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# ARTICLES

## FRICITION BY DESIGN: THE NECESSARY CONTEST OF STATE JUDICIAL POWER AND LEGISLATIVE POLICYMAKING

*Michael L. Buenger* \*

### I. INTRODUCTION

The political and policy influence of America's courts and judges is unparalleled; no judiciary in the world wields greater influence in the governing of a nation and the fashioning of its policies. Alexis de Tocqueville's oft-quoted observation of American public policy development is equally true today: "Scarcely any political question arises in the United States which is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings."<sup>1</sup> Much of our civic lexicon, ideas of fairness, beliefs in balancing individual rights

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1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 357 (Francis Bowen ed., Henry Reeve trans., Sever & Francis 1862) (1835). de Tocqueville noted,

Whenever a law which the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate, but it gives rise to immense political influence. . . . The political power which the Americans have intrusted to their courts of justice is therefore immense.

*Id.* at 127–28.

and communal protections, public policies, even our private relationships, are framed by our understanding of and reliance upon the role that the judiciary plays in governing America.<sup>2</sup> Given its all encompassing personality, the exercise of judicial power has constantly been a source of controversy, never more so than at the present.

This article begins with a basic premise: all courts in America make policy in the context of administering justice.<sup>3</sup> Courts declare rights and responsibilities and nullify the actions of governments given explicit or implied constitutional limitations on power. To argue that courts should not be involved in policy debates and their outcomes, or that they can only do so with the express imprimatur of the legislature, is to ignore political reality and more than 230 years of American judicial history. America's courts and judges have never played the role of mere umpires in the game of public policy. While they clearly call the balls and strikes, America's judges have also been key players, sometimes hitting home runs,<sup>4</sup> sometimes striking out,<sup>5</sup> and sometimes catching the foul balls of others.<sup>6</sup>

Much has been written on this subject, particularly regarding the policy role of federal courts. By comparison, relatively little has been written examining the role that state courts play in the policy arena. One could write an extensive article simply compar-

2. To argue that the judiciary only recently entered the realm of policymaking miscasts 200 years of history and displays a fundamental misunderstanding of the unique role of American courts. As Donald L. Horowitz observed,

The difference in the scope of judicial power in England and the United States should not be exaggerated. It is primarily a difference of emphasis. There have been periods . . . of great passivity in America. But still the difference remains. What it has meant, in the main, is that American courts have been more open to new challenges, more willing to take on new tasks. This has encouraged others to push problems their way—so much so that no courts anywhere have greater responsibility for making public policy than the courts of the United States.

DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 3 (1977).

3. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 465 (1991) ("Governor Ashcroft relies on the plain language of the statute: It exempts persons appointed 'at the policymaking level.' The Governor argues that state judges, in fashioning and applying the common law, *make policy*." (emphasis added)).

4. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

5. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 454 (1856), *superseded by amendment*, U.S. CONST. amend. XIV, § 1.

6. See *United States v. Nixon*, 418 U.S. 683, 686–87 (1974), *superseded by statute*, FED. R. EVID. 104(a), Pub. L. No. 93-595, 88 Stat. 1930, *as recognized in* *Bourjaily v. United States*, 483 U.S. 171, 177–79 (1987).

ing and contrasting the different policy functions of federal and state courts. That is beyond the scope of this article, although some limited comparisons are necessary for context. Rather, this article focuses more narrowly on the state courts by examining three areas: (1) the early historical development of the judiciary's chief policymaking power, judicial review, and its role in the state court context;<sup>7</sup> (2) issues of the constitutional and institutional independence of state courts; and (3) various features in state constitutions that vest state courts, directly and indirectly, with significant and explicit powers of review over the actions of state governments. Legislative deference in the state court context may mean something entirely different than it does in the federal context. By comparing the context and history of state judicial power, the various judicial structures found in states, and the explicit constitutional limitations placed on the power of state governments (and particularly state legislatures), one can conclude that not all courts are created equal, and that in America not all systems of checks and balances are precisely the same.

## II. STATE COURTS: THE STARTING POINT OF THE AMERICAN JUDICIAL MODEL

### A. *The Evolution of American Judicial Power*

Claims that courts have exceeded their role as interpreters of law and arbiters of disputes and have gravitated into the realm of policymaking outside the democratic process are characterized today by catch phrases such as “legislating from the bench,” or “judicial supremacy.”<sup>8</sup> Notwithstanding such rhetorical character-

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7. The concept of judicial review, usually attributed to Chief Justice John Marshall, did not begin with *Marbury v. Madison*. See 5 U.S. (1 Cranch) 137, 180 (1803). Rather, *Marbury* was a national articulation of a concept fairly well-settled in several colonies and states before the adoption of the Federal Constitution. See David R. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of Marbury v. Madison*, 57 ALA. L. REV. 1041, 1043 (2006).

8. See, e.g., Jane Lampman, *Bringing the Case Against Judges*, THE CHRISTIAN SCI. MONITOR (Boston, Mass.), Apr. 13, 2005, at 15; *Romney, Bush Contend Some Judges Go Too Far*, THE BOSTON GLOBE, Oct. 20, 2004, at B6; Lisa Porteus, *'Activist Judges' Under Siege*, FOXNEWS.COM, May 23, 2005, <http://www.foxnews.com/story/0,2933,157313,00.html>; Newt Gingrich, Remarks at the Georgetown Univ. Law Center & Am. Law Inst., Panel on “Fair and Independent Courts: A Conference on the State of the Judiciary” 13–15 (Sept. 28, 2006) (transcript available at <http://www.law.georgetown.edu/news/documents/CoJ092806-panel3.pdf>) [hereinafter Gingrich Transcript]. In 2006, Former House Speaker Newt Gingrich argued that “Supreme Court decisions that are ‘so clearly at variance with

izations, the fact is that unlike courts in much of Europe or elsewhere, the American judiciary has always played a central role in shaping much of the nation's public policy, frequently to the dismay of others.<sup>9</sup> Thomas Jefferson challenged the policy role John Marshall claimed for the federal judiciary.<sup>10</sup> Andrew Jackson defied judicial authority.<sup>11</sup> Abraham Lincoln expressed grave

the national will' should be overridden by the other branches of government." *Gingrich Urges Overriding Supreme Court*, BOSTON.COM, Sept. 29, 2006, [http://www.boston.com/news/nation/washington/articles/2006/09/29/gingrich\\_urges\\_overriding\\_supreme\\_court/](http://www.boston.com/news/nation/washington/articles/2006/09/29/gingrich_urges_overriding_supreme_court/).

"What I reject out of hand is the idea that by five to four judges can rewrite the Constitution, but it takes two-thirds of the House, two-thirds of the Senate and three-fourths of the states to equal five judges." Gingrich Transcript, at 15.

9. See DE TOCQUEVILLE, *supra* note 1, at 123–24. A stranger to the American judicial system

hears the authority of a judge invoked in the political occurrences of every day, and he naturally concludes that, in the United States, the judges are important political functionaries: nevertheless, when he examines the nature of the tribunals, they offer at the first glance nothing which is contrary to the usual habits and privileges of those bodies; and the magistrates seem to him to interfere in public affairs only by chance, but by a chance which recurs every day.

*Id.*

10. See Letter from Thomas Jefferson to W.H. Torrance (June 11, 1815), [http://memory.loc.gov/ammem/collections/jefferson\\_papers/index.html](http://memory.loc.gov/ammem/collections/jefferson_papers/index.html) (search "letter to W.H. Torrance"; then follow "Thomas Jefferson to W.H. Torrance, June 11, 1815" hyperlink; then follow "transcription" hyperlink) ("Certainly there is not a word in the constitution which has given that power to them more than to the executive or legislative branches. Questions of property, of character and of crime being ascribed to the judges, through a definite course of legal proceeding, laws involving such questions belong, of course, to them; and as they decide on them ultimately and without appeal, they of course decide *for themselves*. The constitutional validity of the law or laws again prescribing executive action, and to be administered by that branch ultimately and without appeal, the executive must decide *for themselves* also, whether, under the constitution, they are valid or not. So also as to laws governing the proceedings of the legislature, that body must judge *for itself* the constitutionality of the law, and equally without appeal or control from its co-ordinate branches. And, in general, that branch which is to act ultimately, and without appeal, on any law, is the rightful expositor of the validity of the law, uncontrolled by the opinions of the other co-ordinate authorities."); see also Letter from Thomas Jefferson to Edward Livingston (Mar. 25, 1825), [http://www.memory.loc.gov/ammem/collections/jefferson\\_papers.index.html](http://www.memory.loc.gov/ammem/collections/jefferson_papers.index.html) (search "Edward Livingston, March 25, 1825"; then follow "Thomas Jefferson to Edward Livingston, March 25, 1825" hyperlink).

11. President Jackson wrote:

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this Government. The Congress, the Executive, and the Court, must each for itself be guided by its own opinion of the constitution. Each public officer, who takes an oath to support the constitution, swears, that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress, than the opinion of Congress has over the judges; and, on that

doubts about the federal judiciary's meddling in national policy questions.<sup>12</sup> Franklin Roosevelt attempted to restructure the Supreme Court when it interfered with his economic policies.<sup>13</sup> And today, the role of the judiciary is a central consideration in policy debates and political campaigns at both the state and national level.<sup>14</sup> Yet the fundamental role of the American judiciary has remained largely intact for over 230 years. Courts exercise no greater idiosyncratic policy function today than they have throughout the history of the nation.<sup>15</sup> What has changed is the

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point, the President is independent of both. The authority of the Supreme Court must not, therefore be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

President Andrew Jackson, Bank Veto, in MESSAGES OF GEN. ANDREW JACKSON 147, 156 (Otis Broaders & Co. 1837).

12. In his first inaugural address, President Lincoln observed:

At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers . . . practically resigned their government into the hands of that eminent tribunal.

Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), available at [http://avalon.law.yale.edu/19th\\_century/lincoln1.asp](http://avalon.law.yale.edu/19th_century/lincoln1.asp).

13. See Franklin D. Roosevelt, Fireside Chat on Reorganization of the Judiciary (Mar. 9, 1937) (transcript available at <http://www.mhrcc.org/fdr/chat9.html>) (proposing to restructure the courts because “[w]hen the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress—and to approve or disapprove the public policy written into these laws”). Franklin Roosevelt’s “court-packing plan” was in part a reaction to the Court’s decisions in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (invalidating certain wage fixing regulations as an invalid exercise of federal power) and *United States v. Butler*, 297 U.S. 1, 74 (1936) (invalidating the Agricultural Adjustment Act). See Robert P. Wasson, Jr., *Resolving Separation of Powers and Federalism Problems Raised by Erie, the Rules of Decision Act, and the Rules Enabling Act: A Proposed Solution*, 32 CAP. U. L. REV. 519, 544–46 (2004).

14. See David G. Savage, *Conservative Courts Likely Bush Legacy*, L.A. TIMES, Jan. 2, 2008, at A11; Terry Ganey, *Blunt Judges the Judges*, COLUM. TRIB., Aug. 5, 2007, <http://www.columbiatribune.com/2007/Aug/20070805Feat004.asp>.

15. See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978); *United States v. Nixon*, 418 U.S. 683 (1974), *superseded by statute*, FED. R. EVID. 104(a), Pub. L. No. 93-595, 88 Stat. 1930, *as recognized in* *Bourjaily v. United States*, 483 U.S. 171, 177–79 (1987); *Roe v. Wade*, 410 U.S. 113 (1973), *overruled in part by* *Gonzales v. Carhart*, 550 U.S. 124 (2007), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Korematsu v. United States*, 323 U.S. 214 (1944), *superseded by statute*, Pub. L. No. 100-383, 102 Stat. 903, *as recognized in* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213–15 & n.\* (1995); *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347

complexity, political context, number, and, perhaps, the polarizing nature of the policy issues presented to the courts.<sup>16</sup> People desire finality and predictability in their legal affairs, and the American judicial process is designed to achieve these goals above all else.

At the state level, the injection of the judiciary into policy questions is spurring renewed conflicts with the political branches of government and bolstering charges of judicial overreaching.<sup>17</sup> These emerging conflicts vary from state to state, pitting those who believe policymaking falls exclusively within the realm of democratic processes, that is, the legislature, against those who see the judiciary's role more robustly, as embracing not only dispute resolution and interpretation, but also fashioning remedies that can have broad public policy implications.<sup>18</sup> Given differing constitutional structures, many state courts are confronting not only substantive policy questions but also the very democratic process by which such policy is created. More than one state constitution is explicitly designed to place brakes on the legislative policymaking process given the vast nature of state police powers.<sup>19</sup> The current rancorous debate over the role of the judiciary seldom acknowledges these different constitutional schemes and controls that state courts are required to administer. Clearly, not all criticism of state appellate judges is misplaced, but neither is it accurate to portray all courts and judges as diving into the policy arena with unrestrained gusto and without constitutional foundation. The unfortunate reality is that state legislators too often duck the hard political, social, and cultural issues of the day, leaving the public with few alternatives but to turn to the judicial process.

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U.S. 483 (1954); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), *superseded by amendment*, U.S. CONST. amend. XIV, § 1; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

16. This statement deserves qualifications as, arguably, the *Dred Scott* decision contributed greatly to the Civil War, the great polarizing event in American history. See Benjamin R. Dryden, Comment, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. PA. J. CONST. L. 819, 863 (2008).

17. See, e.g., Gregory J. Sullivan, Editorial, *Injustice of Palimony*, TIMES (Trenton, N.J.), June 26, 2008, at A13; Debra Erdley, *Reform Wary of Pa. Court*, PITTSBURGH TRIB. REV., Feb. 23, 2007, [http://www.pittsburghlive.com/x/pittsburghtrib/search/print\\_494570.html](http://www.pittsburghlive.com/x/pittsburghtrib/search/print_494570.html).

18. See *id.*

19. See, e.g., ALA. CONST. art. IV, § 104; ARIZ. CONST. art. IV, § 19.

The involvement of America's courts in substantive policy matters predates *Marbury v. Madison* and the adoption of the Federal Constitution.<sup>20</sup> American judicial power is a unique amalgamation of powers rooted in the nation's colonial and pre-Federal Constitution past. This power enables courts to declare and enforce rights and responsibilities not only between individual contestants, but also between individuals and their governments.<sup>21</sup> The courts' power relies on four essential elements for its strength: (1) *stare decisis*, which promotes a consistent application of law by requiring courts to decide similar matters similarly; (2) the merging of equity and law into a single remedial structure, which enables courts to fashion remedies and gives judges great discretion in doing so; (3) the common law tradition, the basic tenants of which assume judges will propound law in the framework of litigation independently of the legislature; and (4) separation of powers, which delineates judicial authority from legislative and executive authority.<sup>22</sup>

This fourth element presents a problem in defining the precise contours of the American judiciary's participation in the policy arena. The separation of powers doctrine enshrined in the Federal Constitution and all state constitutions is a far more elastic principle than that found in continental legal systems, where the role of adjudication is historically more aligned to Thomas Jefferson's vision of judges as "mere machine[s]."<sup>23</sup> Separation of pow-

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20. See *supra* note 7.

21. See *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); Alan I. Bigel, *Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 23 (1994).

