2.

114. J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n, 336 N.W.2d 679, 693-94 (Wis. Ct. App. 1983) (noting separation of powers principle present in Wisconsin constitution only by implication, and therefore declining to regard factually similar cases from states with express separation of powers clauses as persuasive precedent); *see also* Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 912 (Ky. 1984) (relying on strict wording of state's separation of powers clause as reason, among others, to reject "liberal" interpretations of some sister state courts). But see *infra* notes 128 and 223-28 for examples of cases that do *not* depend on the wording of the text.

115. One common format for vesting such broad appointment powers in the governor recites that, unless otherwise provided in the constitution, the governor shall appoint all single executive heads of departments and all boards or commissions which head departments, or which have regulatory or quasi-judicial functions. *See, e.g.*, ALASKA CONST. art. III, §§ 25-26 (Governor appoints department heads and approves selection of chief executive officer); MICH. CONST. art. V, § 3 (Governor appoints executive officer); N.J. CONST. art. V, § IV (same); S.D. CONST. art. IV, § 9 (same). Other provisions are variously phrased, but are equally clear that it is the governor who has the power to appoint, though that power is sometimes subject to confirmation by the Senate or the legislature as a whole. *See, e.g.*, FLA. CONST. art. IV, § 6(a) (requiring either confirmation by Senate or approval by three cabinet members); ILL. CONST. art. V, § 9(a) (requiring majority of Senate);

ments,[116] while others leave it to the legislature to decide the method by which officials will be appointed—including, in some cases, reserving that power to itself.[117] Some states carefully differentiate those administrators who must be gubernatorial appointees from those for whom the legislature may determine the method of appointment,[118] while in other states the text is, on its face, remarkably unclear as to which branch controls the mechanisms of appointment.[119]

MINN. CONST. art. V, § 3 (requiring advice and consent of Senate); MO. CONST. art. IV, § 51 (same); N.Y. CONST. art V, § 4 (same); VA. CONST. art. V, § 10 (requiring confirmation by General Assembly).

Particularly when combined, as they usually are, with additional provisions making clear that such appointees serve at the pleasure of the governor, these appointment provisions obviously strengthen the governor, and tend to locate both control of the administrative bureaucracy and responsibility for its actions squarely in the governor's hands.

116. *See, e.g.*, ILL. CONST. art. V, § 9(a) (prohibiting General Assembly from electing or appointing officers of executive branch). In a few states this prohibition stands as a specific exception to the legislature's otherwise plenary authority to regulate how administrative officials will be chosen. *See, e.g.*, OHIO CONST. art. II, § 27 (prohibiting General Assembly from making any appointment or filling any vacancy); W. VA. CONST. art. VII, § 8 (same).

117. See *supra* note 79, noting scattered provisions in older state constitutions placing power to elect certain specified state officials in the hands of the legislature. A more common method of granting effective power to the legislature is for the state constitution to provide that the governor may appoint subordinate officials only insofar as he is authorized to do so "by law" or, alternatively, that the governor enjoys the power to appoint unless the legislature provides by law for some other methods of election or appointment of that official. *See, e.g.*, DEL. CONST. art. III, § 9 (providing exception for vacancies that occur within two months of election); IND. CONST. art. 15, § 1 (appointments not provided for in constitution must be appointed as prescribed by law); KAN. CONST. art. 15, § 1 (same); ME. CONST. art. V, pt. 1, § 8 (same); MD. CONST. art. II, § 10 (same); NEV. CONST. art. 15, § 10 (same); OKLA. CONST. art. VI, § 13 (same); PA CONST. art. IV, § 8 (providing various methods of making appointments depending on office involved and time of vacancy); R.I. CONST. art. IX, § 5 (same as Indiana); TENN. CONST. art. VII, § 4 (granting legislature power to establish method of filling vacancies); VT. CONST. art. II, § 20 (appointment power limited by constitution and law passed by legislature); WIS. CONST. art. XIII § 9 (same).

Several state courts have held that such provisions have the effect of authorizing the legislature to vest itself with the power to make certain administrative appointments, and that no violation of separation of powers inheres in doing so. *See, e.g.*, State *ex rel.* Rosenstock v. Swift, 11 Nev. 128, 142-43 (1876) (recognizing authority of legislature to choose officers of municipal corporations); Richardson v. Young, 125 S.W. 664, 668 (Tenn. 1910) (recognizing power of appointment does not rest exclusively in any one branch); *see also* Caldwell v. Bateman, 312 S.E.2d 320 (Ga. 1984) (upholding statute permitting legislature to make appointments to administrative body, without discussion of appointments clause of state constitution); Parcell v. State, 620 P.2d 834, 837 (Kan. 1980) (same).

118. Interestingly, the Hawaii Constitution provides that the legislature may prescribe how individual heads of departments are to be chosen, but that the governor must appoint members of boards or commissions. HAW. CONST. art. V, § 5. The Louisiana Constitution, in contrast, makes precisely the opposite allocation. LA. CONST. art. IV, § 5(H).

119. Provisions of this sort typically provide that the governor shall appoint all officers whose appointment "is not otherwise provided for." Such language leaves unclear whether the "other provision" referred to must be found in the state constitution or may be provided by statute. If the former, then the governor has wide powers of appointment. If the latter, then the legislature will have significant control over the appointment process. *See, e.g.*, COLO CONST. art. IV, § 6; IDAHO CONST. art. IV, § 6; MONT. CONST. art. VI, § 8; N.M. CONST. art. V, § 5; N.C. CONST. art. III, § 5(8); UTAH CONST. art. VII, § 10; W. VA. CONST. art. VII, § 8.

At least one court has construed this language to mean that the governor has appointment

In addition, while the vast majority of state constitutions include provisions specifically forbidding legislators from occupying other governmental positions during their legislative terms,[120] those constitutions differ significantly as to the exact content of the prohibition. Some of these incompatibility clauses are very broadly phrased, prohibiting legislators from occupying any "office"[121] or from accepting any other form of employment with the state or its subdivisions[122] during their legislative terms. Others are a bit more limited, forbidding legislators only from occupying "lucrative" offices or "offices of profit" while holding their legislative seats.[123] Yet other provisions are quite narrow in scope, forbid-

---

authority unless the legislature otherwise provides. State *ex rel.* Martin v. Melott, 359 S.E.2d 783, 785-86 (N.C. 1987).

120. Such provisions serve a number of purposes. In addition to providing further support for basic separation of powers concerns, they were also intended, like their federal cognate, to avoid what the founders saw as the potential for corruption inherent in the practice of British ministries to secure the support of members of parliament by dealing out lucrative offices to those supporters. *See supra* note 45 and accompanying text.

121. Though such provisions differ in detail as to their phrasing, the Hawaii version may be taken as typical: "No member of the legislature shall hold any public office under the State . . . . The term 'public office', for the purposes of this section, shall not include notaries public, reserve police officers or officers of emergency organizations for civilian defense or disaster relief." HAWAII CONST. art. III, § 8; *see also* ARK. CONST. art. V, § 10 (prohibiting holding of any civil office); CAL. CONST. art. IV, § 13 (prohibiting holding of any other office or state employment); COLO. CONST. art. V, § 8 (any federal or state office); CONN. CONST. art. III, § 11 (same); DEL. CONST. art. II, § 14 (creating exceptions for attorneys and militia); MINN. CONST. art. IV, § 5 (creating exceptions for post master or notary public); MONT. CONST. art. V, § 9 (creating exceptions for notary public and militia); N.M. CONST. art. IV, § 28 (prohibiting legislators from contracting with state for one year); N.D. CONST. art. IV, § 6 (prohibiting any full time employment); OHIO CONST. art. II, § 4 (creating exceptions for officers of political parties, notaries public, and militia); OKLA. CONST. art. V, § 18 (prohibiting concurrent state and federal employment); WY. CONST. art. 3, § 8 (creating exceptions for militia and notary public).

122. The Arizona provision may be taken as typical of these:

> No member of Legislature, during term for which he shall have been elected or appointed shall be eligible to hold any other office *or be otherwise employed* by the State of Arizona or any county or incorporated city or town thereof. This prohibition shall not extend to the office of school trustee, nor to the employment as a teacher or instructor in the public school system.

ARIZ. CONST. art. IV, pt. 2, § 5 (emphasis added); *see also* MICH. CONST. art. IV, § 8.

123. The Florida constitution may be taken as typical of the very common provisions of this sort, limited to "lucrative" offices, or offices of "profit" or "emolument:"

> No person holding office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention or statutory body having only advisory powers.

FLA. CONST. art. II, § 5(a). See also, to like effect, ALA. CONST. art. XVII, § 280 (prohibiting dual employment if annual salary exceeds $200); ALASKA CONST. art. II, § 5 (prohibiting holding of any office or position for profit); GA. CONST. art. III, § II, para. IV; IOWA CONST. art. III, § 22 (prohibiting holding of any position if salary exceeds $100 a year); ME. CONST. art. IV, pt. 3, § 11 & art. IX, § 2; MD. CONST. art. III, §§ 10 - 11 (prohibiting holding of any office or position for profit); MO. CONST. art. III, § 12 (prohibiting holding of lucrative offices or positions); NEB. CONST. art. III, § 9

ding legislators only from simultaneously holding office under the federal government or the government of another state,[124] or from holding an office the election to which is vested in the legislative assembly.[125] Some of the clauses are exceedingly specific as to what combinations of offices are forbidden,[126] while others are open ended, leaving it to the legislature itself to define which offices are incompatible with legislative service.[127]

Moreover, these fairly narrow textual points, important as they are, do not tell the whole story. Different state constitutions embody radically different visions of the relative weight of the political branches. Some state constitutions were written to allow their legislatures to dominate the processes of state government, weakening the governor by splitting executive authority among several independently elected officials, by limiting the substantive powers of the governor, by limiting the governor to one or a few terms of office, or through other mechanisms. Other state constitutions show an obvious preference for a strong executive branch, and manifest this preference through such mechanisms as limiting legislative sessions, giving a governor extensive line-item veto authority, or through other arrangements.

Thus, it may well be argued that each state's doctrine on the allocation of governmental power between political branches has a strong and inherent element of the *sui generis*, devoid of much potential to teach or learn from other states. To some extent this is true. Specific textual or historical differences may well mandate unique results in individual cases. And, more broadly, states with well defined traditions of dominance by either of the political branches may find

---

(same); N.J. CONST. art. IV, § V, para. 4 (prohibiting holding of offices for profit and holding of both judgeship and seat on legislature); N.Y. CONST. art. III, § 7 (prohibiting dual civil appointment); PA. CONST. art. II, § 6 (prohibiting holding of any civil position where there is any monetary benefit); S.C. CONST. art. III, § 24 (prohibiting any dual state or federal employment); S.D. CONST. art. III, § 3 (prohibiting employment in excess of $300 a year); TENN. CONST. art. II, § 26 (prohibiting any dual state employment other than position in militia or as justice of peace); TEX. CONST. art. III, § 19 (prohibiting legislative office); UTAH CONST. art. VI, § 6 (exempting militia, Post Master, and United States Commissioner from dual employment ban); VA. CONST. art. IV, § 4 (prohibiting state and federal employment).

124. *See* NEV. CONST. art. IV, § 9 (prohibiting employment under two governments simultaneously); R.I. CONST. art. IX, § 6 (same); WASH. CONST. art. II, § 14 (same).

125. *See* IND. CONST. art. V, § 30 ("No Senator or Representative shall, during the term for which he was elected, be eligible for any office, the election to which is vested in the legislative assembly. . . ."); OR. CONST. art. IV, § 30 (same).

126. The oldest constitutions are the most specific. *See, e.g.*, MASS. CONST. ch. VI, art. 2 (providing details of salary and distinguishing between offices); N.H. CONST. arts. 94 - 95 (listing offices); VT. CONST. ch. II, § 54 (same).

127. The Louisiana incompatibility provision seems the most open ended: "The legislature shall enact laws defining and regulating dual employment and defining regulating and prohibiting dual office holding in state and local government." Statutes enacted in response to this mandate have been upheld against constitutional challenge. Bellon v. Deshotel, 370 So. 2d 221, 223 (La. App. Ct. 1979). The North Carolina equivalent generally prohibits legislators from simultaneously occupying "offices of profit," but provides that the General Assembly may make exceptions to this rule by general law. N.C. CONST. art. VI, § 9. The Kansas Constitution, in contrast, absolutely prohibits federal employees from serving in the legislature, and goes on to empower the legislature to enact additional disqualifications. KAN. CONST. art. II, § 5.

it more true to the intentions of their framers to consider decisions from states with similar approaches to be more relevant than decisions from states with a different philosophy.