22. See Thomas Healy, *Stare Decisis As a Constitutional Requirement*, 104 W. VA. L. REV. 43, 91–92 (2002).

23. "Let mercy be the character of the lawgiver, but let the judge be a mere machine." Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), [http://avalon.law.yale.edu/18th\\_century/let9.asp](http://avalon.law.yale.edu/18th_century/let9.asp); see JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (Stanford Univ. Press 2d ed. 1985) (noting that in France, the way to prevent judicial abuses of power "was first to separate the legislative and executive from the judicial power, and then to regulate the judiciary carefully to ensure that it restricted itself to applying the law made by the legislature and did not interfere with public officials performing their administrative functions"); Stanley B. Lubman, *Dispute Resolution in China After Deng Xiaoping: "Mao and Mediation" Revisited*, 11 COLUM. J. ASIAN L. 229, 348 (1997) (noting that the French Revolution established a system that "limited the courts to applying the rules enacted by the legislature; courts were otherwise 'completely forbidden to intrude upon the policy-making function of the legislature'" (citation omitted); Keith Rosenn, *Judicial Review: Old and New*, 81 YALE L.J. 1411, 1414 (1972) ("[C]ivil law countries have adhered to a more rigid doctrine of separation of powers, in which judicial review is re-



ers in the continental legal system is brighter, less ambiguous than in the United States, and gives legislative and executive bodies almost sole responsibility for promulgating and administering public policy.<sup>24</sup>

By contrast, American courts have continuously been far more active and far less deferential to legislative power given the constitutional structure of the government, a cultural aversion to unregulated majoritarian rule, a community expectation that courts will protect the rights of individuals against unlawful intrusions by the government, and a general societal acceptance that in a common-law tradition courts do make law and, therefore, by extension, public policy.<sup>25</sup> This design of judicial power is reflected in many present state constitutions that impose significant procedural and substantive limitations on the legislative process while giving equally significant powers to the courts to curb hyper-democratic rule at the expense of individual liberty, minority rights, public transparency, and constitutional principles.<sup>26</sup> In short, a state legislature's broad policymaking powers may be significantly constrained by constitutional restrictions expressly designed to limit those powers. The ability to overturn legislative policy decisions in light of these restrictions, even decisions enjoying wide popular support, is the most distinguishing characteristic of American courts and pits the democratically oriented legislative process against the less democratic judicial process.<sup>27</sup> But what is the source of this unique understanding of judicial power?

The exact origin of the American judiciary's chief policy power, judicial review, is not entirely clear. Its origins appear to rest in

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garded as a political function for which the ordinary courts are unsuited.”)

24. See Lubman, *supra* note 23, at 348.

25. For a discussion comparing the role of civil and common law judiciaries, see MERRYMAN, *supra* note 23. Merryman notes that, unlike judges in continental Europe, judges in the United States and England were a progressive force, frequently siding with individuals against abusive government power. *Id.* at 16. “The fear of judicial lawmaking and of judicial interference in administration did not exist. On the contrary, the power of the judges to shape the development of the common law was a familiar and welcome institution.” *Id.*

26. See, e.g., ALA. CONST. art. IV, § 104 (imposing substantive restrictions on the legislature); ARIZ. CONST. art. IV, § 19 (imposing restrictions on the legislature); KY. CONST. §§ 54–56 (imposing restrictions on the legislature).

27. It is wrong to assert that the American judicial process is anti-democratic, particularly at the state level. While juries play an intimate role in the judicial process, judicial elections all ensure a high degree of democratic participation in the selection of those who administer the judicial process.

the traditional role of common law judges,<sup>28</sup> emerging Enlightenment ideas concerning government and limits on government power, and frustrations with the arbitrariness of British rule in the colonies, particularly, though not solely, in regard to the administration of justice.<sup>29</sup> The English Act of Settlement (the "Act") also played a key role in evolving notions of judicial power in the colonies for two seemingly opposing reasons. First, the Act gave judges in England the guarantee of tenure of office during good behavior and the security of their salaries.<sup>30</sup> In so doing, the Act promoted independent judges, that is, judges who could decide cases with reduced fear of political intimidation from the Crown and Parliament.<sup>31</sup> Second, the Act did not apply to colonial judges.<sup>32</sup> As Blackstone noted, provincial constitutions "depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions."<sup>33</sup> The exercise of government power in the colonies was determined by their provincial, proprietary, or charter status.<sup>34</sup> Colonial judges, therefore, enjoyed their tenure largely through the arbitrary pleasure of colonial authorities or the Crown.<sup>35</sup> Judges were thus subject to the very legislative and executive intimidations that the Act sought to curb in England.<sup>36</sup> The failure

28. According to Sir William Blackstone, judges were "the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land;" judges had an obligation to declare "not that such a sentence was *bad law*, but that it was *not law*." WILLIAM BLACKSTONE, 1 COMMENTARIES 69–70 (Garland Publ'g 1978) (1783) (emphasis added).

29. See Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1062 (2007).

30. An Act for the Further Limitation of the Crown and Better Securing the Rights and Liberties of the Subject, 1700 & 1701, 7 Will. 3, c.2, § 3 (Eng.). The Act of Settlement mandated that "Judges Commissions be made *Quam diu se bene Gesserint* and their Salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawfull [sic] to remove them." *Id.*; see Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1297, 1300 (1995).

31. See Rakove, *supra* note 29, at 1063.

32. See Hoffman, *supra* note 30, at 1300.

33. BLACKSTONE, *supra* note 28, at 109.

34. See *id.*

35. See Hoffman, *supra* note 30, at 1300.

36. England viewed the legal status of the colonies differently; they were dependent independents whose purpose was primarily to serve economic needs. As Blackstone noted, the American colonies were in the form of plantations:

And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions. They are subject however to the control of the parliament; though (like Ireland, Man, and the rest) not bound by any acts of par-

of England to extend the protections of the Act to colonial judges was one of the chief complaints articulated in the Declaration of Independence.<sup>37</sup>

This failure did not, however, prevent colonial judges from testing the boundaries of judicial power. In one early case, *William Cosby v. Van Dam*, the colony of New York's Chief Justice Lewis Morris attacked an attempt by a newly arrived governor to alter court jurisdiction with the goal of securing additional personal compensation under arcane colonial rules.<sup>38</sup> Morris declared the governor's act to be unlawful, holding in part:

"I take it, the giving of a new Jurisdiction in Equity by Letters Patent to an old Court, that never had such Jurisdiction before, or Erecting a new court of Equity by Letters Patent or Ordinance of the Governour and Council, without Assent of the Legislature, are equally unlawful, and not a sufficient Warrant to justify this Court to proceed in a Court of Equity. And therefore by the Grace of God, I, as Chief Justice of this Province, shall not pay any Obedience to them in that Point."<sup>39</sup>

Unfortunately for Morris, because the Act did not extend to colonial judges, he was dismissed.<sup>40</sup> This was but one example of

liament, unless particularly named . . . . The form of government in most of them is borrowed from that of England. They have a governor named by the king, (or in some proprietary colonies by the proprietor) who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king in council here in England. Their general assemblies which are their house of commons, together with their council of state being their upper house, with the concurrence of the king or his representative the governor, make laws suited to their own emergencies. But it is particularly declared by statute 7 & 8 W. III. c. 22. that all laws, bye-laws, usages, and customs, which shall be in practice in any of the plantations, repugnant to any law, made or to be made in this kingdom relative to the said plantations shall be utterly void and of none effect.

BLACKSTONE, *supra* note 28, at 108–09.

37. See THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776). Critical provisions in the Act of Settlement found their way into initial state constitutions. See, e.g., MD. CONST. OF 1776 art. XXX (1867).

38. See Paul Finkelman, *The Zenger Case: Prototype of a Political Trial*, in AMERICAN POLITICAL TRIALS 21, 24–25 (Michael R. Belknap ed., Greenwood Press 1981).

39. R. Carter Pittman, *Judicial Supremacy in America: Its Colonial and Constitutional History*, 16 GA. BAR J. 148, 154 (1953). When Governor Cosby demanded that Morris justify his opinion, Morris did him one better and had Zenger publish it, resulting in a criminal libel charge against Zenger. *Id.* at 154, 157. For a history on the Zenger case, see generally *A Brief Narrative of the Case and Tryal of John Peter Zenger, Printer of the New-York Weekly Journal*, N.Y. WKLY J., in The Historical Society of the Courts of the State of New York, [http://www.courts.state.ny.us/history/elecbook/zenger\\_tryal/pg1.htm](http://www.courts.state.ny.us/history/elecbook/zenger_tryal/pg1.htm) (last visited Dec. 11, 2008).

40. See Pittman, *supra* note 39, at 156. Other courts were confronted with arguments

intimidation that would lend credence to broad demands for greater judicial independence in the administration of the law.<sup>41</sup>

Developing a coherent historical understanding of the evolution of American judicial power is complicated by the almost complete absence of early historical records. The development of colonial legal systems is one of the least known aspects of American history because judicial opinions were generally not recorded, and colonial courts were initially indistinguishable from the other branches of government.<sup>42</sup> Notwithstanding their attachment to England, the legal systems in each colony, and by extension, each state, developed largely independently from one another, framed by the significant differences of the people and circumstances under which each colony was founded.<sup>43</sup> Although English common law formed the principal foundation for early state legal systems,<sup>44</sup> the states also developed independent systems of adju-

that the judiciary could declare invalid certain actions of government. *See, e.g.*, Robin v. Hardaway, 2 Va. (33 Gratt.) 109, 114 (Va. 1772). Though the court in *Robin* did not adopt the position, it took note of an argument challenging a 1782 act as void:

Now all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice. . . . And so he concluded the act of 1782 originally void, because contrary to natural right and justice.

*Id.* (citations omitted).

41. *See* The Massachusetts Government Act (May 20, 1774), available at [http://avalon.law.yale.edu/18th\\_century/mass\\_gov\\_act.asp](http://avalon.law.yale.edu/18th_century/mass_gov_act.asp); *see also* The Administration of Justice Act (May 20, 1774), available at [http://avalon.law.yale.edu/18th\\_century/admin\\_of\\_justice\\_act.asp](http://avalon.law.yale.edu/18th_century/admin_of_justice_act.asp). In 1761, the Privy Council issued instructions to colonial governors prohibiting them from approving any legislation that conditioned judicial appointment on anything other than the pleasure of the crown. *See* Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 681 (1980).

42. *See, e.g.*, S.C. CONST. of 1776 art. XVI (1776); Government of New Haven Colony (Nov. 6, 1643), available at [http://avalon.law.yale.edu/17th\\_century/ct02.asp](http://avalon.law.yale.edu/17th_century/ct02.asp).

43. *See generally* JACK P. GREENE, PURSUITS OF HAPPINESS: THE SOCIAL DEVELOPMENT OF EARLY MODERN BRITISH COLONIES AND THE FORMATION OF AMERICAN CULTURE (1988) (discussing the relationship between regionalism and the difference in political culture in the colonies). While the colonies enjoyed some economic and social intercourse, government intercourse was reserved generally to communication through the various colonial structures established by England. *See generally id.* at 7–27 (discussing the two models of English colonization). Each colony was largely distinct in creation, government, and culture. *See generally id.* Virginia was founded by a trading company under royal charter, Massachusetts by religious exiles, Maryland by an Irish Catholic proprietor, Pennsylvania by a religiously tolerant and pacifist Quaker, and New York by Dutch traders. *See* Reuben Gold Thwaites, *The Colonies, in EPOCHS OF AMERICAN HISTORY* 66, 81–82, 124–26, 203–04, 215–16 (Albert Bushnell Hart ed., Longmans, Green, & Co. 1894).

44. One of the first acts of the independent states was the adoption of so-called “recep-

cation—a mixing of common law, pragmatism, religion, and statutes. The evolution of the American judiciary can only be understood in the context of colonial events—the lack of protections offered to judges, the trampling of liberties by legislative and executive bodies, the interference of the crown into the independent administration of justice, the difficulties of administering justice across a diverse and sparsely populated territory, the need for flexibility in merging differing colonial legal systems, and ultimately, the emergence of written constitutions as supreme law and the supreme check on previously unchecked legislative and executive power.<sup>45</sup> The strength and breadth of judicial review was a direct reaction to broad distrust of unregulated majoritarian rule and of the concentration of power in small factions controlling the reins of government through legislative assemblies.<sup>46</sup>

Depending on one's reading of history, the first expressions of judicial review emerged in the state courts of New Jersey, Rhode Island, Virginia, or Maryland.<sup>47</sup> The power to declare legislative acts void was asserted—though not followed—in New Jersey as early as 1779 in *Holmes v. Walton*, a case challenging a conviction by a jury of six, not twelve, as the Constitution of New Jersey required through an extension of English common law.<sup>48</sup> In 1782,

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tion statutes" that gave legal effect to the existing body of English common law as the foundation for state legal systems. See, e.g., DEL. CONST. OF 1776 art. XXV (1792); N.Y. CONST. art. XXXV (1821).

45. To accomplish the ends of Society by being equal to Contingencies infinite, demands the deposit of power great and extensive indeed in the hands of Rulers. So great, as to render abuse probable, unless prevented by the most careful precautions: among which, the freedom [and] frequency of elections, the liberty of the Press, the Trial by Jury, and the Independence of the Judges, seem to be so capital [and] essential; that they ought to be secured by a Bill of Rights to regulate the discretion of Rulers in a legal way, restraining the progress of Ambition [and] Avarice within just bounds.

Letter from Richard Henry Lee to Edmund Pendleton (May 26, 1788), in 2 THE DEBATE ON THE CONSTITUTION 462, 462–63 (Bernard Bailyn ed., Literary Classics of the U.S., Inc. 1993).

46. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1525, 1531–33 (1990). An additional check on legislative power is the executive veto, which allows the executive to prevent the adoption of policy, unless a super majority of the legislature overrides the veto. U.S. CONST. art. I, § 7.

47. See *infra* notes 48–56 and accompanying text.

48. See *United States v. Jepson*, 90 F. Supp. 983, 989–92 (N.J. 1950). There is no known written decision in the *Holmes* case; however, for a history of the case, see *id.* at 987–96. The Supreme Court of New Jersey rejected the argument that the defendant could not be tried by a six person jury and upheld the verdict. See *id.* at 989–90. However, a month later, the New Jersey legislature reversed the decision and reinstated the right to a twelve-person jury. See H. Richmond Fisher, *The Seventh Amendment and the Common Law*, 56 F.R.D. 507, 532 n.88 (1973); see also *Colgrove v. Battin*, 413 U.S. 149, 177–78 n.7

Virginia courts accepted the concept of judicial review somewhat temperately in *Commonwealth v. Caton*.<sup>49</sup> In several cases that followed *Caton*, Virginia courts were less hesitant in striking down legislative acts on constitutional grounds.<sup>50</sup> In 1784, a New York court struck down a legislative enactment, resulting in a demand that the opinion writer be removed from the bench.<sup>51</sup> Judges in Rhode Island faced similar assaults when they attempted to strike down a legislative act; the state legislature demanded that the judges explain their authority for such a decision.<sup>52</sup> The issue of judicial review also arose in other states, with

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(1973) (Marshall, J., dissenting); *State v. Parkhurst*, 9 N.J.L. 427, app. 444 (1827) ("In later days, in the case of *Taylor v. Reading*, a certain act of the legislature, passed March, 1795, upon the petition of the defendants, declaring that in certain cases payments made in continental money should be credited as specie, was by this court held to be an *ex post facto* law, and as such unconstitutional, and in that case inoperative.").