Despite these divergences, however, it seems possible to make useful comparisons among states with respect to basic principles of allocation of powers between governor and legislatures. Courts in fact do so. While some decisions rely solely on their own in-state distribution of powers precedents, most state distribution of powers decisions cite and rely upon precedent from other states.[128] Such cross-state reliance is not unjustified. To be sure, some differences in constitutional texts are so express in their mandates and so clear in their divergences as to preclude any real comparison between jurisdictions. However, these observations apply only to a limited number of issues in a limited number of states. Many state constitutional texts are unclear, not self-evidently requiring either a pro-executive or a pro-legislative interpretation. More importantly, most of the hard issues relating to the distribution of powers between governors and legislatures—including most of the questions involving the authority of legislators to confer administrative tasks on themselves or their appointees—are simply not answered by these texts. Such issues must be determined through the analysis of those basic separation of powers principles that all states share.

Thus the possibility exists to make useful state comparisons with respect to the basic allocation of powers principles between governors and legislators. But to determine whether there are real possibilities for a *unified* state constitutional approach, it is necessary to look to the cases, to see whether their analyses show sufficient similarity and cohesiveness across state lines.

B. Allocating Power Between Governors and Legislatures: The Exercise of Administrative Powers by Legislators or Legislative Appointees

As was noted above, state legislatures cannot avoid delegating large measures of discretion over important and politically salient issues to administrative bodies. However, ceding total control over those administrators' exercise of that discretion to the executive is often politically unacceptable, particularly in sensitive areas such as the regulation of political campaigns or preparing the state

---

128. *See, e.g.*, Fox v. McDonald, 13 So. 416, 420-21 (Ala. 1893) (discussing precedent from several states); Greer v. State, 212 S.E.2d 836, 838-39 (Ga. 1975) (same); Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 293-97 (Ind. 1958) (citing both federal and sister-state precedent); State *ex rel.* Black v. Burch, 80 N.E.2d 294, 300-02 (Ind. 1948) (relying on precedent from New York and Louisiana for broad construction of "functions" of branch of government); Frazier v. State, 504 So. 2d 675, 697 (Miss. 1987) (relying on precedent from Oklahoma and Texas to construe incompatibility clause); Alexander v. State, 441 So. 2d 1329, 1335-37 (Miss. 1983) (relying on federal and Indiana precedents); State *ex rel.* Spire v. Conway, 472 N.W.2d 403, 416 (Neb. 1991) (carefully picking among precedents from other states); State *ex rel.* Wallace v. Bone, 286 S.E.2d 79, 86-87 (N.C. 1982) (citing precedent from many states and discussing several at length); Monaghan v. School District No. 1, 315 P.2d 797, 803-04 (Or. 1957) (relying on precedent from Indiana, Louisiana, and New York); State *ex rel.* State Office Bldg. Comm'n v. Bailey, 150 S.E.2d 449, 452 (W. Va. 1966) (extensively discussing federal and Indiana precedent); J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n, 336 N.W.2d 679, 693-94 (Wis. Ct. App. 1983) (distinguishing some sister-state precedents, and expressly following analysis developed by Kansas courts).

budget. Since state legislatures are generally far less able than Congress to exercise influence through informal oversight mechanisms, legislators may reasonably believe that the only practical alternative is to secure legislative influence directly, by structuring state government so that the legislature has a role in choosing the administrators who will actually carry out its programs.

This legislative input into choosing agency members can take many forms. In its weaker form, the legislature may require the governor or other appointing authority to make appointments from a short list provided by the legislature, or may retain for itself or its leadership the power specifically to designate individuals to serve as its representatives on the board or commission. More intrusive, and more constitutionally suspect, are systems whereby the legislature vests administrative functions in its own members, either by providing for the appointment of individual legislators to a traditional agency or board or by transferring administrative functions to a legislative committee.

Not surprisingly, these efforts by legislators to vest administrative powers in themselves or their appointees have aroused varying responses from the different state courts. To be sure, some of these divergent results may be explained on the basis of differences in constitutional texts and history among those states. But as will be developed below, each method by which legislatures may seek influence over staffing seems to have given rise to several lines of analysis that garner support across state lines, and thus give some indication of emerging state-based approaches to the analysis of separation of powers issues.

Model 1: Legislative Appointment of Administrative Officials

There is no doubt that state legislatures, like Congress, enjoy some powers with respect to the appointment of administrative officials. The legislative branch always enjoys the authority to appoint its own functionaries who perform duties incidental to the legislative process.[129] With respect to officials with broader administrative duties, legislatures typically possess the power to set their qualifications[130] and to approve certain high ranking gubernatorial appoin-

129. The concept of "administrator," as used in the discussion in the text, thus does not include individuals or bodies which provide "housekeeping" services for the legislature, or which are purely advisory in nature. Without any doubt, any reasonable notion of distribution of powers would have to be construed to permit the legislature freely to appoint and remove those who merely provide advice to the legislature, or who carry out its internal operations. *See, e.g.*, Quinn v. Donnewald, 483 N.E.2d 216, 222 (Ill. 1985) (holding legislative appointment of Board charged to recommend levels of compensation for public officials does not violate appointments clause of Illinois Constitution, which forbids legislature from appointing executive officials; here Board operates only in advisory capacity, in area of legislative authority); *see also* Beadling v. Governor, 308 N.W.2d 269, 272 (Mich. Ct. App. 1981) (despite clear indication of legislative intent to contrary, state statute granting high officials right to appeal terminations to Governor could not apply to Director of House of Representatives fiscal agency; general separation of powers principles precluded executive agency from passing upon propriety of termination of purely legislative official).

130. *See, e.g.*, Murrill v. Edwards, 613 So. 2d 185, 190 (La. Ct. App. 1992), (noting even if legislature chooses to leave appointive power in hands of governor, legislature may still "require that the membership of a certain board of commission possess certain qualifications or be representative of certain areas of society, or that certain representative groups in society submit nominees to the governor for appointment"), *cert. denied*, 614 So. 2d 65 (La. 1993). However, if the legislature vests

tees.[131] However, the question remains whether legislatures may go beyond this limited role and, unlike Congress, confer on themselves or their leadership the power to designate members of certain administrative boards and commissions. As was noted above, a few state constitutions specifically resolve this question, either by explicitly vesting appointive authority in the governor[132] or by explicitly forbidding the legislature to exercise such powers.[133] In most cases, however, state constitutional appointment clauses are not facially exclusive; rather they are generally phrased to permit a construction that would allow legislatures to determine both how and by whom statutory administrative officials may be chosen.[134]

In the absence of an explicit constitutional answer, the question of whether legislatures or their leadership may appoint administrative officials must be resolved on general distribution of powers grounds. This in turn requires consideration of two distinguishable sub-issues. The first sub-issue arises out of constitutional provisions "vesting" executive authority in the governor and asks whether the mere act of appointing a government official is so inherently "executive" in nature that it must be reserved, absent explicit constitutional direction to the contrary, to the governor or some other executive branch official. If the answer to the first sub-issue is "no," the second sub-issue arises—assuming that a legislature or legislative leader may appoint an official, whether and to what extent general separation of powers considerations preclude that legislative appointee from performing particular executive or administrative duties.

The first of these sub-issues can be disposed of fairly briefly. There is authority in some states for the proposition that the act of appointing subordinate administrative officials is, in itself, an inherently and exclusively executive function. Such claims have been made in federal cases,[135] in some older state

---

the governor with the power to appoint a particular official, it cannot describe the appointees' qualifications so narrowly as to limit substantially the governor's discretion to choose whom to appoint. *Id.* at 190-91; *see also* Wittler v. Baumgartner, 144 N.W.2d 62, 71-72 (Neb. 1966) (where constitution vests appointive authority in governor, legislature may not describe qualifications of those appointees in such way as to limit governor's choice to only one or few individuals), *overruled by* State *ex rel.* Douglas v. Nebraska Mortg. Fin. Fund, 283 N.W.2d 12 (Neb. 1979).

131. Virtually all state constitutions that authorize gubernatorial appointment of senior administrative officials also provide for senatorial or, more rarely, legislative confirmation of these choices. *See* provisions cited *supra*, note 115. Such provisions have seldom been litigated, but it is clear that the power to reject is broad indeed. *See, e.g.*, Kraus v. Kentucky State Senate, 1992 WL 311175 (Ct. App. Ky. Oct. 30, 1992).

132. *See, e.g.*, provisions cited *supra*, note 115.

133. *See supra* note 116 and accompanying text.

134. *See supra* notes 117-19 and accompanying text.

135. *See, e.g.*, Myers v. United States, 272 U.S. 52, 116 (1926) (deriving inherent and exclusive presidential power to hire and fire administrative officials from "vesting" and "take care" clauses of the Federal Constitution), *overruled by* INS v. Chadha, 462 U.S. 919 (1983). *But see* Morrison v. Olson, 487 U.S. 654, 671 (1988) (upholding vesting of appointment power in non-executive officer).

It is noteworthy—and telling—that the major article discussing the leading case on appointment authority under the Kentucky Constitution, while asserting that, "[i]t is generally recognized that the power to appoint Executive Officers is inherently executive," supports this assertion solely by citation to federal case law. Snyder & Ireland, *supra* note 74, at 210-11 & nn.231 & 232.

cases,[136] and occasionally in more recent state court decisions as well.[137] However, most of the more recent and better reasoned state cases have correctly rejected this broad assertion of inherent and exclusive executive power. The authority to appoint administrative officials belongs ultimately to the people, and in drafting a constitution, the people may allocate the authority to appoint in any way they wish, or may keep it to themselves by making those offices elective. Thus, in the absence of a clear constitutional mandate to the contrary—an express grant of an exclusive appointing power to the executive, some argument that such authority is required in a particular case by the necessary implication of some other express grant of executive authority, or an express restriction on the legislature—ordinary principles of state constitutional interpretation would suggest that the legislature is not precluded from choosing a method other than executive appointment to fill the offices it creates.[138] Nor

---

136. *See, e.g.*, Tucker v. State, 35 N.E.2d 270, 280-85 (Ind. 1941) ("except in cases where the power of appointment is merely incidental to a major power expressly granted" in constitution, or where new office created by legislature is made elective rather than appointive, power to name officials part of "executive power" vested in governor); *In re* Opinion of the Justices, 21 N.E.2d 551, 556-57 (Mass. 1939) (despite constitutional provision giving legislature power to "provide by fixed laws for the naming and settling of all civil officers," power to appoint "special commissioners" charged with redrawing election districts "executive power" which legislative officials cannot exercise); *In re* Opinion of the Justices, 19 N.E.2d 807, 817-18 (Mass. 1939) (same result).

137. *See, e.g.*, Alexander v. State, 441 So. 2d 1329, 1344-45 (Miss. 1983) (power to appoint at "core" of executive power and, therefore, legislature may not appoint individuals to serve on administrative agencies that perform executive functions); Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 922-23 (Ky. 1984) (discussing mixed precedents, but ultimately concluding power to appoint inherently executive in nature); Opinion of the Justices, 309 N.E.2d 476, 479 (Mass. 1974) (state "Electronic Data Processing and Telecommunications Commission" unconstitutional on ground, among others, that "[c]reation of a public office is a legislative function, but the appointment of a particular person to office is the function of the executive department") (quoting Committee of Admin. v. Kelley, 215 N.E.2d 653, 657 (Mass. 1966)).

Note, however, that *Alexander* (completely) and *Legislative Research Comm'n v. Brown* (partially) involved situations where legislators themselves were personally occupying administrative roles. They were not just the appointers, but the appointees as well. This factor raises additional issues, *see supra* notes 120-27, and may account for the court's hostility to the assertion of non-executive appointive authority in those cases.

138. It is a traditional and fundamental tenet of state constitutional law that the legislature rather than the executive is the "residual legatee" of the original sovereign power of the people. Thus, state executives, like their federal counterparts, enjoy only those powers conferred by the terms and necessary implications of their respective constitutions. State legislatures, however, unlike Congress, retain all powers not explicitly taken from them by the constitution. This residual power has been properly held to include, unless the constitution provides to the contrary, the power to exercise the people's original authority freely to determine how officials will be chosen.

This argument was made explicitly by the Arizona Supreme Court in Lockwood v. Jordan, 231 P.2d 428, 432-33 (Ariz. 1951), which held that the power to appoint "post auditor" was not inherently executive in nature. The court in *Lockwood* argued that in Arizona, at least, the people considered the power to appoint primarily a "political question" which they largely kept to themselves—making many offices elective, and surrendering the right to choose officials only in so far as "the inherent necessities and proprieties seemed to require it." *Id.* at 433. The court concluded therefore that appointment power in general is not inherently "executive." *Id.* Rather, the legislature

> may not only provide a mode for filling a vacancy in office, but it may create offices when not prohibited by the constitution and provide for election of the officers by the people,

must the core concept of executive power—the power and duty to carry out the laws—necessarily imply the exclusive power to appoint all of the subordinate officials who may have some hand in administering the laws. The executive is obligated to enforce the laws only to the extent that law itself permits her to do so. Thus, even if a provision restricting her ability to choose certain subordinates were to interfere with enforcement of a particular law to some extent, that restriction is itself part of the law and adherence to it is conceptually indistinguishable from the executive's duty to abide by any substantive limitations the legislature may choose to engraft onto its laws.[139] For these or similar reasons, most recent decisions have upheld the power of state legislatures to confer appointment authority on persons who are not members of the state executive, at least where the legislature's choice as to the holder of that authority is related to the functions of the agency.[140]

Additional questions are raised, however, if the legislature purports to reserve such appointment authority for itself or its leadership. Even if such an

---

allow for their appointment by a board or commission of their creation, or by the executive, or may itself make the appointment.

Id.; *see also* State *ex rel.* Morford v. Emerson, 8 A.2d 154, 156-58 (Del. Super. Ct. 1939) (limiting executive's power to make appointments); State *ex rel.* Martin v. Melott, 359 S.E.2d 783, 787 (N.C. 1987) (appointment of Director of Administrative Hearings not exercise of executive power); Wentz v. Thomas, 15 P.2d 65, 70-71 (Okla. 1932) (permitting legislature to create and appoint members to State Highway Commission). Similar arguments have also been used to uphold the legislator's power to create investigatory committees of its own members, committees that may continue to function even after the legislative session has ended. *See, e.g.*, State v. Fluent, 191 P.2d 241, 246 (Wash. 1948) (noting legislatures have such powers unless explicitly restricted in state constitution), *cert. denied sub nom.* Washington Pension Union v. Washington, 335 U.S. 844 (1948).

Such arguments from the original reserved powers of the legislature, however, have not always been accepted as sufficient to allow it to vest executive functions in individual legislators. *See, e.g.*, State *ex rel.* Anderson v. State Office Bldg. Comm'n, 345 P.2d 674, 678-79 (Kan. 1959) (rejecting argument that such vesting of original sovereign authority in state legislature permits legislature to require that Governor appoint individual legislators to State Office Building Commission, arguing such construction would permit legislature to institute "parliamentary" government of sort founders clearly rejected); Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 913 (Ky. 1984) (while legislature repository of all state powers not vested elsewhere, this does not allow it to vest executive functions in legislators; residual power includes only those powers legislative in nature).

139. *See* State *ex rel.* Martin v. Melott, 359 S.E.2d 783, 787 (N.C. 1987) (distinguishing between "the power to execute the laws" which it held to fall within core of executive authority, and power to appoint others, which held did not).

140. *See, e.g.*, Caldwell v. Bateman, 312 S.E.2d 320, 325 (Ga. 1984) (upholding statute empowering Speaker of House and President of Senate to appoint two of five members of Georgia Campaign and Financial Disclosure Commission); State *ex rel.* Martin v. Melott, 359 S.E.2d 783, 786-87 (N.C. 1987) (rejecting arguments that text of state constitution vests governor with exclusive appointive authority and act of appointing inherently exercise of executive power; and upholding statute giving Chief Justice of State Supreme Court power to appoint Director of State Office of Administrative Hearings); *see also* Chiles v. Public Serv. Comm'n Nominating Council, 573 So. 2d 829, 832-33 (Fla. 1991) (legislature could freely determine how members of PSC would be appointed, since functions of agency—though both "executive" and "legislative" in nature—primarily legislative); *In re* Advisory Opinion to the Governor, 276 So. 2d 25, 29-30 (Fla. 1973) (upholding legislative appointments to administrative agency without discussing whether appointment is "executive" function); Parcell v. State, 620 P.2d 834, 836 (Kan. 1980) (same); State Bd. of Ethics v. Green, 566 So. 2d 623, 625 & n.4 (La. 1990) (same).

exercise of appointment authority by the legislative branch survives scrutiny under the appointments or vesting clauses of a state constitution, it may still fall afoul of more general distribution of powers concerns, as expressed in many states' explicit separation of powers mandates.[141]

One line of analysis of these issues takes an essentially "formalist" approach to distribution of powers analysis. In these cases the central issue tends to become one of classification—a legislative body or leader will be allowed to appoint an official if, but only if, that official's duties are construed as essentially "legislative" in character; a court, if but only if the official's duties are seen as essentially judicial. Decisions from several states—including Louisiana, Massachusetts, Mississippi, and North Carolina—have taken such an approach, striking down mechanisms of appointment that they saw as incompatible with the functions of the appointee,[142] and upholding those that were seen to be compatible.[143]

One problem with such a conceptual approach, as with similar federal analyses, is that it is often very difficult to classify the functions of the appointee so neatly.[144] But even where the duties of appointees can be classified with reasonable certainty, this approach can lead to results that seem hard to justify on grounds of efficiency, accountability, or the need to prevent abdication of political responsibility—or even on grounds of any realistic fear of dangerous concentration of power. For example, in *Opinion of the Justices*,[145] the Massachusetts Supreme Court held unconstitutional a proposed Electronic Data Processing

---

141. On the distinction between vesting or appointments clause analysis and separation of powers analysis, see Charles Herman Winfree, State *ex rel.* Martin v. Melott: *The Separation of Powers and the Power to Appoint*, 66 N.C. L. REV. 1109 (1988), criticizing the *Martin* court for concentrating only on the appointments clause issues, and failing to consider seriously the distribution of powers issues raised when a legislature retains appointment authority in its own hands.

142. *See, e.g.*, Opinion of the Justices, 309 N.E.2d 476, 479-80 (Mass. 1974) (holding, among other things, that neither courts nor legislature could appoint members to proposed Electronic Data Processing and Telecommunications Commission, which would have unified operational control over all data processing and communication services for entire state government); Alexander v. State, 441 So. 2d 1329, 1344-45 (Miss. 1983) (distinguishing prior cases and holding, *inter alia*, that legislative appointees could not exercise executive function of overseeing how appropriations were spent); *see also* State *ex rel.* Martin v. Melott, 359 S.E.2d 783, 789-92 (N.C. 1987) (Martin, J., dissenting) (arguing duties of Director of State Office of Administrative Hearings primarily executive and legislative in nature, and therefore cannot be appointed by Chief Justice).

143. *See Melott*, 359 S.E.2d at 787-88 (Meyer, J., concurring) (arguing question of who may appoint depends upon duties of appointee, that duties of Director of Office of Administrative Hearings primarily judicial in nature, and permissible to vest appointment authority in Chief Justice of State Supreme Court); Guidry v. Roberts, 335 So. 2d 438, 445-46 (La. 1976) (legislature might appoint members of ethics committee because committee exercised no "executive" functions). *Compare* Clark v. State *ex rel.* Mississippi State Med. Ass'n, 381 So. 2d 1046, 1051 (Miss. 1980) (upholding statute permitting Mississippi Medical Association to appoint three members of State Board of Health).

144. *See, e.g.*, *Melott*, 359 S.E.2d at 789-92 (in which majority opinion and dissent disagreed largely on question of whether duties of Director of State Office of Administrative Hearings should be classified as primarily judicial, executive, or legislative in nature; best answer to question—familiar to test takers everywhere—appears to be "all of the above").

145. 309 N.E.2d 476, 479-80 (Mass. 1974).

and Telecommunications Commission. That Commission would have been composed of members appointed severally by the governor, the legislative leadership, and the Chief Justice of the State Supreme Court, and would have unified operational control over all data processing and communication services for the entire state government. Though the court described the motives behind the commission as "laudable,"[146] and acknowledged the possibility for some flexibility in analysis where classification of the appointee's functions would be "ambiguous,"[147] it nonetheless held that the essentially "executive" functions to be performed by the Commission precluded vesting any appointment authority with either the court or the legislature.[148] While the court was doubtless correct in its classification of the Commission's functions as "executive," it is hard to see how such an arrangement could pose any real danger to the state, how it could obscure political accountability for any branch's substantive work, or how it might interfere with any branch or allow any branch to avoid its constitutional responsibilities. The court did make some effort to argue that giving anyone outside the judicial branch operative control of its data processing or telecommunications systems might hold some "potential for dangerous concentration of indirect but very real control;"[149] but the proof of that contention was essentially by assertion. Surely telephones are no more necessary to the court's ability to function than are, for example, heat and light or the physical structure of the courthouse. Yet it would be difficult to argue that the court may not pay its utility bills through a centralized administrative disbursing office, or that the constitution requires the court to maintain its own unique building maintenance staff.

Other courts have reached different results, upholding the power of the legislature to appoint administrators even if those administrators exercise non-legislative functions. However, most of these courts have reached their results without much in the way of convincing analysis of the separation of powers issues inherent in such cross-branch appointments. As was noted above, the Louisiana Supreme Court in *Green* adopted an analysis apparently based upon federal "functionalist" models, focusing its analysis solely on whether the legislature retained "control" of its appointees on the Board of Ethics for Elected Officials after they were appointed.[150] While this factor may certainly be relevant in determining whether a legislative appointment scheme constitutes an effort at legislative aggrandizement, it seems less than complete as an analysis of the distribution of powers requirement in this area. The Georgia Supreme Court in *Caldwell v. Bateman*,[151] which similarly upheld the propriety of legislative appointees serving on the State Campaign and Financial Disclosure Commis-

---

146. *Id.* at 479.

147. *Id.*

148. *Id.* at 480.

149. *Id.* at 481.

150. State *ex rel.* Bd. of Ethics for Elected Officials v. Green, 566 So. 2d 623, 625 (La. 1990). See generally *supra* notes 60-71 and accompanying text for discussion of *Green*.

151. 312 S.E.2d 320 (Ga. 1984) (upholding statute granting legislative leaders authority to appoint two of five members of State Campaign and Financial Disclosure Commission).

sion, was even less explanatory. It focused only on whether a legislator's exercise of the allegedly executive power of appointment violated the incompatibility clause of the Georgia Constitution, without discussing the more basic separation of powers issues implicit in such an appointment.[152]

These choices between sterile conceptualism or superficial functionalism are not, however, the only options for a state court considering these issues. A different line of decisions has emerged that takes a more pragmatic and potentially fruitful approach to state distribution of powers questions, one that focuses instead on the particular circumstances of each case and the real possibility of interference with the goals served by separation of powers if legislative appointees were permitted to exercise those particular functions, regardless of how those functions might be conceptually classified. Thus, for example, in *Parcell v. State*,[153] the Kansas Supreme Court considered an issue very similar to that considered by the Louisiana court in *Green*—whether legislative appointees might serve on the Kansas State Governmental Ethics Commission. The Commission consisted of eleven members with appointment authority carefully allocated among both the political branches and the political parties: five members to be appointed by the Governor; two by the President of the Senate; two by the Speaker of House; one by the Minority Leader of House; and one by the Minority Leader of Senate.[154] Like the Louisiana Board of Ethics analyzed in *Green*, the Kansas Commission was empowered to perform both legislative and executive functions.[155] As in *Green*, a politician under investigation for alleged violation of the state campaign finance laws challenged the constitutionality of the Commission, arguing that a committee dominated by legislative appointees may not perform executive functions.

The Kansas Supreme Court's prior decision in *State ex rel. Schneider v. Bennett*,[156] which will be discussed below,[157] had established a framework for

---

152. 312 S.E.2d at 325. Compare Lockwood v. Jordan, 231 P.2d 428, 433 (Ariz. 1951), in which the Arizona Supreme Court upheld legislative appointment of a "post auditor" for the state. The court was at pains to argue that the legislature was not utterly debarred from exercising appointment authority. However, on the underlying issue of separation of powers, the court did little more than punt—identifying the "primary" duties of that auditor as one of advising the legislature, and leaving the door open for consideration of separation issues "if and when legislation is passed" imposing executive duties on that auditor. *Lockwood*, 231 P.2d at 433. It is hard to conceive, however, how any kind of auditor could operate without performing some functions ordinarily considered executive in nature.

153. 620 P.2d 834 (Kan. 1980).

154. *Id.* at 835.