49. See 8 Va. (4 Call.) 5, 17–18 (1782). The court noted:

But how far this court, in whom the judiciary powers may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the plain terms of that constitution, is indeed a deep, important, and I will add, a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas. I am happy in being of opinion there is no occasion to consider it upon this occasion; and still more happy in the hope that the wisdom and prudence of the legislature will prevent the disagreeable necessity of ever deciding it, by suggesting the propriety of making the principles of the constitution the great rule to direct the spirit of their laws.

*Id.*; see also *id.* at 20 ("Chancellor Blair and the rest of the judges, were of opinion, that the court had power to declare any resolution or act of the legislature, or of either branch of it, to be unconstitutional and void; and, that the resolution of the house of delegates, in this case, was inoperative, as the senate had not concurred in it.").

50. See *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 31 n.\* (1792) ("To wait for the legislature to decide whether the act be unconstitutional, which would be contrary to that article in the Constitution, which declares that 'the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.'—Since to decide whether the plaintiff or the defendant under the existing laws have a right, is a judicial act, and to decide whether the act be a void law as to a right vested or in litigation, is in fact to decide which of the parties have the right.") (quoting VA. CONST. OF 1776, § 16); *Cases of the Judges of the Court of Appeals*, 8 Va. (4 Call.) 135, 141–47 (1788); cf. *Turpin v. Lockett*, 10 Va. (6 Call.) 113, 153 (1804) (holding that an act of assembly directing overseers of the poor to sell a glebe was valid).

51. See 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 133–37 (1971).

52. Kaufman, *supra* note 41, at 685. The matter involved the case of *Trevitt v. Weedon*, an unreported case from 1786 that concerned an action brought against a butcher who refused to accept paper currency for payment of a debt. See *id.* To enforce the acceptance of its paper currency, Rhode Island empowered the judiciary to act summarily against any person refusing payment. *Id.* When the case came to trial, the defendant argued that the act was unconstitutional for violating his right to a jury trial. *Id.* Although the court dismissed the action for want of jurisdiction, a majority of its members were of the opinion that the act was unconstitutional. *Id.* This sparked a firestorm in the legisla-

some state courts declaring legislative acts unconstitutional,<sup>53</sup> and other state courts upholding such acts.<sup>54</sup> Although the early history is not precisely clear, what is indisputable is that judicial review of legislative acts emerged in state courts well before its articulation in *Marbury*<sup>55</sup> and eventually formed a core principle

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ture. See *id.* James Madison noted the Rhode Island situation in arguing for an independent federal judiciary: “[I]n Rhode Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature who would be willing instruments of the wicked [and] arbitrary plans of their masters.” *Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 28 (Max Farrand ed., Yale Univ. Press 1966) (1911)). Political intrusions into state judicial departments did not end with *Trevitt*. Jeffersonian Republicans sought to remove Pennsylvania’s Chief Judge Alexander Addison, and later sought to impeach the three “federalist” judges on the state’s supreme court. For a general discussion on the Addison matter and other attempts at removing judges, see JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 193–95 (2002).

53. See, e.g., *Bayard v. Singleton*, 1 N.C. (1 Mart.) 5, 7 (1787) (“But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.”); *Merrill v. Sherburne*, 1 N.H. 199, 217 (1818) (holding that the legislature may not vacate a judgment and grant a new trial, for to do so is unconstitutional); *Emerick v. Harris*, 1 Binn. 416, 424 (Pa. 1808) (“On the first question argued in this case, I have no doubt whatever, that this court is vested with the legitimate power of deciding on the constitutionality of an act of the legislature. The judicial authority of this state comprehends the exercise of this right as well on principle as precedent.”); *Turpin v. Lockett*, 10 Va. (6 Call.) 113, 150 (1804) (“Consequently, unless that act be contrary to the constitution of this commonwealth, these newly incorporated bodies are likewise dissolved.”).

54. See, e.g., *Symsbury Case*, 1 Kirby 444, 447 (Conn. 1785) (holding that the proprietors of Symsbury could not have their grant taken from them, or curtailed, even by the general assembly); *State v. Phillips*, 2 Del. Cas. 200, 202 (1803) (“The Court or jury have nothing to do with the question whether the law is impolitic or not. We are sworn and bound to obey the laws.”); *Anonymous*, 2 N.C. 28, 29, 39-40 (1794) (finding constitutional an act allowing the attorney general to obtain judgments against receivers of public money on motion and stating that the knowledge of the receivers that they possessed a deficiency was constitutional); *Perkins v. Scott*, 57 N.H. 55, 55 (1876) (stating that an act of the legislature providing for sending cases to auditors is not unconstitutional); *Respublica v. Duet*, 2 Yeates 493, 501 (Pa. 1799) (“As to the constitutionality of these laws, a breach of the constitution by the legislature, and the clashing of the law with the constitution, must be evident indeed, before we should think ourselves at liberty to declare a law void and a nullity on that account, yet if a violation of the constitution should in any case be made by an act of the legislature, and that violation should unequivocally appear to us, we should think it our duty not to shrink from the task of saying such law is void. We however see no such violation in the present case, and therefore give judgment for the commonwealth.”); *Ham v. McClaws*, 1 S.C.L. (1 Bay) 93, 98 (1789) (concluding the forfeiture of slaves under the 1788 act prohibiting the importation of slaves by land or water before January 1, 1793 was not within the intention of the legislature under the peculiar circumstances of the case, as such construction would be against common right and reason).

55. See *Bracken v. Visitors of William & Mary Coll.*, 7 Va. (3 Call.) 573, 585, 589

of American government.<sup>56</sup> The desire to prevent the concentration and abuse of power by government officials cannot be underestimated as a quintessential element in the evolution of judicial review.

### B. *Today's Unacknowledged Role of State Judicial Power*

Americans' collective understanding of judicial power is tilted toward the role federal courts play in governing the nation. As Justice Jackson once observed, "We are not final because we are infallible, but we are infallible only because we are final."<sup>57</sup> Having the final say on matters of great national importance draws great attention. To the public, and quite a few public officials, the terms "judge," "court," or "judiciary" have singular meanings that fail to consider the true nature of the American judiciary.<sup>58</sup> Many people see courts and judges as essentially possessing the same powers.

This tendency to view the American judiciary almost exclusively through the lens of federal courts—particularly within academic circles—is regrettable for three reasons. First, it diminishes the vastly important role that early state courts played in creating

(1790) ("This act, then, if the Visitors in 1779, being subversive of the charter, is a nullity; and, of course, cannot deprive the plaintiff of his rights under the charter [of William and Mary College]. . . . The act of 1779, therefore, being void, nothing exists to deprive Mr. Bracken of his salary or his office."). *Marbury* was not the first expression of judicial review even in the federal courts. See *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 309, 28 F. Cas. 1012, 1016 (C.C.D. Pa. 1795) (No. 16,857) (opining that a legislative act repugnant to a constitutional principle must be rejected and that it is the duty of a court to adhere to the Constitution and to declare such acts null and void, as "[t]he Constitution is the basis of legislative authority . . . and is a rule and commission by which both Legislators and Judges are to proceed"); *Minge v. Gilmour*, 17 F. Cas. 440, 444 (C.C.D. N.C. 1798) (No. 9631) ("If an act be unconstitutional, it is void. If it be constitutional, it is valid."). Arguably, the first assertion of judicial review by the Supreme Court occurred in *Hylton v. United States*. See 3 U.S. (3 Dall.) 171, 175 (1796) (declaring the federal carriage tax constitutional).

56. See, e.g., *Patrick Henry Elaborates His Main Objections, and James Madison Responds*, in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 45, at 684–85 ("They [the state courts] had fortitude to declare that they were the Judiciary and would oppose unconstitutional acts. Are you sure that your Federal Judiciary will act thus? Is that Judiciary so well constructed and so independent of the other branches, as our State Judiciary?").

57. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

58. See, e.g., *Rep. Ed Emery Attacks Judicial Activism*, JOPLIN INDEP., (Joplin, Mo.) Apr. 2, 2004, [http://www.joplinindependent.com/display\\_article.php/e-emery1080930635](http://www.joplinindependent.com/display_article.php/e-emery1080930635) (reporting that a state representative filed a bill calling for impeachment of a federal judge).



the basic framework for American judicial power. The framers of the Federal Constitution drew heavily from their state experiences in structuring the national government—not the other way around, as some may assert.<sup>59</sup> The basic structure of the federal judiciary was not revolutionary but evolutionary, a continuing expression of thinking already alive in the states. Those who argue that courts have entered a new and insidious era of judicial “legislating” ignore the early historical development of America’s state courts.<sup>60</sup>

Second, this myopic perspective on judicial power ignores the central role state courts play in handling the overwhelming majority of the nation’s litigation and the myriad policy issues that arise in that litigation, as well as the role state courts play in exercising the vast majority of the nation’s general domestic judicial power.<sup>61</sup> As evidenced by recent cases, state courts are on the vanguard of some of the nation’s most contentious legal and policy questions in areas such as crime and punishment,<sup>62</sup> gay mar-

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59. See, e.g., *The Aspen Ideas Festival*, THE ATLANTIC ONLINE (Oct. 2006), available at [www.theatlantic.com/doc/print/200610/aspen](http://www.theatlantic.com/doc/print/200610/aspen). Justice Sandra Day O’Connor observed, “But my concern is that the Framers of our Constitution thought it was of critical, critical importance, in establishing three branches of government, that we have an independent judiciary, at least at the federal level; and all the states copied that model.” *Id.* The more accurate characterization is that the federal government, including the judiciary, was modeled after principles existing or emerging in the states.

60. Professor Paulsen argues that:

[C]ontrary to the mythology that has come to surround *Marbury*, the power of judicial review was never understood by proponents and defenders of the Constitution as a power of judicial *supremacy* over the other branches, much less one of judicial exclusivity in constitutional interpretation. *Nothing* in the text of the Constitution supports a claim of judicial supremacy.

Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2707–08 (2003). See generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (discussing the arguments against judicial review).

61. State courts handle the bulk of the nation’s litigation—almost 100 million cases were filed in 2004. R. SCHAUFFLER ET AL., NAT’L CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2005: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 14 (2006).

62. See, e.g., *Clark v. Arizona*, 548 U.S. 735, 742 (2006) (finding an Arizona insanity test predicated solely on the defendant’s ability to determine whether a criminal act was right or wrong did not violate due process standards); *Davis v. Washington*, 547 U.S. 813, 822 (2006) (finding that statements are non-testimonial for purposes of the Confrontation Clause when they are elicited in the course of a police interrogation whose primary purpose is to enable police to respond to an ongoing emergency); *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (concluding the exclusionary rule was not the appropriate remedy when police failed to knock and announce before executing a search warrant); *Kansas v. Marsh*, 548 U.S. 163, 165–66 (2006) (holding the Kansas death penalty law constitutional because the state’s weighing equation merely channeled the jury’s discretion in deciding whether to impose life or death); *Roper v. Simmons*, 543 U.S. 551, 559–60 (2005) (holding the ex-

riage<sup>63</sup> and gay rights,<sup>64</sup> abortion,<sup>65</sup> property rights,<sup>66</sup> religion and public life,<sup>67</sup> the rights of incapacitated persons,<sup>68</sup> and elections.<sup>69</sup> While federal courts may enjoy grander stature, the overwhelming intercourse between Americans and the judiciary occurs before state judges.<sup>70</sup> Relying on the federal courts to understand judicial power diminishes the significant role state courts play within their sphere of influence and the different contexts in which state judicial power is exercised.

Third, and most importantly, using the federal courts as the focal point for understanding judicial power presumes that there is only one judicial system in the United States, with merely a se-

ecution of underage offender unconstitutional).

63. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 399-400 (Cal. 2008) (interpreting the California Constitution to guarantee the right to form a family, whether heterosexual or homosexual), *superseded by constitutional amendment*, California Marriage Protection Act, CAL. CONST. art. I, § 7.5; *Perdue v. O'Kelley*, 632 S.E.2d 110, 113 (Ga. 2006) (holding an amendment barring same sex marriage constitutional); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (concluding a ban on same-sex marriage was not rationally related to legitimate state interests); *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006) (finding same-sex marriage was not guaranteed under the New York state constitution); *Andersen v. King County*, 138 P.3d 963, 968 (Wash. 2006) (concluding the legislature has the power to limit marriage to a man and a woman).

64. See, e.g., *Dep't of Human Servs. & Child Welfare Agency Review Bd. v. Howard*, 238 S.W.3d 1, 3, 8-9 (Ark. 2006) (holding that a regulation banning homosexual individuals from being foster parents did not promote the health, safety, and welfare of children and is unconstitutional on the basis of separation of powers), *superseded by Proposed Initiative Act No. 1 of Nov. 4, 2008* (providing that an individual cohabitating outside of a valid marriage may not adopt or be a foster parent of a child younger than eighteen).

65. See, e.g., *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 965 (Alaska 1997) (holding the policy of a quasi-public hospital banning elective abortions unconstitutional).

66. See, e.g., *Jones v. Flowers*, 547 U.S. 220, 225 (2006) (holding that when notice of a tax sale is returned as unclaimed, the state must take additional steps to provide notice before executing a sale of property); *Kelo v. City of New London*, 545 U.S. 469, 483-84 (2005) (finding a taking of private property through eminent domain for economic development is a public purpose under the Takings Clause of the Fifth Amendment).

67. See, e.g., *Moore v. Judicial Inquiry Comm'n*, 891 So. 2d 848, 851-52, 854 (Ala. 2004) (finding a judge who defied a federal injunction to remove a display of the Ten Commandments from the Alabama Supreme Court building was properly removed from office).

68. See, e.g., *In re Schiavo*, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001) (holding a patient's statements to friends and family and other evidence gave the trial court sufficient basis for its decision to order removal of a feeding tube); see also *Bush v. Schiavo*, 885 So. 2d 321, 324, 329 (Fla. 2004) (holding that a law permitting the governor to issue a stay to prevent the withdrawal of an incapacitated person's feeding tube was unconstitutional).

69. See, e.g., *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000), *rev'd*, *Bush v. Gore*, 531 U.S. 98, 111 (2000).

70. Justice Stephen Breyer noted that, "The reputation of the American judiciary is in the hands of the state courts." Robert Barnes, *Judicial Races Now Rife with Politics*, WASH. POST, Oct. 28, 2007, at A01.

ries of subcomponents largely indistinguishable from one another.<sup>71</sup> However, multiple regimes define American judicial power, and each regime has its own principles and dynamics defined explicitly or implicitly by different constitutional considerations that influence its practical exercise.<sup>72</sup> There is no universal constitutional construct that defines the structure and power of state courts, and therefore, variances among them are linked only by broad concepts that weave their way through all state constitutions as basic paradigms of American government.<sup>73</sup> It is, therefore, too simplistic to assume there is but one model for the exercise of judicial power in the United States, or that the power of courts is the same from state to state, or between the federal and state courts. To do so conflates the American judiciary into a unitary structure that simply does not exist.