155. The powers of the Commission included the power to adopt regulations for administering the state Campaign Finance Act, to create forms for candidates to use in reporting on their financial affairs, to review those reports, to issue advisory opinions interpreting the Campaign Finance Act, to investigate complaints and, if it finds cause, to refer the matter to a District Attorney for prosecution. While the Commission has no direct enforcement authority of its own, the court had little difficulty in concluding that at least some of its powers were among those "traditionally ascribed to" the executive branch. *Id.* at 836.

156. 547 P.2d 786 (Kan. 1976).

157. See *infra* notes 202-11 and accompanying text for a discussion of the Kansas Supreme Court's prior decision.

analysis of such distribution of powers issues in the state. According to *Bennett*, the crucial inquiry does not focus solely on any conceptual classification of functions, but rather considers all of the specific facts of the case to determine whether the challenged arrangement constitutes a "usurpation by one department of the powers of another department," defined as whether a department is being "subjected directly or indirectly to the coercive influence of" another, and whether there is "a significant interference by one department with the operations of another department."[158] To this extent, the *Bennett/Parcell* analysis seems somewhat similar to federal analyses of the "functionalist" or "checks and balances" stripe.[159] However, the Kansas court offered what appears to have been a significant advance on federal law by specifying a non-exclusive but useful set of four criteria that can be used to guide the judicial consideration of the issues:

> First, is the essential nature of the power being exercised—Is the power exclusively executive or legislative or is it a blend of the two? A second factor is the degree of control by the legislative department in the exercise of power. Is there a coercive influence or a mere cooperative venture? A third consideration of importance is the nature of the objective sought to be attained by the legislature—Is the intent of the legislature to cooperate with the executive by furnishing some special expertise of one or more of its members, or is the objective of the legislature obviously one of establishing its superiority over the executive department in an area essentially executive in nature? A fourth consideration could be the practical result of the blending of powers as shown by actual experience over a period of time, where such evidence is available.[160]

Applying these factors, the court in *Parcell* held that the presence of legislative appointees on the Kansas Governmental Ethics Commission did not violate the requirements of separation of powers, even though those legislative appointees constituted a majority of the Commission's membership and would be eligible to chair that Commission. Since the Commission did not possess direct enforcement authority, the court had no trouble concluding that its functions were not "essentially" executive in nature.[161] Applying the second factor, the court saw the Commission's structure as an attempt to secure an appropriate balance between the branches and the political parties, and therefore an exercise in "cooperation" rather than an assertion of "coercive" control by either branch over the other.[162] The third factor was also satisfied in the court's view because diffusion of appointment authority was necessary—and therefore "cooperative" rather than hegemonic in nature—to insure that the Commission would both be and be

---

158. Parcell v. State, 620 P.2d 834, 836 (Kan. 1980) (quoting State *ex rel.* Schneider v. Bennett, 547 P.2d 786, 792 (Kan. 1976)).

159. *See supra* notes 27-28 and accompanying text.

160. 620 P.2d at 836 (quoting *Bennett*, 547 P.2d at 786).

161. *Parcell*, 620 P.2d at 836.

162. *Id.* at 836-37. The court noted that not only did the system guarantee the governor five out of eleven members would be his own appointees, but also that between five and seven of the members would be of her political party. *Id.* at 837.

perceived as sufficiently independent of both of the political branches whose members it might be called upon to investigate.[163] Finally, the court endorsed the trial judge's speculative, but probably well founded, conclusion that the "practical" effects of this mixture of powers would be positive in nature.[164]

To be sure, the analysis used by the Kansas Supreme Court in *Parcell* is not beyond criticism. The four factors identified by the court—the "essential" nature of the powers being exercised, the degree of cross-branch control, the presence or absence of hegemonic intent, and the practical consequences—while perhaps useful, may well be very difficult to apply in particular cases. Classification of governmental functions is always difficult, and the answer to other questions posed—questions such as whether a particular level of influence by one branch over another rises to the level of "coercion," or whether the legislators' intentions are benignly cooperative or hegemonic—appear to reside primarily in the eye of the beholder. Nor is it obvious why *these* four factors were chosen by the courts. Neither *Parcell* nor *Bennett* contains any convincing derivation of these factors from the basic concepts or purposes underlying distribution of powers theory, and the factors identified by the court appear only indirectly relevant to the concerns of efficiency, accountability, or abdication that ought to lie at the heart of distribution of powers analysis on the state level. Nevertheless, the Kansas approach does point in a useful direction. Its analysis seems far better able to accommodate the evolving needs of state governance, while at the same time preserving the necessary core of autonomy that each branch must retain. It is certainly more likely to lead to socially beneficial results than the strained conceptualism of the Massachussets court in *Opinion of the Justices*,[165] or the unsupported single-factor "control" test of the Louisiana court in *Green*.[166]

Model 2: Legislators Performing Administrative Functions

The last set of issues to be discussed in this partial survey involves legislators who personally serve on administrative committees, or who personally undertake administrative tasks, while simultaneously retaining their legislative seats. It is clear that sitting legislators may perform administrative functions that are part of the internal operations of the legislature itself. But when legislators venture outside of this limited realm and undertake administrative functions relating to the wider functions of government, two additional issues are raised: first, whether such a dual role violates state constitutional incompatibility clauses;[167] and second, whether such a combination of functions in a single per-

163. *Id.*

164. *Id.*

165. See *supra* notes 145-49 and accompanying text for discussion of *Opinion of the Justices*.

166. See *supra* notes 60-71 and accompanying text for discussion of *State v. Green*.

167. See *supra* notes 120-27 and accompanying text for discussion of state constitutional incompatibility clauses. *See generally* Matheson, *supra* note 20, at 327-30. Some state constitutions do not contain an express incompatibility clause, or may contain clauses limited to "offices of profit" or the equivalent. In such circumstances, a separation of powers provision which includes an express prohibition on any person in one branch performing the functions of another, *see supra* notes

son violates distribution of powers concerns.

Cases involving these issues fall into two general categories. The first type are relatively innocuous, consisting of cases in which individual legislators occupy minor pre-existing executive or administrative posts. Such cases prominently include legislators who are also employed as teachers in the state's public schools or universities,[168] or cases in which an individual legislator happens to occupy a seat on a traditional administrative board or commission.[169] In such cases the essential issue is usually whether the combination of roles at issue violates the particular terms of the state constitution's incompatibility clause. Basic distribution of powers concerns are of relatively minor import.[170]

The second—and potentially more dangerous—category of cases is that in which the presence of individual legislators on the body performing assertedly executive or administrative functions is mandated by the law that creates that body. Such results can be obtained in either of two ways. First, an enabling statute might specify that one or more legislators be appointed, either ex officio or in their individual capacities, to a seat on what is otherwise a traditional

---

112-13, has been used by some courts as an alternative constitutional basis for a broad prohibition on simultaneous exercise of legislative and administrative roles. *See, e.g.*, State *ex rel.* Black v. Burch, 80 N.E.2d 294, 302-03 (Ind. 1948) (holding members of General Assembly cannot be employed by administrative department).

168. The issue of whether an individual can be simultaneously a member of the legislature and a public school or university teacher has generated a surprising amount of controversy. *Compare* Jenkins v. Bishop, 589 P.2d 770, 774-75 (Utah 1978) (per curiam) (holding teacher may serve on legislature) *with* Begich v. Jefferson, 441 P.2d 27, 34-35 (Alaska 1968) (holding public school teachers cannot simultaneously hold legislative office), *overruled by* Zerbetz v. Alaska Energy Ctr., 708 P.2d 1270 (Alaska 1985); Stolberg v. Caldwell, 402 A.2d 763, 773 (Conn. 1978) (same); Frazier v. State *ex rel.* Pittman, 504 So. 2d 675, 700 (Miss. 1987) (public school teacher cannot hold office where salary derives from tax levies); State *ex rel.* Spire v. Conway, 472 N.W.2d 403, 415 (Neb. 1991) (tenured assistant professor at state university on unpaid leave also barred); Monaghan v. School Dist. No. 1, 315 P.2d 797, 802-04 (Or. 1957) (member of state legislature ineligible for teaching position); *see also In re* Sawyer, 594 P.2d 805, 809 (Or. 1979) (sitting judge may not be employed as paid part-time teacher at public college).

169. *See, e.g.*, Sheffield v. State Sch. Bldg. Auth., 68 S.E.2d 590, 596-97 (Ga. 1952) (since membership on Authority not "civil office," Speaker of House of Representatives can sit as member of that Authority without violating state constitutional provision); State v. Hayden, 184 P.2d 366, 373 (Or. 1947) (holding, on separation of powers grounds, appointment of state representative to seat on State "Fish Commission" unconstitutional).

170. This is not to say, however, that important separation of powers concerns could never arise in such circumstances. As was noted at note 120, *supra*, the founders' generation feared the potential for corruption that could result if the appointing authority could use the possibility of appointment to a truly lucrative office in return for a legislator's support. Where such circumstances exist, real separation of powers concerns are present.

Though uncommon, a few of the cases involve at least a whiff of such concerns. See, e.g., State *ex rel.* Black v. Burch, 80 N.E.2d 294, 296-98 (Ind. 1948), in which four members of the Indiana legislature had been appointed to salaried positions on various administrative agencies—as Secretary of the Flood Control Water Resources Commission, Director of Motor Vehicle Department of the State Public Service Commission, Superintendent of Maintenance for the State Highway Commission, and in an unspecified but remunerative capacity with the Board of Barber Examiners. While not quite saying so, the court seemed clearly to imply that the offices were sinecures, and ruled the legislators' simultaneous occupation of those offices unconstitutional. *Id.* at 302.

administrative agency. Alternatively, the legislature might achieve a similar result by purporting to confer administrative or executive powers on what is—or was—a purely or primarily legislative body. Examples of such traditional administrative bodies on which legislators have personally served include administrative organs that administer the state's capital construction projects[171] or perform other miscellaneous administrative tasks.[172] Examples of legislative bodies that have gradually acquired administrative functions of various types prominently include the so-called "Legislative Research Commissions" or "Legislative Councils,"[173] Legislative Finance Commissions of various types,[174] and similar legislative bodies purporting to exercise other fiscal powers.[175]

---

171. The cases are common, and decisions go both ways. *Compare* Sheffield v. State Sch. Bldg. Auth., 68 S.E.2d 590, 596-97 (Ga. 1952) (holding seat on Authority is not "civil office," and Speaker of House of Representatives therefore can sit as member of that Authority); State *ex rel.* Fatzer v. Kansas Turnpike Auth., 273 P.2d 198, 207-08 (Kan. 1954) (upholding statute granting seats on Turnpike Authority created to finance, construct, and operate various types of road projects to chairmen of State and House Committees on Roads); Tall Tower v. Procurement Review Panel, 363 S.E.2d 683, 685-86 (S.C. 1987) (upholding presence of legislators on Panel which conducts administrative review of protests arising under state Procurement Code.); J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n, 336 N.W.2d 679, 696-97 (Wis. Ct. App. 1983) (upholding mixed executive and legislative membership on State Building Commission, empowered to, *inter alia*, select sites for public buildings, approve construction contracts, administer construction, and lease those buildings) *with* Greer v. Georgia, 212 S.E.2d 836, 838-39 (Ga. 1975) (striking down statute appointing six sitting legislators to World Congress Center Authority, public corporation authorized to construct and operate Center); Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 297 (Ind. 1958) (striking down Commission created to oversee building of new State Office on ground it contained legislative members); State *ex rel.* Anderson v. State Office Bldg. Comm'n, 345 P.2d 674, 682-83 (Kan. 1959) (striking down statute providing Governor may appoint only members of legislature to seven person State Office Bldg. Comm'n); State *ex rel.* State Office Bldg. Comm'n v. Bailey, 150 S.E.2d 449, 456 (W. Va. 1966) (holding State Office Building with legislative members unconstitutional).

172. *See, e.g.*, People v. Tremaine, 168 N.E. 817, 822 (N.Y. 1929) (incompatibility clause prohibits legislators from sitting on committees which control spending); State *ex rel.* Wallace v. Bone, 286 S.E.2d 79, 81 (N.C. 1982) (striking down appointment of four legislators to North Carolina Environmental Management Commission). Such bodies are probably far more common than the case law discussing them would indicate. In at least one recent case, an administrative body which included legislators among its members—the Pennsylvania Intergovernmental Cooperation Authority, a body formed to enter into binding financial reform plans with major cities in that state—was upheld without discussion of the merits of the distribution of powers issues raised, on grounds of lack of standing. Local 22, Philadelphia Fire Fighters' Union v. Commonwealth, 613 A.2d 522, 526 (Pa. 1992).

173. *See, e.g.*, Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 915 (Ky. 1984) (striking down Commission which purported to exercise broad authority over state administrative bureaucracy). See *infra* notes 211-19 and accompanying text for discussion of legislative research committees ("LRCs").

174. *See, e.g.*, State *ex rel.* Schneider v. Bennett, 547 P.2d 786, 798 (Kan. 1976) (upholding in part State Finance Council, composed of executive and legislative members, exercising broad powers over operations of state Department of Administration, power to fix compensation of executive officials, and supervisory power over state civil service and Division of the Budget). *See infra* notes 199-207 and accompanying text.

175. Such committees, often joining executive and legislative officials on the same body, come in great variety. Some have been upheld against separation of powers challenge, while others have been declared unconstitutional. *Compare* State *ex rel.* McLeod v. Edwards, 236 S.E.2d 406, 409 (S.C. 1977) (upholding State Budget and Control Board comprised of Governor, State Treasurer,

It is easy to understand why legislatures would want to require a legislative presence on certain controversial or politically powerful administrative organs. In view of the institutional problems caused by short legislative sessions and lack of staff, the urge to create a continuously functioning body, one that can act on the legislature's behalf when it cannot fend for itself, can be strong indeed. And even while the legislature is in session, the most direct way for legislators to assert influence on the way statutes and programs are administered is for legislators themselves to sit as members of the relevant agency or board.

Such service by a legislator on an administrative body does not necessarily violate state constitutional incompatibility provisions, at least those which, like most, preclude sitting legislators from occupying administrative "offices" during their legislative terms.[176] Particularly where the legislators serve without pay, the additional responsibilities that such service entails may not rise to the level of an "office."[177] However, even if not made per se unconstitutional by such an incompatibility clause, such a combination of roles in a single individual raises serious distribution of powers questions—questions that result not only from the mixing of conceptually different roles, but also from the real potential for such arrangements to allow the combination of lawmaking and law-applying func-

---

Comptroller General, Chairman of Senate Finance Committee, and Chairman of House Ways and Means Committee, all ex officio, and authorized to deal with fiscal affairs of state); Elliott v. McNair, 156 S.E.2d 421, 431 (S.C. 1967) (upholding State Budget and Control Board, comprised of Governor, State Treasurer, Comptroller General, Chairman of Senate Finance Committee, and Chairman of House Ways and Means Committee, all ex officio) *with* Alexander v. State *ex rel.* Allain, 441 So. 2d 1329, 1339-42 (Miss. 1983) (striking down, *inter alia*, statute setting up joint executive/legislative Commission on Budget and Accounting with broad powers to prepare proposed state budget, oversee administration of certain appropriations, regulate purchases by state agencies, and administer state employees' life and health insurance plans); *In re* Opinion of the Justices, 19 N.E.2d 807, 817-18 (Mass. 1939) (striking down legislative "Recess Commission" which purported to exercise authority to approve governor's decisions to spend emergency funds); *see also* Stockman v. Leddy, 129 P. 220, 223 (Colo. 1912) (striking down committee of legislators empowered to investigate and act in prosecuting or defending certain actions on part of state), *overruled by* Denver Assoc. for Retarded Children, Inc. v. School Dist., 535 P.2d 200 (Colo. 1975).

176. See *supra* notes 121-27 and accompanying text for discussion of state constitutional incompatibility provisions.

177. *See, e.g.*, Sheffield v. State Sch. Bldg. Auth., 68 S.E.2d 590, 597 (Ga. 1952) (Speaker of Georgia House of Representatives could sit as member of state School Building Authority without violating incompatibility clause of state constitution). *But see In re Opinion of the Justices*, 19 N.E.2d at 817-18 (legislator's seat on "Recess Commission" of legislature constituted forbidden occupation of "civil office" under meaning of state constitution).

It must be noted, however, that the express incompatibility clauses may not be the only source for a constitutional prohibition on dual officeholding. As was discussed at notes 111-13, *supra*, some state constitutional "separation of powers" clauses contain additional language expressly forbidding persons belonging to or exercising powers under one branch from holding office or exercising any power or function of another. Such clauses can function as alternative grounds for prohibiting a legislator from exercising an administrative role. Where such provisions refer to holding "office" in another branch, they do not seem greatly broader than a typical incompatibility clause. However, where the second clause of the state separation of powers provision refers to persons in one branch exercising the "powers" or "functions" of another branch, a much broader prohibition on dual officeholding may result.

tions in the same persons or institutions.[178] Depending on the circumstances, such a combination of roles could well result in the small-scale "tyranny" of effectively unfettered discretion on the part of the agency at issue, provide a mechanism for the domination of one branch over another, interfere with the efficient operation of government, or blur the lines of responsibility and accountability that are required to link political actors to the process of democratic control of government.[179]

Although the factual circumstances and outcomes vary, the analyses employed by state courts to analyze cases involving legislators who personally exercise administrative functions are strikingly similar to the analyses employed in the cases involving legislative appointees to administrative agencies, addressed above. Here too, many of the courts that have struck down such arrangements have done so largely for "formalist" reasons.[180] Thus, for example, in *Book v. State Office Building Commission*,[181] the Indiana Supreme Court declared that a Commission created to oversee the erection of a new state office building was unconstitutional solely because that Commission contained both executive and legislative officials among its members.[182] Though the court acknowledged in principle the need for "flexible" interpretation of distribution of powers principles, it relied on federal as well as state authority to conclude that executive and legislative functions must be kept radically separate.[183] Since the court classified the Commission as an "executive" organ,[184] no legislator could serve on it. The court made no attempt to analyze why application of such a strict rule was

178. This is the aspect of separation of powers analysis that Professor Vile refers to as the "separation of persons" strand. VILE, *supra* note 24, at 17.

179. See *infra* notes 180-221 and accompanying text for a futher discussion of these problems.

180. See *infra* notes 181-85 and accompanying text for discussion of *Book v. State Office Bldg. Comm'n*. *See also* Stockman v. Leddy, 129 P. 220 (Colo. 1912) (striking down committee of legislators formed to prosecute ceratin legal actions on part of state), *overruled by* Denver Assoc. for Retarded Children, Inc. v. School Dist., 535 P.2d 200 (Colo. 1975); State *ex rel.* Judge v. Legislative Finance Comm., 543 P.2d 1317, 1321 (Mont. 1975) (holding committee composed of legislative members, purportedly authorized to review and approve expenditures by state agencies in excess of appropriations and any allocation of non-general fund monies not available at previous general session of legislature, unconstitutional); State v. Hayden, 184 P.2d 366, 373 (Or. 1947) (holding state representative may not be appointed to State Fish Commission); State *ex rel.* State Office Bldg. Comm'n v. Bailey, 150 S.E.2d 449, 456 (W. Va. 1966) (holding committee unconstitutional where legislative members perform administrative or executive functions).

181. 149 N.E.2d 273 (Ind. 1958).

182. *Id.* at 293-97. The Commission consisted of the Governor, Lieutenant Governor, the Budget Director, the legislative members of the State Budget Committee, one additional member of the Senate (appointed by the Lieutenant Governor), and one additional member of the House of Rep. (appointed by the Speaker). All members served ex officio; the legislative members constituted a majority of the Commission. *Id.* at 293.

183. *Id.* at 293-97 (quoting O'Donoghue v. United States, 289 U.S. 516, 530 (1933); Springer v. Philippine Islands, 277 U.S. 189, 202 (1928); THE FEDERALIST NO. 48 (James Madison); and cross section of drafters of Federal Constitution, for proposition that strict separation of powers must be maintained).

184. The court's discussion clearly shows the "classifying" methodology of the formalist approach:

> The members of the Commission are clearly not judicial or legislative officers, hence, they, of necessity, must fall within the executive department of State Government, and are ad-

necessary to prevent abuses in the case before it, but rather relied upon the generalized potential for evil that might occur if similar institutions were in fact used to usurp the governor's duty to execute the laws.[185]

Recent cases coming to similar conclusions have tended to rely on both the formalist argument articulated in *Book*, and on a more general argument about the nature of the legislative function—that legislatures may create instrumentalities to implement legislation, but may not "retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality."[186] Such reasoning was applied in *Greer v. Georgia* to preclude individual legislators from serving as members of the Authority created to oversee construction of Atlanta's World Congress Center;[187] in *State ex rel. Wallace v. Bone* to strike down a statute giving legislative leaders power to appoint four legislators to the North Carolina Environmental Management Commission;[188] and in *Alexander v. State ex rel. Allain* to preclude legislators from sitting on the Mississippi Commission on Budget and Accounting, an organ that both as-

---

ministrative officers in the sense that they would perform functions which usually are and would be performed by administrative officers within the executive department.

Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 295 (Ind. 1958).

185. *Id.* at 296. "If members of the Legislature may be appointed as members of Boards which exercise functions within the executive-administrative department of Government, the door is then open for the Legislature to enter and assume complete control thereof." *Id.*

186. Greer v. Georgia, 212 S.E.2d 836, 838 (Ga. 1975).

187. *Id.* at 839. The statute at issue provided that the Authority was to construct and operate the Center, and that six of the 20 members of that Authority must be appointed from the members of the General Assembly. *Id.* at 837. The court acknowledged "it is impossible to draw a mathematical line by which every action can be exactly classified; and there are some matters which do not inherently and essentially appertain to one department of government rather than to another." *Id.* at 838 (quoting Southern Ry. Co. v. Melton, 65 S.E. 665, 667 (Ga. 1909)). However, it had no difficulty in concluding that the functions of this Authority were "primarily, if not exclusively, executive," and that legislators were not permitted to have any direct role in implementing the laws. *Greer*, 212 S.E.2d at 838. The court rejected, without discussion, arguments that such dual service would not, under the facts of the case, pose any real threat to the values underlying the separation of powers principle. *Id.* at 837.

188. 286 S.E.2d 79, 81 (N.C. 1982). The North Carolina Environmental Management Commission was a quasi-independent regulatory agency with the investigatory, permitting, and enforcement powers typical of such an agency. *Id.* at 79-80. Of the 17 members of the Commission, 13 were to be appointed by the governor, two by the Speaker of House from the membership of the House, and two by the President of the Senate from the membership of the Senate. *Id.* The court relied upon the tradition of strict separation of powers in North Carolina and an extensive review of sister-state precedent to conclude that legislators may not sit on agencies with such operational responsibilities:

> It is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws. We agree with the Georgia court's holding in *Greer* that the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality.

Id. at 88. The court was apparently unmoved by the fact that its decision would affect some 49 other North Carolina boards and commissions on which legislators were then serving as members. *Id.*; *see generally* Orth, *supra* note 20, at 10-17 (critiquing *Wallace* as unsupported by precedent and unnecessarily rigid).

sisted in preparing the state budget and oversaw certain administrative expenditures.[189]

Such strict approaches may have some merit at least as prophylactic measures. Given the real possibility for abuse inherent in allowing those who write the laws also to determine how those laws shall be applied, a strict refusal ever to allow legislative and administrative functions to be joined in the same person may indeed be the safest course. But this formalist approach suffers from the defects of its virtues—it has tended to obscure the difference between novel governmental arrangements that are real violations of the principles of distribution of powers and those that are merely technical violations. Thus, for example, in *Alexander v. State ex rel. Allain*,[190] the Mississippi Supreme Court's formalist analysis led it to declare unconstitutional not only the Commission on Budget and Accounting's role in supervising expenditures by administrative agencies[191] mentioned above, but also the Commission's role in preparing a proposed budget that would thereafter be presented to the legislature as a whole. The court acknowledged that both the Governor and the legislature had important roles in the budget-making process,[192] and that each could appoint some of their members or other experts or advisors to assist them.[193] However, the court held that those legislative and executive appointees could not sit together on a common budget drafting committee without violating the requirement of separation of powers.[194] The grounds for this holding appear to be wholly conceptual—issues of whether such an arrangement posed any real danger to the state, whether it obscured political accountability for budgeting decisions, or whether it allowed any branch to avoid its responsibilities were all left undiscussed. The fact that such an arrangement might be of "practical benefit to the state," or that it might be "efficient, convenient and useful in facilitating the functions of government" was, we were told, "legally irrelevant."[195]

---

189. 441 So. 2d 1329, 1338-42 (Miss. 1983). The statutes at issue in *Alexander* authorized legislators to sit on several administrative boards and commissions, the most significant of which was the Commission on Budget and Accounting ("CBA"). The CBA was composed of the Governor, Lieutenant Governor, and nine members of the legislature. Its powers included preparing a proposed state budget, some administration of appropriations, regulating purchases by state agencies, and administering state employees' life and health insurance plans. *Id.* at 1338-39. The court began by noting what it saw as the intentions of the drafters of the state constitution to enact a particularly strong separation of powers provision to declare all such boards and commissions unconstitutional. *Id.* at 1335-36. The court sharply distinguished between legislative and executive roles, and, citing the federal decision in *Chadha*, concluded that all of the activities of the commission were inherently executive functions in which legislators cannot participate in any way. *Id.* at 1338-42.