Nevertheless, Americans often think of courts in a unitary sense—that all courts essentially share the same attributes and administer the law in a similar fashion. Such a simplistic understanding of judicial power is evidenced by how little Americans actually pay attention to the diversity of their governmental institutions, including their courts. For example, federal courts are not courts of general judicial authority in the same sense that state courts are courts of general judicial authority. “It is a fundamental precept that federal courts are courts of limited jurisdiction,” constrained to exercise only the authority conferred by Article III of the Constitution and affirmatively granted by federal statute.<sup>74</sup> Every exercise of federal judicial authority must, like

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71. *But see* *Alden v. Maine*, 527 U.S. 706, 714–15 (1999). (“[T]he constitutional design secures the founding generation’s rejection of ‘the concept of a central government that would act upon and through the States’ in favor of ‘a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton’s words, ‘the only proper objects of government.’ . . . [The states] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.”) (citation omitted).

72. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (stating the Supreme Court will not review a state court decision that indicates clearly and expressly that it is based on separate, adequate, and independent state grounds).

73. The volume of a state’s constitution can impact the power and authority of state courts, giving some state judiciaries greater powers, and others, more limited powers. Even the processes used to select judges—from life-time appointment, to virtual life-time appointment, to appointment and retention, to direct election (partisan and nonpartisan)—reflects the remarkable diversity of state judiciaries. *See* discussion *infra* notes 109–20 and accompanying text.

74. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978); *see also* *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32–33 (1812) (noting that federal courts derive their powers from the Constitution and Congress and retain no residual jurisdiction); *Mar-*

the exercise of federal legislative power, be within the confines of those powers delegated by the Constitution.<sup>75</sup> Federal courts, therefore, possess restricted judicial powers confined by the effects of specific constitutional constraints, particularly the Bill of Rights; the principle of delegated (not general) powers; and the vast legislative authority of Congress.<sup>76</sup>

By contrast, states retain and exercise the majority of the nation's domestic authority through their vast police powers.<sup>77</sup>

tin v. Sallie Mae, Inc., No. 5:07-CV-00123, 2007 U.S. Dist. LEXIS 90418, at \*7 (S.D. W. Va. Dec. 7, 2007) ("Federal courts cannot assume jurisdiction exists . . ."), *motion denied by Martin v. Sallie Mae, Inc.*, No. 5:07-CV-00123, 2008 U.S. Dist. LEXIS 53541 (S.D. W. Va. July 15, 2008).

75. While the constitutional divide between federal and state power is not always clear, the parameters of the federal judicial power are today far more defined, given their largely statutory basis.

76. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 64–65 (1996) (explaining that state sovereign immunity is a constitutional limitation on federal judicial power); *Ex Parte New York*, 256 U.S. 490, 497 (1921) ("[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . ."); *Hans v. Louisiana*, 134 U.S. 1, 14–15, 17, 21 (1890) (noting that each state is a sovereign entity in the federal system). *But see Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976) (limiting *Hans* in that Congress may enforce "an award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment").

77. The Supreme Court has said:

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." . . . The States thus retain "a residuary and inviolable sovereignty." They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.

*Alden v. Maine*, 527 U.S. 706, 714–15 (1999) (quoting THE FEDERALIST NO. 39, at 194 (James Madison) (Bantam Books 1982) (1788)); *see also Printz v. United States*, 521 U.S. 898, 922, 933 (1997) (holding the Brady Act violated sovereignty by compelling states to administer a federal regulatory scheme, and the responsibility for the administration of laws enacted by Congress belonged to the President, not state law enforcement officers); *New York v. United States*, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."); *Texas v. White*, 74 U.S. (7 Wall) 700, 725 (1868) ("[T]he perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States . . . . Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in

Thus, state courts exercise the nation's general judicial power. States enjoy no delegated powers and therefore are not subject to limitations consequential to that concept.<sup>78</sup> As the Supreme Court of Missouri observed relative to legislative power, "The state constitution, unlike the [F]ederal [C]onstitution, is not a grant of power, but as to legislative power, it is only a limitation; and, therefore, except for the restrictions imposed by the state constitution, the power of the state legislature is unlimited and practically absolute."<sup>79</sup> Arguably, the same can be said for state judicial power if it is to have a meaningful role in checking legislative power. Many state courts draw their powers directly from their respective constitutions, and therefore, they are not susceptible to legislative limitations in the same manner that federal courts are susceptible to congressional limitations on substantive, procedural, and jurisdictional matters.<sup>80</sup> The distinction between the delegated powers enjoyed by federal courts and the general powers enjoyed by state courts is subtle, but also profoundly important in understanding the exercise of judicial review in the latter's venue and its implication in the policy arena.

### III. INSTITUTIONAL INDEPENDENCE—THE FEDERAL AND STATE COURTS COMPARED

#### A. *Just How Independent Are the Independent Federal Courts?*

The framers' assumption in drafting the Federal Constitution was that the national government would possess limited powers, while the states would retain the more general domestic powers

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all its provisions, looks to an indestructible Union, composed of indestructible States."), *overruled by* *Morgan v. United States*, 113 U.S. 476 (1885).

78. See, e.g., *State ex rel. Jardon v. Indus. Dev. Auth.*, 570 S.W.2d 666, 673-75 (Mo. 1978) (finding constitutional an act of the state legislature and noting that other state courts have upheld similar acts).

79. *State ex rel. Danforth v. State Envtl. Improvement Auth.*, 518 S.W.2d 68, 72 (Mo. 1975) (citing *Kansas City v. Fishman*, 241 S.W.2d 377, 379 (Mo. 1951)).

80. The Supremacy Clause gives Congress some authority over substantive matters before state courts to the extent that the matters fall within one of the delegated powers of the Constitution. See U.S. CONST. art. VI; John Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 *FORDHAM INT'L L.J.* 552, 580 (2006). This was controversial. Opponents of the Supremacy Clause branded it as the clause that would "be the destruction of every law which will come in competition with the laws of the United States." James Iredell and Timothy Bloodworth Debate the Supremacy of the Constitution and of Federal Law (July 29, 1788), in 2 *THE DEBATE ON THE CONSTITUTION*, *supra* note 45, at 899, 900.

of government.<sup>81</sup> This is reflected in the political concept that the federal government enjoys its powers by delegation, while the states enjoy their powers by limitation. Thus, federal courts—a controversial creation at the outset<sup>82</sup>—are limited by constitutional constraints and the design of Article III, which vests Congress with significant legislative power over the federal judiciary.<sup>83</sup> As James Winthrop observed during the debate on the Constitution, “The rule which is to govern the new [federal] courts, must, therefore, be made by the court itself, or by its employers, the Congress.”<sup>84</sup>

The Federal Constitution gives little hint as to the structure and jurisdiction of the federal courts, except as to the Supreme Court.<sup>85</sup> The framers gave Congress very broad authority to implement Article III, leaving the particulars of the federal judicial structure and its jurisdiction to the politics of the legislative process.<sup>86</sup> Only the particulars of the jurisdiction of the Supreme Court are expressed in the Constitution, and even here, Article III, section 2 gives Congress authority to regulate the appellate jurisdiction of the Supreme Court.<sup>87</sup> Accordingly, as a practical matter, the Constitution imposes few limitations on Congress’s power to confer federal jurisdiction, to withdraw federal jurisdiction, or even to restructure the federal judiciary.<sup>88</sup> In short, the

81. See James Wilson, Speech at a Public Meeting (Oct. 6, 1787), in 1 *THE DEBATE ON THE CONSTITUTION* 63, 64 (Bernard Bailyn ed., The Library of America 1993).

82. See “Brutus” XI, *The Supreme Court: They Will Mould the Government into Almost any Shape They Please*, reprinted in 2 *THE DEBATE ON THE CONSTITUTION*, *supra* note 45, at 129, 133. (“The [federal] judicial power will operate to effect . . . an entire subversion of the legislative, executive and judicial powers of the individual states.”); see also James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 *NW. U. L. REV.* 191, 217–19 (2007). State courts had, prior to the adoption of the Federal Constitution, complete and exclusive jurisdiction over all legal disputes. See *id.* at 133 (“Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction.”).

83. U.S. CONST. art. III, §§ 1–2.

84. “Agrippa” [James Winthrop] V, *On the “Derangement” of the Federal Courts*, *MASS. GAZETTE*, Dec. 11, 1787, reprinted in 1 *THE DEBATE ON THE CONSTITUTION*, *supra* note 81, at 474.

85. See U.S. CONST. art. III, §§ 1, 2.

86. See U.S. CONST. art. I, § 8, cl. 9 (“The Congress Shall have Power . . . To constitute Tribunals inferior to the supreme Court.”); U.S. CONST. art. III, § 1 (“The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

87. U.S. CONST. art. III, § 2, cl. 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and *under such Regulations as the Congress shall make.*”) (emphasis added).

88. See, e.g., *Finley v. United States*, 490 U.S. 545, 547–48 (1989) (“It remains rudi-

framers largely delegated the assembly and regulation of the federal judiciary to the politics of Congress and provided little insulation to the federal courts from the vast legislative authority of that body.<sup>89</sup> The Federal Constitution, for example, contains no “open courts” provision to act as a counterbalance to Congress’s legislative power in federal judicial matters, particularly those related to jurisdiction.<sup>90</sup> Many state constitutions, by comparison,

mentary law that [a]s regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it . . .* To the extent that such action is not taken, the power lies dormant.” (quoting *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1867)), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, *as recognized in Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 557–58 (2005); *see also* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 901, 905 (1984) (arguing that the Constitution, as evidenced by the exceptions clause and *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), supports the proposition that Congress retains authority over access to the federal courts); Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 737 (1999). *But see* David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2494–95 (1998) (arguing that due process considerations may confine Congress’s ability to limit access to the federal judiciary in cases challenging detention).

89. Congress’s authority regarding the federal courts is not, however, without limit. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995) (finding that a judicial decision is the last word of the judiciary with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was); *see also* Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 918–19, 921 (2006).

90. The Supreme Court observed that:

This position has held constant since at least 1845, when the Court stated that the “judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.”

*Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (citing *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)); *see also* *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (“Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.”); *Plaque-mines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517 (1898) (noting that in defining and regulating jurisdiction of federal courts, Congress has taken care not to exclude the jurisdiction of the state courts from every case to which the judicial power of the United States extends); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (“The political truth is that the disposal of the judicial power (except in a few specified instances) belongs to Congress: and Congress is not bound to enlarge the jurisdiction of the Federal courts to every

contain a version of the Magna Carta's great command that courts be open to hear and give remedy to all lawful complaints.<sup>91</sup> Access to state courts is, in many circumstances, subject to limited legislative regulation, and most certainly not legislative abolition.<sup>92</sup> Ultimately, the check on Congress's authority over the federal courts rests more in wisdom and tradition than in any explicit constitutional limitations on its legislative powers in this domain.

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subject, in every form which the Constitution might warrant." (quoting *Turner v. Bank of North-America*, 4 U.S. (4 Dall.) 8, 10 n.1 (1799)).

91. The Magna Carta stated that,

No free man shall be taken, imprisoned or disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers or by the law of the land. To no-one will We sell, to none will We deny or delay, right or justice.

MAGNA CARTA, cl. 39, 40, *reprinted in* A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 33, 45 (rev. ed. 1998). This is the basis of so-called modern open courts clauses found in many state constitutions. *See, e.g.*, ALA. CONST. art. I, § 14; ARIZ. CONST. art. II, § 11; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KY. CONST. § 14; ME. CONST. art. I, § 19; MASS. CONST. pt. I, art. 11; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; PA. CONST. art. I, § 11; S.D. CONST. art. VI, § 20; UTAH CONST. art. I, § 11; WIS. CONST. art. I, § 9. Most open courts mandates are contained in the bill of rights of a state's constitution. *See, e.g.*, ALA. CONST. art. I, § 14. These provisions are typically coupled with the language of the Magna Carta conferring a right to remedy in due course of law or guaranteeing the administration of justice without sale, denial, or delay. *See State ex rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544, 548 (W. Va. 1980).

92. *See, e.g.*, *McColum v. Sisters of Charity*, 799 S.W.2d 15, 18–19 (Ky. 1990) (holding a statute of repose unconstitutional as it violated the open courts provision); *Virmani v. Presbyterian Health Servs. Corp.*, 493 S.E.2d 310, 315–16 (N.C. App. 1997) (finding that a legislative act cannot supersede the constitutional right of access under the open courts provision); *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1198 (Utah 1999) (noting that the purpose of the open courts clause is to impose a limitation on the legislature's latitude in defining, modifying, and modernizing the law (citing *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985))). *But see* *Green v. Siegel, Barnett & Schutz*, 557 N.W.2d 396, 402 (S.D. 1996) (recognizing that the open courts provision is judicial, not legislative in character; "[i]t does not mean that the courts may usurp powers which belong to the" legislature (quoting *Simons v. Kidd*, 38 N.W.2d 883, 886 (S.D. 1949))). Some courts have concluded that the open courts provision only confers access to litigants, not to the general public. *See C. v. C.*, 320 A.2d 717, 728 (Del. 1974); *State ex rel. Post-Tribune Publ'g Co. v. Porter Superior Court*, 412 N.E.2d 748, 750–51 (Ind. 1980); *Katz v. Katz*, 514 A.2d 1374, 1377 (Pa. Super. Ct. 1986). However, the greater weight of authority is that open courts provisions confer upon the general public an independent right of access to courts. *See Phoenix Newspapers, Inc. v. Superior Court*, 418 P.2d 594, 597 (Ariz. 1966); *KFGO Radio, Inc. v. Rothe*, 298 N.W.2d 505, 510–11 (N.D. 1980), *limited by* *Dickinson Newspapers, Inc. v. Jorgensen*, 338 N.W.2d 72, 75–76 (N.D. 1983); *State ex rel. The Repository v. Unger*, 504 N.E.2d 37, 40 (Ohio 1986); *Oregonian Publ'g Co. v. O'Leary*, 736 P.2d 173, 175–76 (Or. 1987); *Federated Publ'ns, Inc. v. Kurtz*, 615 P.2d 440, 445 (Wash. 1980).



Several recent developments illustrate this point. Setting aside the wisdom of limiting access to the federal courts, there have been numerous examples, both successful and unsuccessful, of Congress's efforts to trim federal jurisdiction. Successful efforts include the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,<sup>93</sup> the Prison Litigation Reform Act of 1996,<sup>94</sup> and the Antiterrorism and Effective Death Penalty Act of 1996.<sup>95</sup> Unsuccessful efforts to trim jurisdiction include the Pornography Jurisdiction Limitation Act of 2006,<sup>96</sup> the Constitution Restoration Act of 2005,<sup>97</sup> the Marriage Protection Act of 2005,<sup>98</sup> the Pledge Protection Act of 2005,<sup>99</sup> the Public Prayer

93. Pub. L. No. 104-208 §§ 326, 329, 110 Stat. 3009-631 (codified at 8 U.S.C. § 1228 (2006)). The Attorney General's discretionary judgment regarding the application of this section is not subject to review. 8 U.S.C. § 1226(e) (2007). See *Demore v. Hyung Joon Kim*, 538 U.S. 510, 517 (2003) (concluding that section 1226(e) does not deprive the Court of entertaining a habeas action contesting the validity of the statute, as Congress failed to make a clear and unequivocal statement removing federal court review in such an action); see also *id.* at 535 (O'Connor, J., concurring) (concluding that it cannot seriously be maintained that "no court does not really mean 'no court,'" or that Congress was ambiguous in its intent to deprive federal courts of jurisdiction over the specified decisions of the Attorney General); cf. *Ex parte Yarger*, 75 U.S. (8 Wall.) 85, 102 (1868) ("We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law . . ."). But see *INS v. St. Cyr*, 533 U.S. 289, 326 (2001) ("We find nothing in IIRIRA unmistakably indicating that Congress considered the question whether to apply its repeal of § 212(c) retroactively to such aliens. We therefore hold that § 212(c) relief remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.").

94. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at 42 U.S.C. § 1997e (2000)) (requiring exhaustion of administrative remedies before a prisoner may file an action).

95. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2244 (2000)) (limiting the number of habeas corpus petitions available to prison inmates); see *Burton v. Stewart*, 549 U.S. 147, 152 (2007) (holding that a federal district court did not have jurisdiction to consider a state prisoner's federal habeas corpus petition—which challenged only the constitutionality of his sentence—because, for purposes of gate keeping requirements in 28 U.S.C. § 2244(b), the petition was a "second or successive petition" that the prisoner had not sought or obtained authorization to file).

96. H.R. 5528, 109th Cong. § 2 (2006) (proposing that no federal court created by Congress should have jurisdiction to decide "whether a State pornography law imposes a constitutionally invalid restriction on the freedom of expression").

97. H.R. 1070, 109th Cong. § 101 (2005) (proposing that the Supreme Court should "not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter to the extent that relief is sought against an entity of Federal, State, or local government, or against an officer or agent [thereof], . . . concerning that entity's, officer's, or agent's acknowledgment of God as the sovereign source of law, liberty, or government").

98. H.R. 1100, 109th Cong. § 2 (2005) (proposing that no federal court or the Supreme Court should have any jurisdiction to "hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C").

99. H.R. 2389, 109th Cong. § 2 (2005) (proposing that no federal court or the Supreme Court should have jurisdiction to hear or decide any case pertaining to the constitu-

Protection Act of 2007,<sup>100</sup> the We the People Act,<sup>101</sup> and the Safeguarding Our Religious Liberties Act.<sup>102</sup> The point is not to debate the relative wisdom of such actions, but merely to observe that Congress, not the Constitution, defines much of what we know of the federal courts.<sup>103</sup> Except as to narrow incidents involving the Supreme Court, every exercise of federal judicial power is co-extensive with the delegated powers of the national government and, as such, is both confined by and dependent upon

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tionality of the Pledge of Allegiance).

100. H.R. 2104, 110th Cong. § 3 (2007) (proposing that the Supreme Court should “not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter that relates to the alleged establishment of religion involving an entity of the federal government or a State or local government, or an officer or agent [thereof], acting in an official capacity, concerning the expression of public prayer”).

101. H.R. 300, 110th Cong. § 3 (2007) (proposing that no federal court or the Supreme Court should adjudicate: “(A) any claim involving the laws, regulations, or policies of any State or unit of local government relating to the free exercise or establishment of religion; (B) any claim based upon the right of privacy, including any such claim related to any issue of sexual practices, orientation, or reproduction; or (C) any claim based upon equal protection of the laws to the extent such claim is based upon the right to marry without regard to sex or sexual orientation”). The proposed Act would have also made it an impeachable offense for any justice or judge to violate the Act and would have subjected the judicial officer to removal by the President under rules adopted by Congress. *Id.* § 6.

102. H.R. 4576, 109th Cong. § 2 (2005) (proposing that no federal courts or the Supreme Court should have jurisdiction “to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of— (1) the Ten Commandments, or its recitation, display, acknowledgement, or use; (2) the Pledge of Allegiance . . . or its recitation, display, acknowledgement, or use; and (3) the National Motto . . . or its recitation, display, acknowledgement, or use”); *see also* S. 913, 110th Cong. § 1 (2007) (proposing the amendment of section 221(i) of the Immigration and Nationality Act (8 U.S.C. 1201(i) § 1), by providing that a revocation may not be reviewed by any court, and no court shall have jurisdiction to hear any claim arising from, or any challenge to, such a revocation”).

103. *See, e.g.,* Weinberger v. Salfi, 422 U.S. 749, 756, 762–63 (1975) (concluding that 42 U.S.C. § 405(h) deprives the federal courts of general federal question jurisdiction; judicial review of agency decisions must be grounded in § 405(g)); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824) (“[W]hen a question to which the judicial power of the [United States] is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause . . . .”); *Briggs v. Sullivan*, 886 F.2d 1132, 1138 (9th Cir. 1989) (“[F]ederal courts cannot assume jurisdiction over controversies concerning the interpretation of the entitlement provisions of the Social Security Act under the general federal question statute . . . .”), *superseded by statute*, Supplemental Security Income for the Aged, Blind, and Disabled, Pub. L. No. 110-246, 122 Stat. 1857.

the extensive legislative powers of Congress.<sup>104</sup> This is in sharp contrast to many states.

Congressional oversight of the federal judiciary extends to the administration and procedures of the courts. The chief policymaking body for the federal judiciary is the U.S. Judicial Conference, a statutory creation.<sup>105</sup> The Supreme Court possesses no constitutionally based administrative power over the federal judiciary; its institutional power and influence is largely defined by its political will. The rulemaking power of the federal judiciary is based on a statutory grant of authority, not a constitutional delegation of power.<sup>106</sup> As a result, Congress can not only amend federal court rules but, should it choose, it can also repeal the power to promulgate rules.<sup>107</sup> Thus, Congress's oversight of the federal judiciary is extensive, and includes the creation of inferior courts and delineation of their jurisdiction, regulation of the appellate jurisdiction of the Supreme Court, and creation of the administrative and procedural structures under which the federal courts operate.<sup>108</sup> This extensive legislative regulation of the judiciary is seldom seen in states. Rather, most state judiciaries enjoy far greater institutional independence from their respective legislatures, an evolving flashpoint in the debate over the intersection of state judicial power and legislative policymaking.

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104. It is important to recognize constitutional limits when Congress grants original federal jurisdiction. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 876 (3d Cir. 1991) (Scirica, J., concurring); see *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (declaring that even within Congress's extensive authority, every grant of federal jurisdiction must fall within one of the nine categories of cases and controversies enumerated in Article III of the Federal Constitution); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (finding that sovereigns that have not consented to jurisdiction cannot be sued); *Jordan v. Ind. High Sch. Athletic Ass'n, Inc.*, 16 F.3d 785, 787 (7th Cir. 1994); *In re Estate of Marcos*, 978 F.2d 493, 501 (9th Cir. 1992).

105. See 28 U.S.C. § 331 (2000 & Supp. 2006).

106. The Supreme Court of the United States, like many state supreme courts, has the power to make rules. However, where the rulemaking power of many state supreme courts is constitutionally conferred, the rulemaking power of the Supreme Court is a statutory grant under the Rules Enabling Act. See 28 U.S.C. § 2072 (2000); see also *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 9-10 (1941) (noting Congress's power to regulate the practice and procedure of federal courts, and its ability to delegate to the federal courts authority to make rules not inconsistent with the laws or the Federal Constitution).

107. Just as Congress has authority to enact 28 U.S.C. § 2072, it has the authority to repeal it as well. See U.S. CONST. art. 1, § 1 (vesting legislative authority in the Congress); *United States v. Mitchell*, 317 F. Supp. 166, 170 (D.D.C. 1974).

108. U.S. CONST. art. 1, § 8, cl. 9; *id.* art. III, § 2, cl. 2; 28 U.S.C. § 331 (2000 & Supp. 2006).

## B. *The Institutional Independence of State Courts*

In contrast to federal courts, many state courts enjoy a higher level of constitutionally rooted structural, institutional, and jurisdictional independence. It is important to understand the basis of this independence. There exist in the United States two general constitutional frameworks for creating state judiciaries and defining their powers, with a multitude of variations within these two frameworks. The first framework is similar to the federal court structure, providing modest and broadly worded judicial articles that vest state legislatures with significant authority over the state judiciary.<sup>109</sup> This authority extends to the structure, jurisdiction, and administration of the courts. The judicial articles of Maine, Vermont, and Rhode Island exemplify this approach to judicial article construction.<sup>110</sup> Each of these state's constitutions provides for a supreme court, but leaves to the legislature the creation of inferior courts and the regulation of their jurisdiction.<sup>111</sup> In some circumstances, judges are appointed by the governor,<sup>112</sup> by the governor acting in concert with the state legislature,<sup>113</sup> or by the legislature itself.<sup>114</sup> Rarely are the judges in such systems elected or retained directly by voters.<sup>115</sup> This first

109. Within this broad generalization there are unique duties imposed upon state judiciaries that one would not find in the federal constitution. *See, e.g.*, IDAHO CONST. art. V, § 25 (mandating that district judges report to the supreme court defects and omissions in the law which then shall be transmitted by the governor to the legislature); ME. CONST. art. X, § 6 (mandating that the chief justice shall arrange the constitution into proper articles and sections).

110. ME. CONST. art. VI, § 1 (“The judicial power of this State shall be vested in a Supreme Judicial Court, and such other courts as the Legislature shall from time to time establish.”); R.I. CONST. art. X, § 2 (“[I]nferior courts shall have such jurisdiction as may . . . be prescribed by law.”); VT. CONST. ch. II, § 31 (“All other courts of this State shall have original and appellate jurisdiction as provided by law.”). It is no accident that the judicial articles of many of the thirteen original states were similar to Article III of the Federal Constitution.

111. *See* ME. CONST. art. VI, § 1; R.I. CONST. art. X, § 2; VT. CONST. ch. II, § 31. Oregon amended its judicial article to remove constitutional designation of the levels of court in favor of naming only the supreme court and “such other courts as may from time to time be created by law.” OR. CONST. art. VII, § 1 (amended 1910). The amendment eliminated constitutional reference to circuit courts, county courts, justices of the peace, and municipal courts. *See id.*

112. *See, e.g.*, ME. CONST. art. VI, § 4.

113. *See, e.g.*, CONN. CONST. art. V, § 2; VT. CONST. ch. II, § 32.

114. *See, e.g.*, VA. CONST. art. VI, § 7.

115. *See, e.g.*, OR. CONST. art. VII, § 1 (“The judges of the supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years, and shall receive such compensation as may be provided by law, which compensation shall not be diminished during the term for which they are elected.”).

approach to creating a state judiciary is rooted in the eighteenth century vision of vague judicial powers subject to broad legislative regulation.<sup>116</sup>

The second and far more prevalent constitutional framework emerged in the mid-1800s with a series of populist reforms—particularly in the Midwest and the West—that continued into the twentieth century.<sup>117</sup> It is evidenced by a shift away from the appointment of judges and toward a system of direct accountability through elections.<sup>118</sup> The movement was furthered by a wave of state constitutional reforms in the early and mid-twentieth century that refined the balance of powers between the branches of government, increased efficiency by eliminating redundant systems, and, to a large measure, curtailed unbridled state legislative power.<sup>119</sup> Changes in state constitutions also impacted judiciaries by shifting from the legislature broad authority regarding the structure and jurisdiction of the courts and vesting that authority directly in the judiciary. The judicial articles of Arizona, Missouri, and Utah exemplify this development.<sup>120</sup>

With the exception of courts of limited jurisdiction, legislatures were generally stripped of the ability to expand<sup>121</sup> or to confine<sup>122</sup>

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116. See, e.g., VT. CONST. of 1786, ch. II, § 5 (1793).

117. See generally G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 99–100 (Princeton Univ. Press 1998) (discussing the influence of the Populist movement on nineteenth century state constitutions).

118. Compare OHIO CONST. of 1802, art. III, § 8 (1851) (requiring the appointment of judges to a term of seven years by joint ballot of both houses of the general assembly), with OHIO CONST. art. IV, § 6 (requiring judges of the supreme court be elected by electors of the state at large). Compare MO. CONST. of 1820 art. V, § 13 (1945) (requiring that judges be appointed by the governor with the advice and consent of the senate), with MO. CONST. art. V, § 19 (“Judges of the supreme court and of the court of appeals shall be selected for terms of twelve years, judges of the circuit courts for terms of six years, and associate circuit judges for terms of four years.”).

119. See generally Tarr, *supra* note 117, at 14–15, 38, 141–42 (discussing the separation of powers in state constitutions, as well as the twentieth century reforms of state constitutions).

120. See ARIZ. CONST. art. VI; MO. CONST. art. V; UTAH CONST. art. VIII.

121. See Amendments to the Fla. Rules of Workers’ Comp. Procedure, 891 So. 2d 474, 477–78 (Fla. 2004) (holding that the jurisdiction of the courts of Florida is derived entirely from the constitution and cannot be expanded by the legislature); Neil v. Pub. Utils. Comm’n, 178 P. 271, 273 (Idaho 1919) (holding that the jurisdiction of this court is fixed by the state constitution and cannot be extended by the legislature).

122. See, e.g., OHIO CONST. art. IV, § 2(B)(3) (“No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.”); State *ex rel.* Neely v. Brown, 864 P.2d 1038, 1041 (Ariz. 1993) (Martone, J., concurring) (“[W]hen the constitution grants original jurisdiction to a court, the legislature cannot take it away.”); Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n, 818 S.W.2d 935,

the jurisdiction of the courts.<sup>123</sup> The particular structure of the courts was specified in the constitution, in several cases by collapsing various levels of trial courts into one court of general jurisdiction and by limiting the legislature's involvement in structural issues to courts of limited jurisdiction.<sup>124</sup> The authority to administer the courts was vested in the state supreme court<sup>125</sup> or

937 (Ark. 1991) (stating that pursuant to "Amendment 58 to the [state] constitution, which created the court of appeals, and Rule 29 of the Rules of the Arkansas Supreme Court, [the supreme court] decide[s] the appellate jurisdiction of the court of appeals, not the legislature"); *Leone v. Med. Bd.*, 67 Cal. Rptr. 2d 689, 694 (Cal. Ct. App. 1997) (stating that the legislature may not take away jurisdiction "constitutionally granted"), *overruled by Leone v. Med. Bd.*, 995 P.2d 191, 196-98 (Cal. 2000) (holding that, in this particular case, the act of the legislature did not violate the state constitution); *Garcia v. Dist. Court*, 403 P.2d 215, 219 (Colo. 1965) (holding the legislature's attempt to reduce constitutional jurisdiction of district courts void); *State v. Jefferson*, 758 So.2d 661, 664 (Fla. 2000) (noting the constitution does not give the legislature the authority to restrict the subject matter jurisdiction of the appellate courts to hear criminal appeals), *overruled by Leonard v. State*, 760 So.2d 114, 118 (Fla. 2000) (reading the statute to codify existing limitations rather than to limit the court's subject matter jurisdiction); *Pope v. State*, 792 So.2d 713, 720 (La. 2001) (holding that the legislature cannot "divest the district courts of the original jurisdiction fixed by the constitution"); *State v. Losh*, 721 N.W.2d 886, 892 (Minn. 2006) (interpreting the constitution to grant the supreme court independent authority to review determinations by the other state courts because such authority is granted by the state constitution and the "legislature cannot prohibit or require this court to exercise its appellate jurisdiction" (quoting *State v. Wingo*, 266 N.W.2d 508, 512 (Minn. 1978))).