190. 441 So. 2d 1329 (Miss. 1983).

191. *Id.* at 1341.

192. *Id.* at 1339-40 (noting "budgetmaking is a legislative prerogative and responsibility" but "[t]he legislature has acknowledged the right of the governor to submit to it his recommendations upon the budget," a right founded on explicit text of state constitution).

193. The right of the executive to appoint such subordinate advisory officials was unquestioned; the right of the legislature to do so was expressly recognized by the court: "The Legislature of this State has the power and prerogative to create such a committee as it may deem appropriate to assist it in its budget-making responsibilities." *Id.* at 1339-40.

194. *Id.* at 1338-41.

195. Alexander v. State *ex rel.* Allain, 441 So. 2d 1329, 1339 (Miss. 1983).

Nor were earlier cases that reached the contrary conclusion, thus permitting legislators to exercise particular administrative tasks, any models of sophisticated or convincing legal analysis. On the contrary, many of the early cases that upheld such mechanisms against separation of powers challenges tended to analyze them in a superficial manner, either avoiding the issue,[196] relying on the purest *ipse dixit*,[197] or simply asserting, without much analysis, that the functions performed by the agency at issue are "incidental to" proper legislative functions.[198] This lack of critical examination may have been an artifact of the

---

196. *See, e.g.*, Branham v. Lange, 16 Ind. 497 (1861) (upholding constitutionality of statute giving committee of three legislators power to authorize charges against Civil War emergency fund). The question of whether the structure of the committee violated separation of powers principles was squarely presented to the court, in the strongest terms. The Court quoted the grounds of the appeal as including the following:

> The appointment of this Auditing Committee, composed as it is of members of the Legislature, is against Art. 3 of the Constitution of the State, in as much as the distribution of powers of the government is violated. If the General Assembly can safely appoint, out of its own members, a committee for the settlement and the examination and allowance of claims, they can also arrogate to themselves the custody of the public money; the executive prerogative of granting pardons; and elaborate, for the judiciary, a set of rules to be observed by the Courts: all of which would lead to revolution and anarchy.

Id. at 499. The court's rather bland reply merely noted that "the Legislature may prescribe rules as to the custody of public money, (see the Embezzlement Law,) may prescribe rules as to the granting of pardons, ... and has elaborated a set of rules to be observed by the Courts." *Id.* at 500-01. While the implied point as to the absence of "revolution and anarchy" was undoubtedly correct, the court really failed to consider the possibilities for abuse that might inhere if a subcommittee of the same body that appropriated emergency funds also retained the power to dole those funds out.

197. See, e.g., Opinion of the Justices, 13 So. 2d 674 (Ala. 1943), upholding a World War II vintage War Emergency Council—composed of the governor, four members of the House and four from the Senate and empowered, while the legislature was out of session, to meet emergencies by dispersing $750,000 in discretionary funds. The Court had no hesitation in classifying the disputed Council as "administrative" rather than "legislative." Its entire discussion of the separation of powers of problems posed consisted of less than two obscure paragraphs:

> When the members of the Legislature are selected to serve under the proposed act, they do so as members of a board, not as members of the Legislature, nor as individuals. They are not ex officio members because they are also chairmen of certain legislative committees.
>
> The legislator, who may be appointed on the board, is performing administrative acts wholly apart from that which he renders as a legislator. And the Legislature may validly select from their membership executive and administrative officers without violating Section 42 or 43 of the Constitution.

Id. at 677-78. The only case cited for authority, Fox v. McDonald, 13 So. 416 (Ala. 1893), stands only for the proposition that appointment authority is not inherently executive in nature, and that the legislature may vest authority to appoint a city police commissioner in a Board, which is in turn appointed by a judge. Nothing in *Fox* speaks to the propriety of legislators performing executive functions.

198. Two Kansas cases from the 1950s seem typical of this genre. In State *ex rel.* Fatzer v. Kansas Turnpike Auth., 273 P.2d 198 (Kan. 1954), the court upheld the Turnpike Authority against constitutional challenge on separation of powers grounds. *Id.* at 207-08. The Authority, like contemporaneous bodies in other states, was empowered to issue bonds and to finance, construct, and operate various types of state highway projects. *Id.* Membership on the board consisted of seven members, two of whom—the chairmen of the state and house committees on roads—were members of the legislature sitting ex officio. *Id.* The other five were representatives of the executive branch:

wartime or other "emergency" circumstances that led to the creation of many of these earlier legislative-administrative organs, and may reflect the court's desire to avoid standing in the way of a perceived need.

A more serious approach to analysis eventually began with the groundbreaking decision of the Kansas Supreme Court in *State ex rel. Schneider v. Bennett*.[199] At issue in *Bennett* was the State Finance Council, a nine-member body composed of the Governor and the leadership of both houses of the Kansas legislature.[200] The Council was the successor of prior bodies originally created to oversee and approve specific expenditures of emergency funds while the legislature was not in session.[201] Over time, however, the Council had been statuto-

---

the state Director of Highways, and four other individuals to be appointed by the Governor. *Id.* at 206-07. The court began by noting that the Kansas Constitution does not expressly either authorize or prohibit the legislature from appointing its own members as ex officio members of boards and commissions, and that the practice had become common. With respect to separation of powers, the court refused to find any unauthorized attempt to confer executive authority on legislators:

> While the legislature cannot interfere with nor exercise any powers properly belonging to the executive, it may engage in activities which may properly be regarded as incidental to and within the scope of its legislative duties, and it is not an encroachment on the executive for the legislature to create a commission and to designate its members to perform delegable legislative duties.

Id. at 207. The court did not, however, discuss why administration of a building program is "incidental to" the legislative function.

In State v. Fadely, 308 P.2d 537 (1957), the court held constitutional a statute that created a state emergency fund and set up a "State Finance Council" to make intersession appropriations from that fund. *Id.* at 549-50. The six-member Council was a successor to a prior body administering a state war emergency fund, created in 1943, and was composed of the Governor, Lieutenant Governor, Auditor of State, Speaker of the House, and the chairmen of the Senate and House Ways and Means Committees, all serving ex officio. *Id.* at 541. Although the Council had broad power to advise in preparation of the state budget, investigate, hear and determine certain administrative appeals, and approve certain administrative rules, the only challenge was to the Council's power to allocate state Emergency funds. The court rejected a separation of powers challenge in a short and obscure passage that merely relied on *Fatzer* for the principle that where legislators "performed only administrative duties" this "did not constitute an encroachment on the executive. . . ." *Id.*

199. 547 P.2d 786 (Kan. 1976).

200. *Id.* at 794.

201. The Council was specifically empowered, by unanimous vote, to issue short term debt instruments to cover temporary shortfalls within a single fiscal year, and to allocate state emergency funds to and authorize expenditure of those funds by state agencies or political subdivisions. *Id.* at 796.

Legislative bodies exercising such functions have a long history. Examples can be found at least as far back as the Civil War, when the Indiana state legislature appropriated a special sum of $1 million to defray unforeseen emergency expenses and appointed three individual legislators to act as an auditing committee charged to examine and approve accounts to be paid from that fund. *See, e.g.*, Branham v. Lange, 16 Ind. 497 (1861) (upholding legislation against separation of powers challenge). Subsequent emergencies and wars gave rise to similar solutions; legislatures appropriating emergency funds and appointing administrative bodies, including individual legislators, with power to approve dispersal those funds. *See, e.g.*, Opinion of the Justices, 13 So. 2d 674 (Ala. 1943) (upholding constitutionality of War Emergency Council—composed of governor and eight legislators—which was given authority to disperse discretionary funds, to supplement regular appropriations as needed to meet war emergencies).

In some states, as in Kansas, these bodies evolved into general-purpose "State Finance Commissions" and other similar bodies set up to make appropriations for all types of unforseen expenses

rily invested with a broad range of additional supervisory and administrative powers as well.[202] The State Attorney General brought an action alleging, among other things, that separation of powers precluded such a legislatively dominated body from exercising these administrative powers.

The *Bennett* court began its analysis by tracing what it saw as the evolution from the formalist approach that characterized distribution of powers analysis at the beginning of the century, to a "practical" approach that recognized that government powers can no longer be clearly separated into conceptual categories.[203] As was noted above in the discussion of *Parcell*, the court in *Bennett* went on to reformulate the essential inquiry as whether a particular mixing of conceptually different powers constitutes a permissible exercise in "cooperation" between the branches or an unconstitutional attempt at "usurpation" of the au-

---

when the legislature is not in session. *See, e.g.*, State v. Fadely, 308 P.2d 537 (Kan. 1957) ("State Finance Council" not usurpation of power by legislature over executive).

Not all courts have upheld such arrangements, however. Some have held, on separation of powers or incompatibility grounds, or both, that legislators cannot directly exercise such "administrative" responsibilities. *See, e.g.*, State *ex rel.* Judge v. Legislative Fin. Comm., 543 P.2d 1317 (Mont. 1975) (purely legislative committee with power to review and approve expenditures by state agencies in excess of appropriations held violative of separation of powers); *In re* Opinion of the Justices, 19 N.E.2d 807 (Mass. 1939) (proposed legislation establishing fund for "unforeseen conditions" during second fiscal year where action cannot be postponed until next session, but permitting governor to transfer from fund to particular items of appropriation only on consent of special legislatively dominated "recess commission," held unconstitutional).

202. *Bennett*, 547 P.2d at 786. As summarized by the court, these additional administrative duties included the power to: (1) "[h]ear and determine appeals by any state agency from final decisions or final actions of the secretary of administration or the director of [computer services];" (2) "approve, modify and approve or reject proposed rules and regulations submitted by the secretary of administration;" (3) "fix or approve the compensation to be paid to a large number of officers and employees of the executive department;" (4) "approve all rules and regulations prepared by the director of the division of personnel for carrying out the provisions of the Kansas civil service act," including the assignment of government positions to classes and salary ranges; and (5) supervise the activities of the division of the budget, the state vocational training program for prison inmates, and the state director of architectural services. *Id.* at 794-95.

203. *Id.* at 791. The court argued that such a practical approach has been made necessary by the fact that the powers of modern government cannot be completely separated. *Id.* Rather, "[t]he most that can be done is to recognize the theoretical classification made and preserve in general outline the distinction drawn." *Id.* (quoting State v. Johnson, 60 P. 1068, 1079 (Kan. 1900) (Doster, C.J., dissenting)). The court went on:

> In our judgment a strict application of the separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power including legislative, executive, and judicial powers often blended together in the same administrative agency. The courts today have come to recognize that the political philosophers who developed the theory of separation of powers did not have any concept of the complexities of government as it exists today. Under our system of government the absolute independence of the departments is impracticable. We must maintain in our system sufficient flexibility to experiment and to seek new methods of improving governmental efficiency. At the same time we must not lose sight of the ever-existing danger of unchecked power and the concentration of power in the hands of a single person or group which the separation of powers doctrine was designed to prevent.

Bennett, 547 P.2d at 791.

thority belonging to one branch by another.[204] The *Bennett* court proposed a non-exclusive list of four factors—the essential nature of the power being exercised, the degree of control exercised over the other branch, the objective sought in the arrangement, and the likely practical consequences—which might be used to help a reviewing court distinguish between the permissible and the impermissible combinations of functions and/or personnel.[205] Applying this analysis, the court concluded that the power given to the Council to expend emergency funds, issue short term debt, and transfer money were all permissible, in large part because the requirement that such actions be taken only by the unanimous vote of the Council gave the Governor an effective veto over the Council's actions in this area and thus prevented any usurpation of the governor's role.[206] On the other hand, the court concluded that the power given to the Council to exercise "day-to-day" supervision over operations of the Department of Administration was a usurpation of executive authority. Since these matters are essentially executive in nature, and since action by the Council in these areas required only a majority vote, the Council had the potential to exert a "coercive" influence on that portion of the executive realm.[207]

While this analysis is subject to the criticism that the four factors are not clearly derived from basic separation of powers theory and that they may be difficult to apply in some cases, it does seem to have led to defensible results in this case. The court's attention seems properly focused on the underlying reality of what the Council is actually doing, and where the acts relate to appropriating money, the creation of debt or other matters as to which the legislature has a legitimate role, the court seems willing to tolerate experimentation. On the other hand, the day-to-day operations of government are kept firmly in executive hands. This functional split appears well designed to promote the goals of efficiency and accountability, and does not seem likely to lead to any abdication of the core responsibilities of either branch. And while, as noted above, the court's four factors may not be the last word in the structured analysis, they do seem capable of focusing attention on the relevant issues.