123. Many state constitutional reforms of the late nineteenth and early twentieth centuries—the so-called Progressive Era—were directed at curbing the abuse of state legislative powers. See Rachel M. Janutis, *The Struggle Over Tort Reform and the Overlooked Legacy of the Progressives*, 39 AKRON L. REV. 943, 956–58 (2006).

124. See, e.g., ALASKA CONST. art. IV, § 1 ("The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature."); CAL. CONST. art. VI, § 1 ("The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record."); HAW. CONST. art. VI, § 1 ("The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish."); KY. CONST. § 109 ("The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court. The court shall constitute a unified judicial system for operation and administration."); MINN. CONST. art. VI, § 3 ("The district court has original jurisdiction in all civil and criminal cases and shall have appellate jurisdiction as prescribed by law."); MONT. CONST. art. VII, § 1 ("The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law."); N.Y. CONST. art. VI, § 7a ("The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided."); WASH. CONST. art. IV, § 4 ("The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars (\$200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute.").

125. See, e.g., KY. CONST. § 110(5)(b); MO. CONST. art. V, § 4; MONT. CONST. art. VII, §

a state judicial council.<sup>126</sup> The power to adopt procedural rules was constitutionally delegated to the state judiciary,<sup>127</sup> with the legislature generally playing a limited oversight role.<sup>128</sup> And in several states, the constitution, in addition to defining the appellate and original jurisdiction of their supreme courts, also granted the court the power to provide advisory opinions to the legislature, the executive, or both.<sup>129</sup> In short, the state legislature's judicial oversight authority was significantly curtailed, and many aspects of judicial operations and jurisdiction placed beyond its reach.<sup>130</sup>

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2; WIS. CONST. art. VII § 4(3).

126. See CAL. CONST. art. VI, § 6.

127. See, e.g., ARIZ. CONST. art. VI, § 5.5; COLO. CONST. art. VI § 21; D.C. CONST. art. VI, § 15; MICH. CONST. art. VI, § 5; MO. CONST. art. V, § 5.

128. See, e.g., ALASKA CONST. art. IV, § 15 (stating that rules may be changed upon two-thirds vote of each house); FLA. CONST. art. V, § 2(a) (stating that the supreme court shall promulgate uniform court rules with the advice and consent of the council). *But see* D.C. CONST. art. IV, § 5 ("These rules may be changed by law."). Some state constitutions provide that court rules related to practice and procedure have the force and effect of law, superseding laws to the contrary. See *Stern Bros., Inc. v. McClure*, 236 S.E.2d 222, 227 (W. Va. 1977) ("The administrative rules promulgated by this Court . . . operate to supersede the existing statutory provisions . . ."); *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. 1995) ("[I]f there is a conflict between this Court's rules and a statute, the rule always prevails if it addresses practice, procedure or pleadings." (citing *Reichert v. Lynch*, 651 S.W.2d 141, 143 (Mo. 1983))); see also MD. CONST. art. IV, § 18; HAW. CONST. art. VI, § 7; N.H. Const. pt. II, art. 73-a; *Bright v. Dicke*, 652 N.E.2d 275, 277-78 (Ill. 1995) (holding that supreme court rules are neither aspirational nor mere suggestions; they have the force and effect of law).

129. Eight states permit or require the supreme court to give advisory opinions to the governor, the legislature, or other elected officials: Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota. See Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207, 254-56 (1997). Two states provide for supreme court advisory opinions by statute: Alabama and Delaware. *Id.* at 254. In Maine, for example, "[t]he Justices of the Supreme Judicial Court shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Senate or House of Representatives." ME. CONST. art. VI, § 3. The Florida Supreme Court, however, may issue advisory opinions in only two instances: (1) to the governor concerning the exercise of executive power, and (2) to the attorney general on matters concerning citizen initiatives to amend the constitution. FLA. CONST. art. IV, §§ 1(c), 10.

130. See, e.g., FLA. CONST. art V, § 1 ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality."); IDAHO CONST. art. V, § 13 ("The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government . . ."); N.C. CONST. art. IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.").

The combined effect of this almost century-long reform was the creation of robust state judiciaries with greater structural and jurisdictional autonomy, and judicial officers directly accountable to the public through an election process<sup>131</sup> or through the appointment-retention process first established in Missouri.<sup>132</sup> Institutional autonomy increased correspondingly as judicial officers became more directly accountable to the public, who could remove them for any or no reason.<sup>133</sup> This connection between a state's judicial power and its people—power that is not contingent on the legislature's exercise of its authority—can produce state judicial systems that are able to play a more active role in state affairs due to their greater institutional independence from legislative regulation. One of the great misapprehensions in the current debate on judicial power is the tendency in some quarters to demand greater legislative oversight of state judiciaries under a broad claim of increasing democratic accountability, all the while ignoring the element of direct popular accountability that currently exists in most states.

#### IV. CHECKS AND BALANCES AND STATE CONSTITUTIONS

##### A. *Challenge of Judicial Deference to State Legislative Policymaking*

The relationship between state judicial power and legislative policymaking is defined by the particular elements of each state's constitution. Unlike the U.S. Constitution, most state constitutions are anything but models of brevity;<sup>134</sup> they are evolving documents amended on a nearly constant basis.<sup>135</sup> This process of

131. See S.C. CONST. art. V, § 3; WIS. CONST. art. VII, §§ 4, 7. South Carolina is unique in that its judicial structure is a hybrid, combining structural and jurisdictional independence with a system of judicial selection vested exclusively in the state legislature. See S.C. CONST. art. V, § 3.

132. See, e.g., MO. CONST. art. V, § 25. For a summary of judicial selection methods, see AM. JUDICATURE SOC., JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2007), <http://www.ajs.org/selection/docs/judicial%20Selection%20Charts.pdf> [hereinafter JUDICIAL SELECTION IN THE STATES].

133. The development of state judicial disciplinary commissions which are independent arms of the judiciary charged with monitoring and enforcing ethical standards, also helped create robust judiciaries. See, e.g., NEV. CONST. art. VI, § 21; PA. CONST. art. V, § 18.

134. The Alabama Constitution, for example, is approximately 129,000 words and has been amended some 383 times. See Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 75 tbl. 3 (1982).

135. Missouri has had four constitutions since statehood in 1820. See Sturm, *supra*



constant change has enabled states to add definition and clarity by articulating with greater precision the power and structure of their governing systems, including their judiciaries. This constant process of change has also at times led to unwise limits on state power,<sup>136</sup> reduced the flexibility of states to adapt to changing circumstances,<sup>137</sup> and injected an almost hyper-democratic attitude towards governing that allows virtually any idea to have air time, no matter how meritorious or how outlandish.<sup>138</sup> The sheer magnitude of a state's constitution influences the breadth or limits of judicial power. The more refined and encompassing a state's constitution, the greater likelihood the courts will be called upon to play an active role in interpreting and enforcing the myriad constitutional limits on power, particularly legislative power. The more general and undefined a state's constitution, the greater likelihood the courts will defer to broad claims of state legislative prerogative.<sup>139</sup>

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note 134, at 59. Kentucky has operated under four constitutions since statehood in 1792. *See id.* Alabama operates under the 1901 constitution, which is its sixth constitution. *See id.* By contrast, the oldest operational state constitution belongs to Massachusetts, which took effect in 1780. *See id.* In addition to rewriting a state constitution, many states provide for either a direct or indirect initiative petition process that enables citizens to propose constitutional changes outside the legislative process. *See id.* at 76, 80; National Conference of State Legislators, Initiative, Referendum and Recall, <http://www.ncsl.org/programs/legismgt/elect/initiat.htm> (last visited Dec. 11, 2008). States having such a process include Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. National Conference of State Legislators, Initiative, Referendum and Recall, <http://www.ncsl.org/programs/legismgt/elect/irstates.htm> (last visited Dec. 11, 2008).

136. *See, e.g.*, MO. CONST. art. X, §18(e)(1). This provision limits the amount of taxes the General Assembly can raise in any one fiscal year to a formulaic amount. *See id.* Any increases over and above that amount must be approved by the voters of the state. *See id.* Arguably, this severely reduces the ability of the legislature to increase revenues to meet new program needs and mandates, and to weather economically difficult times.

137. *See, e.g.*, COLO. CONST. art. X, § 20. This provision created the Taxpayer's Bill of Rights ("TABOR"), which placed limits on the growth of state government. *See id.* § 20(1). In 2005, at the urging of the governor, voters suspended TABOR to enable the state to address its growing budget problems. *See* Jessica Fender, *Election Hard Time To Tinker with TABOR*, DENVER POST, May 13, 2008, [http://www.denverpost.com/search/ci\\_9238326](http://www.denverpost.com/search/ci_9238326) (noting voter's success in suspending TABOR in 2005).

138. *See, e.g.*, Chet Brokaw, *A Movement Is Under Way in S.D. To Strip Judges of Their Immunity Against Lawsuits*, A.P. WIRE, Nov. 14, 2005. The so-called "JAIL Initiative" sought to amend South Dakota's constitution by providing an elaborate system in which parties aggrieved by a judicial decision could file a complaint with a special grand jury empowered to strip judges of immunity from civil suits. *See id.* The proposal would also enable the special grand jury to indict a judge on criminal charges, impose fines and remove the judge from office. *See id.*

139. *See, e.g.*, *Pawtucket v. Sundlun*, 662 A.2d 40, 44–45 (R.I. 1995) ("Because of the

In order to understand the intersection of state judicial and legislative power, one must begin with this generally accepted proposition: because state constitutions are “certificates” of limitation as opposed to “grants” of authority, state legislatures enjoy plenary power limited only by the expressed provisions of each state’s constitution.<sup>140</sup> “Any constitutional limitation, therefore, must be strictly construed in favor of the power of the General Assembly.”<sup>141</sup> Consequently, state courts generally defer to the legislature in the substantive exercise of legislative power because what is not specifically limited is assumed granted.<sup>142</sup> This is a starkly different context for containing the exercise of government power than that faced by the federal courts, where power is defined by delegation.

However, there are underlying and seemingly conflicting relational issues between the exercise of legislative and judicial power at the state level—issues that center on balancing presumptively plenary legislative power with particularized substantive and procedural limitations on that power. The general principle of state judicial deference to legislative authority must be nuanced in particular circumstances by considerations for the very principle of constitutional limitation. Accordingly, judicial deference to state legislative power is in constant competition and conflict with specific commands in a state’s constitution that impose significant and, at times, very clear limitations on the exercise of that power. Too much deference to state legislative power renders constitutional limitations meaningless, in effect tipping the system of checks and balances in the direction of unbridled legislative authority. Too little deference to state legislative power erodes its presumptively plenary nature and creates ample grounds for political and interbranch conflict over the parameters of particular limitations.

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broad plenary power of the General Assembly, this court’s evaluation of legislative enactments has been extremely deferential . . . Specifically, this court will not invalidate a legislative enactment unless the party challenging the enactment can prove *beyond a reasonable doubt* to this court that the statute in question is repugnant to a provision in the constitution.” (citing *Gorham v. Robinson*, 186 A. 832, 837 (R.I. 1936))).

140. See, e.g., *Bd. of Educ. v. City of St. Louis*, 879 S.W.2d 530, 532–33 (Mo. 1994).

141. *Id.* at 533 (citing *Brown v. Morris*, 290 S.W.2d 160, 166 (Mo. 1956)).

142. For a general discussion on federal court deference to Congress, see Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656 (2000).

How much deference to pay a state legislature in particular circumstances implicates the differing policy functions of the judiciary and legislature and informs the breadth of the judiciary's role in state policy matters. Because every state legislative act is effectively a policy action framed by the principle of plenary power, judicial invalidation of an act is a policy action framed primarily by the principle of constitutional limitation. Therefore, the degree of deference to be afforded state legislatures is informed by broad constitutional tenets, and specific constitutional limitations intended to embrace a broad array of policy matters and the very process by which a state legislature makes policy choices.<sup>143</sup> Opponents of robust state judicial review frequently overlook or disregard this important nuance—that is, the nuance of limitation. Nowhere in the Federal Constitution do the principles of plenary legislative authority collide with stringent constitutional limitation in such an explicit fashion. Arguably, some state courts have been far too deferential and dormant in reviewing the exercise of state legislative powers, even in the face of specific constitutional limitations.<sup>144</sup>

### B. *Judicial Review of the Substance and Procedure of Legislative Policymaking*

Unlike the power under the Federal Constitution, the power of judicial review at the state level is both explicit and implied. Many state constitutions recognize the power of judicial review by: (1) placing restrictions on its exercise;<sup>145</sup> (2) specifically re-

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143. See, e.g., MO. CONST. art. III, § 39(d) (“All state revenues derived from the conduct of all gaming activities as are now or hereafter authorized by this constitution or by law, unless otherwise provided by law on the effective date of this section, shall be appropriated beginning July 1, 1993, solely for the public institutions of elementary, secondary and higher education and shall not be included within the definition of ‘total state revenues’ in section 17 of article X of this constitution.”).

144. Many state constitutions contain a “single subject” limitation on legislative acts. See, e.g., WASH. CONST. art. II, § 19 (“No bill shall embrace more than one subject, and that shall be expressed in the title.”). One method state legislatures employ to avoid this limitation is the adoption of “omnibus bills.” See, e.g., *In re Boot*, 925 P.2d 964, 972 (Wash. 1996) (stating that the omnibus bill is intended to solve one problem in a “comprehensive manner”). Courts generally uphold such measures even in the face of strict constitutional prohibitions. See *id.* at 971 (requiring “rational unity” between the subjects contained in an omnibus bill).

145. See, e.g., ARIZ. CONST. art. VI, § 2 (“[T]he [supreme] court shall not declare any law unconstitutional except when sitting in banc.”); UTAH CONST. art. VIII, § 2 (“The [supreme] court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except on the concurrence of a majority of all justices of

cognizing and authorizing judicial review;<sup>146</sup> and (3) creating limitations on the exercise of state power, particularly legislative power, enforceable by the judiciary.<sup>147</sup> In this latter context, constitutional limitations are both substantive and procedural in nature; they not only limit the subject matters on which a state legislature may act, but also stipulate by prescription or prohibition the procedures a legislature must employ when it acts.

Substantive limitations on the lawmaking, i.e., policymaking, authority of a state legislature can include provisions prohibiting special legislation<sup>148</sup> and limiting legislative topics.<sup>149</sup> Procedural limitations include defining the bill format,<sup>150</sup> the number of times a bill must be read,<sup>151</sup> the procedure by which a bill is adopted,<sup>152</sup> and imposing a “single subject” requirement on pro-

the Supreme Court.”).

146. See, e.g., GA. CONST. art. VI, § 6, para. 2(1) (stating that the supreme court shall have jurisdiction in “[a]ll cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn into question.”); see also FLA. CONST. art. V, § 3(b)(3); LA. CONST. art. V, § 5(D); MO. CONST. art. V, § 3; OHIO CONST. art. IV, § 2(B).

147. See, e.g., COLO. CONST. art. X, § 20(1) (“Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution.”); MO. CONST. art. X, § 18(e)(5) (“Any taxpayer or statewide elected official may bring an action under the provisions of section 23 of this article to enforce compliance with the provisions of this section. The Missouri supreme court shall have original jurisdiction to hear any challenge brought by any statewide elected official to enforce this section.”).

148. See, e.g., ALA. CONST. art. IV, § 104 (containing thirty-one subject matter limitations on the legislature’s lawmaking powers); ARIZ. CONST. art. IV, § 19 (containing twenty subject matter limitations on the legislature’s lawmaking powers).

149. See, e.g., ARIZ. CONST. art. XVIII, § 6 (“The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.”); KY. CONST. § 54 (“The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property.”).

150. See, e.g., MO. CONST. art. III, § 21 (“The style of the laws of this state shall be: ‘Be it enacted by the General Assembly of the State of Missouri, as follows.’ No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose.”).

151. See, e.g., W. VA. CONST. art. VI, § 29 (“No bill shall become a law, until it has been fully and distinctly read, on three different days, in each house, unless, in case of urgency, by a vote of four fifths of the members present, taken by yeas and nays on each bill, this rule be dispensed with: Provided, in all cases, that an engrossed bill shall be fully and distinctly read in each house.”).

152. See, e.g., VA. CONST. art. IV, § 11 (“No bill shall become a law unless, prior to its passage: (a) it has been referred to a committee of each house, considered by such committee in session, and reported; (b) it has been printed by the house in which it originated prior to its passage therein; (c) it has been read by its title, or its title has been printed in a daily calendar, on three different calendar days in each house; and (d) upon its final passage a vote has been taken thereon in each house, the name of each member voting for and

posed bills.<sup>153</sup> Whether substantive or procedural in nature, such constitutional measures constrain the otherwise presumptive plenary power of state legislatures.<sup>154</sup> The remainder of this article discusses several of these substantive and procedural limitations as examples of significant constraints that state voters have placed on the exercise of legislative power, and hence, legislative policymaking. These limitations frequently implicate judicial power and legislative prerogative, judicial deference and constitutional limitations, and, of course, the politics of policymaking.

### 1. Limits on the Legislature's Appropriation Power

The power to appropriate public funds is the ultimate public policy power. Over time, therefore, voters in many states have imposed a series of constitutional limitations and priorities on the process,<sup>155</sup> effectively constraining not only the legislature's appropriation power, but also indirectly, its lawmaking power.<sup>156</sup> It is the nature of state legislatures to push the boundaries of their powers, and nowhere is this clearer than in the appropriations arena. State constitutions, therefore, frequently define with some specificity the manner in which state money is to be appropriated and spent.<sup>157</sup> Constitutional restrictions in the appropriations arena run the gamut from limiting the subjects for appropriations, to the priority to be given various appropriations, to the content of an appropriations bill.<sup>158</sup> In comparison, no such constitutional limitation is imposed on Congress. States may also re-

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against recorded in the journal, and a majority of those voting in each house, which majority shall include at least two-fifths of the members elected to that house, recorded in the affirmative.”).

153. See discussion *infra*, Part IV.B.3.

154. See *Mecham v. Gordon*, 751 P.2d 957, 962 (Ariz. 1988) (finding that the court has the constitutional power to ensure that the legislature follows the rules governing impeachments).

155. See, e.g., MO. CONST. art. III, § 36 (delineating the order in which state funds should be distributed to various programs and for various purposes); W. VA. CONST. art. VI, § 51 (“The legislature shall not appropriate any money out of the treasury except in accordance with provisions of this section.”).

156. See Advisory Opinion to the Attorney Gen. re Requirement for Adequate Pub. Educ. Funding, 703 So.2d 446, 449 (Fla. 1997); *State ex rel. Bd. of Educ. v. Caperton*, 441 S.E.2d 373, 375–76 (W. Va. 1994).

157. See, e.g., MD. CONST. art. III, § 52 (“The General Assembly shall not appropriate any money out of the Treasury except in accordance with the provisions of this section.”).

158. See, e.g., ARIZ. CONST. art. IV, § 20 (setting limitations on the subject matter of appropriations bills); MO. CONST. art. III, § 36 (specifying the priority that should be given to various appropriations).

strict the purposes for which state funds can be spent, placing limits on the entities or individuals who can receive state funds.<sup>159</sup> Notwithstanding these limitations, with few exceptions, state courts have tended to shy away from a direct conflict with the legislature over its appropriation authority.<sup>160</sup> To intervene in the budget process generally has been seen as tantamount to political suicide, with the possible exception of funding for public education.<sup>161</sup> Litigation involving this matter is not based on specific constitutional limits placed on the legislature's appropriation authority, but rather on affirmative commands that a state provide an appropriate free education,<sup>162</sup> or on a state's violations of equal protection.<sup>163</sup>

There are four principal provisions found in state constitutions that limit the spending powers of state legislatures. First, many states are required to maintain a balanced budget.<sup>164</sup> Forty-three

159. See, e.g., HAW. CONST. art. VII, § 4 (“No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. No grant shall be made in violation of Section 4 of Article I of this constitution. No grant of public money or property shall be made except pursuant to standards provided by law.”); MO. CONST. art. I, § 7 (“That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.”); VA. CONST. art. IV, § 16 (“The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society . . .”).

160. See, e.g., *Pataki v. N.Y. State Assembly*, 774 N.Y.S.2d 891, 894 (N.Y. App. Div. 2004) (finding that the court should not “immerse” itself in the political process of formulating the state budget; “defendants’ proper constitutional action was to refuse to pass plaintiffs’ appropriation bills and induce negotiations”).

161. See, e.g., *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1360 (N.H. 1997) (holding the then-current system of financing elementary and secondary public education was unconstitutional); *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516, 519 (Mass. 1993) (holding that the state constitution imposes an affirmative duty on the Commonwealth to provide adequate public education); *DeRolph v. State*, 677 N.E.2d 733, 745 (Ohio 1997) (finding that certain provisions of the elementary and secondary school financing system violated the Ohio constitution).

162. See, e.g., *Montoy v. State*, 112 P.3d 923, 939–40 (Kan. 2005) (directing the legislature to increase annual school funding to \$285 million, and rejecting the state’s additional appropriation of \$142 million as inadequate because there was no study or other evidence to support it).

163. See, e.g., *Brigham v. State*, 692 A.2d 384, 397 (Vt. 1997) (holding that the present system of financing public schools had fallen short of providing every school-age child an equal educational opportunity).

164. See Ronald K. Snell, *State Balanced Budget Requirements: Provisions and Practice* (2004), <http://www.ncsl.org/programs/fiscal/balbuda.htm>. One result of these provisions is that states have increasingly relied on federal funding to support state-based programs. The combined effect of balanced budget requirements and low-tax demands of citizens has made states heavily reliant on deficit-allowed federal spending. This reliance

states require the governor to present a balanced budget to the legislature.<sup>165</sup> Forty states require the legislature to adopt a balanced budget.<sup>166</sup> Thirty-eight states prohibit the carrying of a deficit from one fiscal cycle to the next.<sup>167</sup> These restrictions rarely, if ever, give rise to judicial intervention. When state courts confront balanced budget disputes, they exclusively defer to state legislatures and executives to decide the priorities and reallocation of money.<sup>168</sup>

Second, many state constitutions impose constitutional restrictions regarding the manner in which the legislature constructs its spending bills.<sup>169</sup> These restrictions are frequently expressed in the principle that a legislature cannot legislate through appropriations and the principle that appropriations must be made for a

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has skewed the "true cost of ownership of state government" by shifting a significant portion of financing state operations to the federal budget. For example, Ohio's biennium budget for 2008–2009 has 21.6% of estimated revenues coming from federal funds. See OFFICE OF BUDGET AND MANAGEMENT, STATE OF OHIO EXECUTIVE BUDGET FOR FISCAL YEARS 2008 AND 2009, C-3 (2009), available at [http://www.obm.ohio.gov/budget/operating/executive/0809/bb0809\\_c.pdf](http://www.obm.ohio.gov/budget/operating/executive/0809/bb0809_c.pdf). Some 37% of North Dakota's 2007–2009 biennium budget comes from federal funds. STATE OF NORTH DAKOTA, LEGISLATIVE APPROPRIATIONS 2007–2009 BIENNIUM 15 (2009), available at <http://www.nd.gov/fiscal/docs/budget/appropbook2007-09.pdf>. This means of financing has given the federal government a much larger role to play in defining and controlling the domestic agendas of the states under its spending powers. See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (upholding Congress's authority to indirectly regulate state drinking ages through spending power, stating that "Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directive'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980))); see also *United States v. Butler*, 297 U.S. 1, 65–66 (1936) (finding that under the spending clause "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by direct grants of legislative power found in the Constitution," and objectives not thought to be within Article I's enumerated legislative powers may nevertheless be attained through the use of the spending power and the conditional grant of federal funds).

165. See *Snell*, *supra* note 164.

166. *Id.*

167. *Id.*; cf. *Employers Ins. Co. v. State Bd. of Exam'rs*, 21 P.3d 628, 634 (Nev. 2001) (finding that the state is liable under the terms of the lease only for payments for which the legislature made appropriations, and that if the legislature fails to appropriate money for lease payments in subsequent years, the state has no liability).

168. See, e.g., *Judy v. Schaefer*, 627 A.2d 1039, 1049 (Md. 1993) (holding that the governor's power to reduce appropriations under Maryland Code section 7-213 is consistent with the power of the governor in the budgetary process and is necessary to carry out the balanced budget requirement of the constitution); *Bd. of Educ. v. Kean*, 457 A.2d 59, 63 (N.J. Super. Ct. Ch. Div. 1982) (holding that the constitution requires a balanced budget and that when expenditure cuts are required to achieve a balanced budget, the responsibility belongs to the legislature and the governor).

169. See, e.g., COLO. CONST. art. V, § 32; LA. CONST. art. III, § 16(C); PA. CONST. art. III, § 11; WASH. CONST. art. II, § 19.

specific, not general or undefined, purpose.<sup>170</sup> Such constitutional limitations have given rise to a number of cases requiring state courts to confront a range of attempts to legislate through appropriations.<sup>171</sup> Due to the explicit nature of these restrictions, state courts have been less deferential to legislative attempts to meld the appropriations process with substantive acts of lawmaking.<sup>172</sup>

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170. See, e.g. KAN. CONST. art. II, § 24 (“No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law.”).

171. See *infra* note 172.

172. See *Alaska Legis. Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001) (“[T]o satisfy the confinement clause, the qualifying language [in a bill] must be the minimum necessary to explain the Legislature’s intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.” (citation omitted)); *Colo. Gen. Assembly v. Owens*, 136 P.3d 262, 266 (Colo. 2006) (“A general appropriations bill may only contain appropriations for the expenses of the executive, legislative, and judicial departments of the state, state institutions, interest on the public debt, and public schools. The legislature is prohibited from including substantive legislation in a general appropriations bill.” (citations omitted)); *Turnbull v. Fink*, 668 A.2d 1370, 1383 (Del. 1995) (“If an appropriation act contains substantive, non-financial legislation, it then becomes precisely the kind of omnibus bill the single-subject and title rules were meant to prohibit.”); *Thompson v. Graham*, 481 So. 2d 1212, 1214 (Fla. 1985) (“The term ‘appropriation’ act obviously would not include an act of general legislation; and a bill proposing such an act is not converted into an appropriation bill simply because it has engrafted upon it a section making an appropriation. An appropriation bill is one the primary and specific aim of which is to make appropriations of money from the public treasury.” (quoting *Bergzon v. Sec’y of Justice*, 299 U.S. 410, 413 (1937))); *Henry v. Edwards*, 346 So. 2d 153, 156–57 (La. 1977) (“[A] general appropriation bill [is] a particular type of legislation which is specifically addressed in La. Const. art. 3, § 16(c) and which differs in nature and scope from other legislative pronouncements . . . . The general appropriation bill shall be *itemized* and shall contain *only* appropriations for the ordinary expenses of government, public charities, pensions, and the public debt or interest thereon.” (quoting LA. CONST. art. III, § 16(c))); *Opponents of Prison Site, Inc. v. Carnahan*, 994 S.W.2d 573, 580 (Mo. Ct. App. 1999) (“[A]n appropriation bill is limited to appropriating state funds . . . . [A] general appropriation bill, containing appropriation for numerous unrelated state activities, cannot amend substantive legislation . . . .” (citing *Rolla 31 Sch. Dist. v. State*, 837 S.W.2d 1, 4 (Mo. 1992))); *Hosp. & Healthsystem Ass’n v. Dep’t of Pub. Welfare*, 828 A.2d 1196, 1201 (Pa. Commw. Ct. 2003) (stating that the constitution mandates that “a general appropriation bill shall embrace nothing but appropriations for the executive, legislative and judicial departments of the Commonwealth, for the public debt and for public schools” (citing PA. CONST. art. III, § 11)), *rev’d and remanded by Hosp. & Healthsystem Ass’n v. Dep’t of Pub. Welfare*, 888 A.2d 601 (Pa. 2005); *S.D. Educ. Ass’n v. Barnett*, 582 N.W.2d 386, 391–92 (S.D. 1998) (holding that a section of an appropriations bill effecting a substantive change in law violated the constitution); *Retired Pub. Employees Council v. Charles*, 62 P.3d 470, 485 (Wash. 2003) (prohibiting appropriations bills from defining rights or altering existing laws (citing *Serv. Employees Int’l Union Local 6 v. Superintendent of Pub. Instruction*, 705 P.2d 776, 781 (Wash. 1985))); *Common Cause v. Tomblin*, 413 S.E.2d 358, 401 (W. Va. 1991) (Miller, C.J., dissenting) (“We have rejected the notion that the legislature can amend or abolish specific statutes through the budget.”).



Third, state constitutions can impose on a legislature limits concerning the purposes to which appropriations can be committed. Such restrictions are expressed as “public purpose” limitations, which are intended to prevent state legislatures from diverting public money to private purposes.<sup>173</sup> What constitutes a “public purpose” can be a source of controversy, and has been the subject of significant litigation.<sup>174</sup> Generally, an appropriation must “confer[ ] a direct public benefit of a reasonably general character . . . to a significant part of the public, as distinguished from a remote and theoretical benefit.”<sup>175</sup> The appropriation must implicate state police powers and have for its objective the promotion of public health, safety, morals, security, prosperity, contentment, and the general welfare of the community.<sup>176</sup> In most cases, courts have viewed the legislatures’ determinations of “public purpose” broadly,<sup>177</sup> sustaining a wide range of expendi-

173. See, e.g., MONT. CONST. art V, § 11(5) (“No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.”). Additional public purpose limitations are expressed in terms of limiting support for religious institutions. See, e.g., PA. CONST. art. III, § 29 (“No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association . . .”). Some courts have implied a “public purpose” limitation on the theory that taxes are an involuntary means for funding government operations and corresponding expenditures are limited to the underlying purpose of taxation. See, e.g., *Ennis v. State Highway Comm’n*, 108 N.E.2d 687, 697 (Ind. 1952) (“It is implied in all definitions of taxation that taxes can be levied for public purpose only.” (quoting *State ex. rel. Jackson v. Middleton*, 19 N.E.2d 470, 475 (Ind. 1939))).