This line of analysis articulated in *Bennett* has also captured the allegiance of courts in other states. The analysis has been relied upon to uphold the constitutionality of the South Carolina State Budget and Control Board,[208] the South

---

204. In *Bennett*, the court stated:

> The separation of powers doctrine does not in all cases prevent individual members of the legislature from serving on administrative boards or commissions created by legislative enactments. Individual members of the legislature may serve on administrative boards or commissions where such service falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of the government.

Id. at 792. See *supra* notes 153-64 and accompanying text for a discussion of the *Bennett* analysis.

205. See *supra* note 160 and accompanying text for a discussion of four factors proposed by the *Bennett* court.

206. *Id.* at 798. The court, however, struck down the specific grant of power to transfer funds on non-delegation grounds. *Id.* at 799.

207. *Id.* at 797-98.

208. State *ex rel.* McLeod v. Edwards, 236 S.E.2d 406 (S.C. 1977). That Board was comprised

Carolina Procurement Review Panel,[209] and the Wisconsin Building Commission,[210] all of which included legislators as members and all of which performed some tasks that would be classified as "executive" in nature. However, the most interesting counterpoint to the *Bennett* line of cases was a decision that did not directly rely on *Bennett* at all. In *Legislative Research Commission v. Brown*,[211] the Supreme Court of Kentucky refused to cite or discuss *Bennett* or any of its progeny and, indeed, went out of its way to assert that any "liberal" approach to

---

of Governor, State Treasurer, Comptroller General, Chairman of Senate Finance Committee, and Chairman of House Ways and Means Committee, all serving ex officio. The Board dealt with the fiscal affairs of the state through divisions of "Finance," "Purchasing and Property," and "Personnel Administration." *Id.* at 407. While at least some of the functions of the Board were undoubtedly executive in nature, the court found no "usurpation" of executive authority by the legislature on the facts. *Id.* at 409. The legislative members comprised only a minority on the Board. On the totality of the facts, the court found no evidence of any intention to usurp the functions of the executive department, but rather saw the legislators' participation as a "cooperative" effort to make the expertise of the Finance Committee chairmen available to the Board. *Id.*

209. Tall Tower v. Procurement Review Panel, 363 S.E.2d 683 (S.C. 1987), *rev'd on other grounds sub nom.* Charleston Television, Inc. v. South Carolina Budget and Control Bd., 392 S.E.2d 671 (S.C. 1990). The Panel at issue was composed of: a member of the state Budget and Control Board, the chairman of the state Procurement Policy Committee, a member of the House Labor, Commerce and Industry Committee, a member of the Senate Labor, Commerce and Industry Committee, and five other "at large" members appointed by the Governor. *Id.* at 685. The Panel conducts administrative review of protests of decisions regarding the award of state contracts according to the state Procurement Code. *Id.*

As in *McLeod*, the court held that the "overlap" of functions presented in the case did not exceed permissible bounds because the legislators were a minority on the Panel, and because the Panel's membership appeared to be a "cooperative effort to make available to the executive department the special knowledge and expertise of designated legislators in matters related to their function as legislators." *Id.* at 685-86. The court went beyond *McLeod* to hold that the analysis would not change even if the Panel were to elect a legislative member as its chairman. *Id.* at 685.

210. J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n, 336 N.W.2d 679 (Wis. Ct. App. 1983). The State Building Commission was a "legislative committee" consisting of the Governor, three Assemblymen, three Senators, and a private citizen appointed by the governor. It was empowered to, among other things, select sites for public buildings, approve construction contracts, oversee construction, and lease the resulting buildings. The court held that the grant of such executive powers to a legislatively dominated committee did not exceed the permissible bounds of separation of powers. *Id.* at 697.

Although the court in *Ahern* relied upon *Bennett* and endorsed its "pragmatic" approach, the analysis it adopted appears distinguishable from that employed in *Bennett*, at least in emphasis. *Id.* at 696. Like *Bennett*, the *Ahern* court argued that, although the separation principle was "fundamental," it is often impractical to try to classify a particular office as belonging to a particular branch. But rather than phrasing the question in terms of coercion versus cooperation, the *Ahern* court focused more upon the "checks and balances" between the branches:

> The doctrine of separation of powers must be viewed as a general principle to be applied to maintain the balance between the three branches of government, to preserve their respective independence and integrity, and prevent concentration of unchecked power in the hands of any one branch.

Id. at 695 (quoting State v. Washington, 266 N.W.2d 597, 605-06 (Wis. 1978)). Thus, the court concluded, Wisconsin law permits sharing of power among the branches, subject to the limit that no body be allowed to wield "unchecked power." *Id.* at 696.

211. 664 S.W.2d 907 (Ky. 1984). This case is extensively and approvingly discussed in Snyder & Ireland, *supra* note 74, at 103.

the interpretation of separation of powers was precluded by the text and drafting history of the Kentucky Constitution.[212] Nonetheless, both the reasoning and the result in that case are compatible with *Bennett*.

Legislative Research Committees ("LRCs") of the sort at issue in *Brown* began as a reaction to the shortness of state legislative sessions.[213] Like the "Finance Council" at issue in *Bennett*, such LRCs have a long pedigree. Typically, such committees began as groups of legislators who operated between sessions, performing essentially factfinding roles. They were used in several states, and—when confined to such limited roles—generally upheld against constitutional challenge.[214] However, in 1982, the Kentucky legislature made sweeping changes in the status and functions of its LRC. The committee was designated an "independent agency of state government" and given, in addition to its traditional information gathering functions, broad legislative[215] and administrative functions. The court in *Brown* readily concluded that, despite its alleged independence, the LRC was a "legislative" agency.[216] The question was whether

---

212. *Brown*, 664 S.W.2d at 912-13 (noting that §§ 27 and 28 of Kentucky constitution specifically require that powers be separated, and that no person belonging one department may exercise power belonging to others, and pointing out that main purpose for which Kentucky constitutional convention was called was to curb power of state legislature). In rejecting any softening of the demands of separation of powers, the Kentucky Supreme Court also drew support from the similar positions taken by what it saw as the majority of other states, and by the Federal Supreme Court. *Id.* at 914 (citing INS v. Chadha, 462 U.S. 919 (1983)).

213. Snyder & Ireland, *supra* note 74, at 103. Snyder and Ireland state in their article:

> The [Kentucky] Constitution of 1891 resulted in an imbalance of political power between the Governor and the legislature. Handicapped by its brief session and lack of legal existence after its biennial adjournment, the legislature was unable to gather sufficient information to evaluate legislative proposals submitted by the Governor. This lack of information gave the Governor a special advantage in affecting the biennial budget and thereby all of state government.
>
> A consensus that an entity should be created to provide the legislature with the requisite research during the interim between it sessions to enable its members to better discharge their legislative function. Consequently, the Legislative Research Commission (L.R.C.) was born. . . .

Id. at 174.

214. *See, e.g.*, State v. Aronson, 314 P.2d 849, 856 (Mont. 1957) (holding statute creating legislative council did not violate separation of powers clause); State *ex rel.* Jones v. Atterbury, 300 S.W.2d 806, 812-13 (Mo. 1957) (holding Constitution of Missouri permitted and provided for interim legislative research committee); State *ex rel.* Robinson v. Fluent, 191 P.2d 241, 245 (Wash.) (holding "Interim Committee" authorized to conduct factfinding investigations, but requiring Committee be established by joint action of both Houses), *cert. denied sub nom.* Washington Pension Union v. Washington, 335 U.S. 844 (1948); State *ex rel.* Hamblen v. Yelle, 185 P.2d 723, 727 (Wash. 1947) (upholding "State Legislative Council," performing factfinding functions, against allegation that membership on Council was "civil office" that legislators forbidden to hold).

215. In addition to the executive or administrative powers discussed in the text, the 1982 amendments also purported to authorize the LRC to exercise, while the legislature was not in session, all of the legislative powers of that absent legislature, with the sole exception of the power to enact laws. *Brown*, 664 S.W.2d at 912. The court in *Brown* held that such a broad delegation of power to a sub-unit of the legislature violated state constitutional provisions vesting legislative power in the legislature as a whole and limiting the legislature's term. KY. CONST. § 29 (amended 1982); *Brown*, 664 S.W.2d at 914-16.

216. *Brown*, 664 S.W.2d at 911, 916-17. The court held that such claims of independence com-

such an arm of the legislature could exercise any of the range of administrative functions that the legislature had given it.

In holding that many of the new functions assigned to the LRC were unconstitutional, however, the court in *Brown* did not rely upon any formalist analysis. Rather it inquired, as to each challenged innovation, how that practice would affect the functioning of government. With respect to the LRC's asserted power to review and suspend administrative regulations—a suspension that would last until the next session of the legislature, a period that could be as long as twenty-one months—the court reasonably concluded that the power to adopt such regulations went to the heart of the Governor's duty to carry out the law, and that giving a body over which the Governor had no influence the power to suspend such regulations for such a long period of time encroached too deeply on that duty.[217] On the other hand, the authority given to another legislative committee to require the executive branch to report on the state's financial condition, to prepare contingency plans in the event of revenue shortfall, and to require that the plan be submitted for committee review, was held not to violate the state constitution. Since the reviewing committee did not have the power to veto the other branches' contingency plans, the court saw the exercise as "cooperation" between branches rather than any "usurpation" by the committee of the judicial or executive branches' autonomy.[218] And, with respect to the power given to the LRC to review applications by the executive branch for federal block grants, the court proposed what was in effect a compromise. The court acknowledged that the legislature had a legitimate interest in monitoring the uses to which these sources of non-general fund revenues would be put, and that the very limited duration and frequency of legislative sessions posed a practical impediment to such oversight. The court, therefore, proposed that the LRC could perform these oversight functions on behalf of the legislature; all that would be required was for the legislature to establish "adequate standards" to guide the LRC in this endeavor.[219] In effect, the court converted the issue into a non-delegation doctrine problem. In doing so, the *Brown* court seemed to imply that legislators can undertake at least some quasi-administrative duties—at least where necessary to support a core legislative interest, and where those legislators are bound by the same safeguards and limits on their discretion as other administrators exercising delegated authority.

Thus, there appears to be at least a degree of sub silentio convergence of method, exemplified by a Kansas court that saw itself as rejecting the "strict" conceptual analyses[220] and a Kentucky court that saw itself as rejecting the "lib-

---

ported neither with the court's analysis of the committee's functions nor with the mandatory three-part organization of the state government. *Id.* at 917. The court explained that "[t]here is, simply put, no fourth branch of government." *Id.*

217. *Id.* at 918-19. The court also noted that, even if the power to review administrative regulations could be considered "legislative" in nature, such power could only be exercised by the legislature as a whole, not by a small committee. *Id.* at 919.

218. *Id.* at 926-27.

219. *Id.* at 929.

220. State *ex rel.* Schneider v. Bennett, 547 P.2d 786, 791 (Kan. 1976).

eral" analytical alternatives.[221] Though starting with very different philosophical commitments, or at least very different rhetorical foundations, both courts ended by adopting very similar pragmatic approaches to the actual task of distinguishing between permissible and impermissible combinations of functions and/or personnel. Together, they may well indicate both the power of that pragmatic approach to analysis of state distribution of powers issues and the probable line of future development.

C. *Toward an Independent State-Level Allocation of Powers Analysis: On the Virtues of Experimentation and Pragmatism*

Any inquiry into the distribution of powers among governors, state legislatures, state courts, and state administrative agencies must acknowledge the great breadth of the field. This article has examined only a small part of that field and, for that reason, its conclusions must be few, brief, and tentative. Nonetheless, a few observations do seem justified.

First, analogies to and reliance on federal precedents are of only limited utility. For a number of reasons set out above—the lack of persuasive force in current federal analyses, differences in history and structure between the federal and state constitutions, the lesser ability of state legislatures to oversee administrative agencies, and the existence of pervasive federal protection against oppression by state authorities—state courts should not rely too heavily on federal distribution of powers precedents. Moreover, despite the more express terms in which most state constitutions address their commitment to separation of powers, many of the arguments that most strongly support more rigid and conceptual approaches to interpretation on the federal level—the founders' intent to create a strong and unified executive, or the need to create prophylactic rules to prevent the possibility of future tyranny—apply far less strongly, if at all, in interpreting state constitutions. On the contrary, because of the existence of federal law as an ultimate protection against oppression of individuals by state authorities, state courts have the opportunity to interpret and apply state distribution of powers principles with less concern for theoretical purity or any need to avoid precedents that could be misused in the future. They, more than federal courts, have the opportunity to interpret the distribution of powers principles explicit or implicit in their respective state constitutions in accord with the other goals of separation of powers; goals such as efficiency, accountability, and avoidance of abdication.[222]

Second, state courts can and should rely on relevant precedent from other states as persuasive authority. The same structural features that served to differentiate federal distribution of powers analysis from its state analogues—the differing historical circumstances in which the federal and state constitutions were written, structural features such as the legislature's original rather than delegated powers and the prevalence of plural state executives, practical problems

221. *Brown*, 664 S.W.2d at 907.

222. See *supra* notes 72-108 and accompanying text for more detailed discussion of the differences between the federal and state analysis.

caused by intermittent legislative sessions and relative lack of legislative staff, and the lesser importance of anti-tyranny concerns—all serve to demonstrate the profound underlying similarities among all states, no matter what the specific phrasing of their respective constitutions.

Nor are these basic similarities significantly overcome by the differences in the respective texts of various state constitutions. To take the most obvious difference, while most states have express separation of powers clauses in their state constitution, a minority do not.[223] Such a divergence, however, is more apparent than real. The separation principle is no less important or enforceable for being implicit rather than explicit; indeed, as many federal cases show, the absence of an express provision can be compatible with a very rigid view of separation of powers. Nor, despite occasional statements to the contrary, have such textual divergences proven to be outcome determinative in the cases. Kansas and South Carolina, two of the states without express separation of powers clauses, have taken a "pragmatic" approach to these issues,[224] but so have Arizona, Louisiana, and Wisconsin, three states with constitutions in which the principle is expressly stated.[225] Similarly, while Indiana, Mississippi, and North Carolina, all states with express constitutional separation of powers language, have taken a fairly rigid and conceptual approach to these issues,[226] so too has Pennsylvania, a state whose constitution lacks such a provision.[227] This is not to say that text is unimportant. Certain state constitutional provisions—for example, provisions clearly allocating appointment authority,[228] or broadly forbidding dual officeholding[229]—may mandate particular results with regard to specific issues. However, these are different and somewhat specialized questions. On the most basic and general issues of state distribution of powers analysis, the important structural similarities among states far outweigh their differences, including divergent texts.

Third, some sort of "pragmatic" analysis, such as that adopted by the *Bennett* line of cases and echoed in part in *Brown*, appears to be the most promising approach to the resolution of state distribution of powers issues for several rea-

---

223. See *supra* notes 109-14 and accompanying text for a discussion of state constitutional texts.

224. *See, e.g.*, Parcell v. State, 620 P.2d 834 (Kan. 1980); State *ex rel.* Schneider v. Bennett, 547 P.2d 786 (Kan. 1976); Tall Tower v. Procurement Review Panel, 363 S.E.2d 683 (S.C. 1987); State *ex rel.* McLeod v. Edwards, 236 S.E.2d 406 (S.C. 1977).

225. *See, e.g.*, Lockwood v. Jordan, 231 P.2d 428 (Ariz. 1951); State Bd. of Ethics v. Green, 566 So. 2d 623 (La. 1990); Guste v. Legislative Budget Comm., 347 So. 2d 160 (La. 1977); J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n, 336 N.W.2d 679 (Wis. Ct. App. 1983).

226. *See, e.g.*, Book v. State Office Bldg. Comm'n, 149 N.E.2d 273 (Ind. 1958); Alexander v. State, 441 So. 2d 1329 (Miss. 1983); State *ex rel.* Wallace v. Bone, 286 S.E.2d 79 (N.C. 1982).

227. *See, e.g.*, Commonwealth v. Sessoms, 532 A.2d 775, 780 (Pa. 1987) (deriving strong separation of powers principle from vesting of governmental powers in different organs of state government and, specifically, noting "the inclusion of legislators and/or judges on an agency administering the laws is itself likely violative of the separation of powers doctrine"). The opinion in *Sessom* closely followed the formalist analysis of the United States Supreme Court in Bowsher v. Synar, 478 U.S. 714 (1986).

228. *See supra* notes 115-16, 118, and accompanying text.

229. *See supra* notes 121-22 and accompanying text.

sons. Such an analysis is compatible with both the text of most state constitutions and the basic intentions of the architects of the American system of distribution of powers. It seems better able than its more conceptually-based competitors to preserve the dynamic balance between governors and legislatures in light of the great growth in size and power of state-level administrative agencies. And, most importantly, it permits courts to make distinctions between potentially useful and potentially dangerous governmental innovations.

Such an approach would be contrary neither to the ideas of the original founders of the American polity, nor to the plain terms of express state constitutional texts. The framers of the original American constitutions clearly were pragmatists rather than conceptual purists. That fact is shown both by the range of constitutional structures they created and their willingness to change those structures if they did not work, and by their willingness to mix conceptually different types of power if by doing so they could achieve practical benefits, such as the increase in individual security to be derived from the opposition of power against power.[230] Nor would such a pragmatic approach be precluded by the terms of even the most absolute sounding state constitutional provision. While such clauses prohibit mixing of "legislative" and "executive" powers, these terms do not define themselves. As was discussed above, the power to appoint need not be considered an "executive" act.[231] And the influence exercised by legislators personally sitting as members of specialized boards or commissions need not be considered to rise to the level of legislative exercise of executive powers, at least in the absence of an overwhelming or coercive legislative influence on that body.

Nor is a rigid definitional approach to separation of powers questions the only way to avoid the evils against which the doctrine was intended. Other provisions, such as an explicit allocation of the authority to make particular administrative appointments or a carefully articulated incompatibility clause, may well prevent real abuses without the need for analysis under more general allocation of powers principles. Indeed, some sort of pragmatic approach to the distribution of powers may be required to vindicate the framers' desire to maintain a rough balance of influence between governors and legislators. Because much of the work administrators perform has often been considered most nearly analogous to traditional "executive" functions, the traditional solution, on both the federal and the state levels, has been to assign primary responsibility over the

---

230. Various conclusions may perhaps be drawn from the specific ways in which constitutions have changed over time—such as the gradual abandonment of most early constitutional provisions vesting explicit appointive authority in state legislatures. *See* Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 216-18 (1989). However, the overriding fact is that they did change and that early constitution makers were not wedded to any philosophical notion of separation of powers, but rather were willing to mix powers in various ways to achieve pragmatic ends, and to alter the mixture if experience indicated that they should do so. *See generally* THE FEDERALIST NOS. 47 & 48 (James Madison) (Michael L. Chadwick ed., 1987) (respectively surveying less than total separation of powers in state constitutions of revolutionary era, and advocating judicious mixture of powers to impose "checks and balances" upon each branch and thus achieve practical result of limited government).

231. *See supra* notes 136-40 and accompanying text.

administrative machinery to the executive branch and to phrase constitutional questions in terms of whether a particular effort by the legislature to exercise influence or control constitutes an impermissible interference with that primary executive authority. However, total control over administration cannot be assigned to governors or presidents without severely unbalancing the balance of power among the branches which the framers of our constitutions tried so hard to preserve.

Moreover, a fact-based analysis of the *Bennett* type permits the court to make useful distinctions among various specific proposals for conferring administrative duties on legislators or legislative appointees. Some forms of executive-legislative interaction in the administration of the laws clearly are "cooperative" and beneficial in nature. To return to the example that began this discussion, the presence of legislative appointees on the Louisiana Board of Ethics for Elected Officials seems to be more than merely innocuous. Rather, the presence of legislative as well as executive appointees serves both to insure the Board's impartiality and independence, and to strengthen the public's perception of that impartiality and independence—both of which are necessary for the Board to do its job. And, as the court in *Bennett* pointed out, there will be occasions when legislatures will have relevant expertise that might be usefully lent to joint administrative-executive endeavors.[232] This is not to say, however, that all arrangements giving administrative power to legislators or legislative appointees should be found acceptable. On the contrary, giving administrative tasks and duties to legislators or legislative appointees poses significant dangers. There is a quasi-delegation concern—the possibility of maintaining ongoing legislative input into the administration of a statute may reduce the incentive for the legislature to draft statutes carefully, or may encourage them to pass the "hard questions" on to a separate and less publicly accountable "expert" body that the legislature can both control and, if expedient, disclaim.[233] Alternatively, to the extent that individual legislators take it upon themselves to direct some portion of the day-to-day affairs of administrative bodies, some decrease in efficiency and accountability may well occur.[234] Such a combination of roles could result in the small-scale "tyranny" of effectively unfettered discretion on the part of the agency at issue.[235] In a few cases, such efforts to impose legislative control on the administrative process may even be so far reaching as to truly threaten the

---

232. State *ex rel.* Schneider v. Bennett, 547 P.2d 786, 792-93 (Kan. 1976).

233. *See* quote cited *supra* note 95.

234. The potential problems seem evident. Any requirement that an agency seek approval of its actions from multiple masters will potentially slow its activities and, where those masters disagree, require negotiations and compromises that could limit the speed and effectiveness of its work. Moreover, if neither of the politically accountable branches holds ultimate authority over such an administrative organ, each can blame the other for any shortcomings in the administration of the laws. And where each branch accuses the other of interference, the possibility that the electorate can effectively assert its ultimate authority becomes even more remote.

235. If the same persons exercise effective control of both the drafting and the application of rules, there can be little effective opposition to arbitrary use of those powers. Rules can be broadly drafted in the assurance that they will only be used against those whom the drafter wishes them used against, and will not readily be changed even if misused.

independence and initiative of the governor, and thus the system of checks and balances that the framers of all American constitutions clearly envisioned.[236] Finally, and though less obvious probably most important, many such attempts to assert legislative influence over the administrative process represent an increase in effective power not for the legislature as a whole, but for individual legislators—those who win posts on administrative bodies and, especially, those in the legislative leadership who have the power to appoint outsiders or colleagues to those committees. Such an increase in effective power over state-wide issues in the hands of a few individuals, each of whom is accountable to the electorate of only a small portion of the state, raises obvious problems of lack of electoral accountability.[237]

In any event, it is only by explicitly weighing each effort by the legislature to place administrative powers in the hands of its members or appointees against this range of concerns, that these issues may be directly addressed. Some form of *Bennett*-type analysis holds out at least the hope that the court will be able to distinguish between the useful and the pathological. The process of judging is not certain and it may therefore be appropriate for courts to err on the side of caution, perhaps by placing the burden of persuasion on the party seeking to justify a departure from strict conceptual distinctions among the different magistracies. But however done, a pragmatic, fact-based approach cannot help but be better at distinguishing legitimate from illegitimate innovations than any purely definitional or conceptual analysis would be.

Finally, it appears from this brief analysis of cases that the work of formulating a pragmatic, state-based approach to these issues is far from accomplished. The various factors articulated by the courts—the "control" test of the Louisiana court in *Green*, the four-factor test employed by the Kansas courts in the *Bennett/Parcell* line of cases, or the fact-based attempt by the Kentucky court to distinguish between "cooperation" and "usurpation"—are all useful building blocks for analysis. However, more thought must be given to the task of refining the factors that should go into such an analysis, demonstrating how those factors can be convincingly derived from the underlying purposes of the separation and checks and balances principle (both the purposes as they appeared to the founders and as they appear to us), and creating a structure for applying these factors that is reasonably predictable in its outcomes.

---

236. This may well have been the case in Legislative Research Comm'n v. Brown, 664 S.W.2d 907 (Ky. 1984). The powers that the legislative Commission purported to arrogate to itself in that case were truly sweeping—including not only the power to make appointments to many administrative agencies, but also the power to confirm executive appointments, to review and suspend administrative regulations, and to control applications for federal "Block Grant" funds, among others. Together, these may well have limited the powers of the Governor to the point where she might cease to play an effective role as a counterweight to the legislature.

237. Periods during which powerful Congressional leaders exercised disproportionate influence over the federal government have not been happy ones. *See, e.g.*, WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (World Publishing Co. 1965) (1885) (describing and critiquing power of "Speaker Cannon").