174. See, e.g., Dale F. Rubin, *Public Aid to Professional Sports Teams—A Constitutional Disgrace: The Battle To Revive Judicial Rulings and State Constitutional Enactments Prohibiting Public Subsidies to Private Corporations*, 30 U. TOL. L. REV. 393, 402–08 (1999) (discussing the controversy over giving public money to professional sports teams and the rationale for prohibiting public aid to private corporations). Outside of the general “public purpose” requirement, state legislatures are also subject to very specific restrictions on the use of state revenues. See, e.g., WASH. CONST. art. II, § 40 (providing that state highway tax revenue must be deposited into a special fund and used only for the maintenance of the state’s roads).

175. Opinion of the Justices, 150 N.E.2d 693, 697 (Mass. 1958).

176. *Platte Valley Pub. Power & Irrigation Dist. v. Lincoln County*, 14 N.W.2d 202, 205 (Neb. 1944); *State ex rel. McClure v. Hagerman*, 98 N.E.2d 835, 838 (Ohio 1951); *Blumenthal v. City of Cheyenne*, 186 P.2d 556, 561–62 (Wyo. 1947) (quoting *Fritz v. Presbrey*, 116 A. 419, 421 (R.I. 1922)).

177. See *Cal. Ass’n of Retail Tobacconists v. State*, 135 Cal. Rptr. 2d 224, 243 (Cal. Ct. App. 2003) (holding that a restriction on expenditures of public money for public purposes must be read broadly and does not prohibit the legislature from appropriating money to private efforts that serve a public benefit (citing JOSEPH R. GRODIN ET AL., *THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE* 280–81 (1993))); *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331, 337 (Minn. 1978) (finding that “great deference” is to be paid to a legislative determination that expenditures serve a public purpose); *State ex rel. Zillmer v. Kreutzberg*, 90 N.W. 1098, 1105 (Wis. 1902) (“[I]f a public purpose can be

tures, including money for private development.<sup>178</sup> However, in a number of cases, courts have also struck down legislative attempts to divert public money to seemingly private ventures.<sup>179</sup> As the Supreme Court of North Carolina has observed,

The General Assembly has declared in the Act that the financing and construction of hospital facilities is a public purpose for which public money may be expended and that the enactment of this Act is necessary and proper for effectuating the purposes therein set forth. *Such an expression of opinion by the General Assembly is entitled to, and is always given, great weight by this Court, but it is not conclusive.* It is the duty and prerogative of this Court to determine whether an appropriation of tax funds is for a purpose forbidden by the Constitution of the State when, as here, that question is properly raised.<sup>180</sup>

Finally, a state constitution can impose limits on the legislature's ability to pledge a state's credit for purposes unrelated to public needs.<sup>181</sup> For example, Article II, section 31 of the Tennessee Constitution provides,

The credit of this State shall not be hereafter loaned or given to or in aid of any person, association, company, corporation or municipality: nor shall the State become the owner in whole or in part of any bank or a stockholder with others in any association, company, corporation or municipality.<sup>182</sup>

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conceived which might rationally be deemed to justify the act, the court cannot further weigh the adequacy of the need of the wisdom of the method.”)

178. See *Minn. Hous. Fin. Agency v. Hatfield*, 210 N.W.2d 298, 307–08 (Minn. 1973) (holding the construction of low and moderate income housing by nonpublic agencies is a valid public purpose); *City of Pipestone v. Madsen*, 178 N.W.2d 594, 603–04 (Minn. 1970) (holding that construction of industrial facilities in a blighted area and leased on a long term lease to a private corporation is a public purpose); *Visina v. Freeman*, 89 N.W.2d 635, 649–50 (Minn. 1958) (holding the construction of port facilities might have some private benefits, but primarily served a public purpose); *Cent. Lumber Co. v. City of Waseca*, 188 N.W. 275, 275 (Minn. 1922) (holding that the operation of a lumber and coal yard is a public purpose); *Citizens for More Important Things v. King County*, 932 P.2d 135, 137 (Wash. 1997) (holding that the expenditure of public funds on preconstruction costs to build a sports stadium is a public purpose).

179. See, e.g., *O'Neill v. Burns*, 198 So. 2d 1, 4–5 (Fla. 1967) (holding that disbursement of state funds to the non-profit organization was not permissible because it was an incidental, rather than primary, benefit to the public).

180. *Foster v. N.C. Med. Care Comm'n*, 195 S.E.2d 517, 527 (N.C. 1973) (emphasis added) (holding that the expenditure of public money to finance a not-for-profit hospital was not a public purpose within the meaning of the constitution).

181. Constitutional restrictions on pledging the state's credit for private purposes began emerging in the mid-1800s in reaction to many failed state-financed private ventures. For a general discussion of the history of this constitutional prohibition in Maryland, see *Johns Hopkins Univ. v. Williams*, 86 A.2d 892 (Md. 1952).

182. TENN. CONST. art. II, § 31.

Other state constitutions contain similar restrictions.<sup>183</sup> Disputes concerning such restrictive provisions tend to dovetail with the "public purpose" requirement; that is, the credit of a state cannot be pledged to benefit private interests any more than tax revenue can be diverted to private ventures. However, there is no fixed standard of what constitutes a pledge of state credit for a non-public benefit.<sup>184</sup> Consequently, state courts have taken a fairly liberal view in resolving such cases and have found that it is permissible to issue public debt to finance safety improvements in nursing homes,<sup>185</sup> parks and stadiums,<sup>186</sup> and private redevelopment.<sup>187</sup>

## 2. Limitations on Spending and Taxing

Although related to the state legislature's appropriation power, spending and taxing limits are discrete because they impose substantive restrictions on the ability of the legislature to generate revenue and to spend revenue. In the latter part of the twentieth century, initiatives in various states imposed a series of constitutional restrictions on the legislatures' authority to tax and

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183. See IND. CONST. art. 10, § 5 ("No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: To meet casual deficits in the revenue; to pay the interest on the State Debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense."); MO. CONST. art. III, § 37 ("The general assembly shall have no power to contract or authorize the contracting of any liability of the state, or to issue bonds therefore . . ."); PA. CONST. art. VIII, § 8 ("The credit of the Commonwealth shall not be pledged or loaned to any individual, company, corporation or association nor shall the Commonwealth become a joint owner or stockholder in any company, corporation or association.").

184. Many state courts distinguish lending the state's money from lending the state's credit. See *State ex rel. Wis. Dev. Auth. v. Dammann*, 280 N.W. 698, 715 (Wis. 1938) (holding "that the giving or loaning of the credit of the state . . . occurs only when such giving or loaning results in the creation by the state of a legally enforceable obligation on its part to pay to one party an obligation incurred or to be incurred in favor of that party by another party"); see also *Fairbank v. Stratton*, 152 N.E.2d 569, 570, 573 (Ill. 1958) (holding that the state treasurer could lawfully purchase revenue bonds issued by the Metropolitan Fair and Exposition Authority, as this constituted a loan, not the pledging of the state's credit). For an extensive discussion on the difference between lending state money and pledging state credit, see *Utah Tech. Fin. Corp. v. Wilkinson*, 723 P.2d 406 (Utah 1986).

185. See *Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 202 (Pa. 1975).

186. See *Kelly v. Marylanders for Sports Sanity, Inc.*, 530 A.2d 245, 257 (Md. 1987); *Libertarian Party of Wis. v. State*, 546 N.W.2d 424, 440 (Wis. 1996).

187. See *Utah Hous. Fin. Agency v. Smart*, 561 P.2d 1052, 1055-56 (Utah 1977); see also *State ex rel. Bd. of County Comm'rs v. Zupancic*, 581 N.E.2d 1086, 1089 (Ohio 1991) (holding that construction of low income rental housing was construction for industry and commerce, and thus permissible under the constitution).

spend in order to restrict the growth of state government.<sup>188</sup> The restrictions generally followed one of two patterns: (1) specific spending limits<sup>189</sup> or (2) limits on the legislatures' taxing power.<sup>190</sup> In some states, the two methods were combined.<sup>191</sup> Additional limitations included requirements that revenue collections exceeding constitutionally permissible spending levels be refunded,<sup>192</sup> and that any proposed tax in excess of a constitutionally specified limit be approved by voters.<sup>193</sup> Some states also imposed restrictions on the legislatures' authority to shift spending obligations to units of local governments as a means of circumventing voter-imposed spending limits.<sup>194</sup> Combined with balanced budget requirements, these restrictions became potent limitations on state legislatures and their spending and taxing powers.<sup>195</sup> In some cases, they contributed to budget crises as revenues declined in hard economic times and state obligations grew disproportionate to the revenue available.<sup>196</sup> Restrictions have also contributed to significant litigation in those states having such limitations.<sup>197</sup>

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188. See, e.g., COLO. CONST. art. X, § 20(7)–(8).

189. See, e.g., MO. CONST. art. X, § 20.

190. See, e.g., *id.* § 18(a).

191. See, e.g., *id.* §§ 18(a), (20); see also COLO. CONST. art. X, § 20.

192. See, e.g., MO. CONST. art. X, § 18(b); OR. CONST. art. IX § 14(3).

193. See, e.g., MO. CONST. art. X, § 18(e)(1).

194. See, e.g., *id.* § 21.

195. See, e.g., David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2638–39 (2005). They also arguably spurred “creative” financing of state programs and projects to circumvent the limitations, at times added by state courts. See NICHOLAS JOHNSON ET. AL., CTR. ON BUDGET & POLICY PRIORITIES, COLORADO'S FISCAL PROBLEMS HAVE BEEN SEVERE AND ARE LIKELY TO CONTINUE: COLORADO'S STRINGENT “TABOR” LIMIT HAS WORSENERED THE PROBLEMS 4 (2004), <http://www.cbpp.org/3-17-04sfp.pdf>.

196. See Ronald K. Snell, *Nuts and Bolts of TABOR*, STATE LEGISLATURES, Jan. 2005, at 24, 24–25, available at [http://www.ncsl.org/programs/pubs/slmag/2005/05SLJan\\_CoTaborAmendment.pdf](http://www.ncsl.org/programs/pubs/slmag/2005/05SLJan_CoTaborAmendment.pdf); see also Super, *supra* note 195, at 2638–39.

197. A discussion of the extent of the litigation involving taxing and spending limits is beyond the scope of this article. However, in states having such limits, significant litigation has arisen concerning the definition of various terms, the nature of ballot language to increase or decrease taxes, and the extent to which the limits apply to alternative legislative funding schemes. See, e.g., Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1, 15 (Colo. 1993) (holding that the state constitution prohibits the general assembly from limiting revenues collected by the gaming commission, but that the general assembly could decrease revenues collected elsewhere or refund the surplus to taxpayers).

### 3. The Bill Enacting Process—The Single Subject Rule

Many state constitutions require that a bill embrace but one subject, the so-called "single subject rule."<sup>198</sup> The rule was designed to prevent the combining of non-germane measures into one bill—measures that would not otherwise pass on their own merit and thus required the political advantage of being combined with more popular measures.<sup>199</sup> In Michigan, the practice was known as "logrolling."<sup>200</sup> Minnesota courts have referred to such bills as "Christmas tree[s]."<sup>201</sup> In other states, specific case names have been used to describe the practice, such as in Missouri, where a multiple non-germane subject bill is described as having a "*Hammerschmidt* problem."<sup>202</sup> The single subject rule is supported by the corollary principle in some states that "no bill shall be so amended in its passage through either house as to change its original purpose."<sup>203</sup>

Over the years, state courts have faced numerous challenges to various legislative measures on the grounds that the enacting process violated the single subject rule. Courts in many states have taken a fairly liberal view of the single subject rule, holding that to meet the requirement the contents of a bill need only have a general relationship to the bill's title.<sup>204</sup> Consequently, state legislatures have historically enjoyed relative freedom in constructing the title and contents of bills, and state courts have arguably aided and abetted lax compliance with this constitutional

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198. See, e.g., GA. CONST. art. III, § 5, para III; LA. CONST. art. III, § 15(A); MINN. CONST. art. IV, § 17; see also Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 822 fig.2 (2006).

199. *People ex rel. Drake v. Mahaney*, 13 Mich. 481, 494 (1865).

200. *Rohan v. Detroit Racing Ass'n*, 22 N.W.2d 433, 444 (Mich. 1946).

201. *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 785 (Minn. 1986) (Yetka, J. concurring) ("A Christmas tree bill has normally been referred to, in legislative jargon, as a bill so drafted as to give a number of legislators approval of their separate or pet projects in order to gather sufficient votes to pass it.").

202. See S. 91-76, 2d Sess., at 1860 (Mo. 2002), available at <http://www.senate.mo.gov/02info/journals/Day76.htm>. (referencing *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. 1994) ("Consistent with these rules of construction, the words 'one subject' must be broadly read, but not so broadly that the phrase becomes meaningless.")).

203. MO. CONST. art. III, § 21.

204. *Johnson v. Harrison*, 50 N.W. 923, 924-25 (Minn. 1891). Minnesota courts have gone so far as to hold that the provisions of a bill need only have a "filament" of commonality with the title. *Blanch v. Suburban Hennepin Reg'l Park Dist.*, 449 N.W.2d 150, 155 (Minn. 1989).

limitation.<sup>205</sup> In so doing, state judiciaries have avoided direct confrontation with state legislatures over what many legislators view as a matter exclusively connected to the internal legislative process, notwithstanding the explicit terms of a constitution.<sup>206</sup>

Not all state courts, however, have been willing to concede that the contents of legislative acts need only be tied together by a filament. Consequently, state courts have struck down laws related to sentencing guidelines,<sup>207</sup> revenue,<sup>208</sup> administrative rule-making by state agencies,<sup>209</sup> zoning and ethics and election reform,<sup>210</sup> economic development and livestock indemnification,<sup>211</sup> allocation of space in a state capitol and water rights,<sup>212</sup> crime,<sup>213</sup> and tort reform.<sup>214</sup> Even Minnesota, a state that historically applied one of the most liberal understandings of the single subject rule, held in 2000 that the state legislature violated the rule by including in a tax bill a requirement that laborers on certain construction projects be paid a prevailing wage.<sup>215</sup> The single subject rule stands as a pointed example of state constitutional limitations that implicate not only the substance of legislative power, but also the exercise of that power at its most elemental level: the procedure of constructing legislation.

205. See, e.g., *San Joaquin Helicopters v. Dep't of Forestry*, 3 Cal. Rptr. 3d 246, 251, 254 (Cal. Ct. App. 2003) (concluding that although an exemption from the Administrative Procedure Act was enacted as part of a surplus property bill, the single subject rule was not violated).

206. The Supreme Court of Ohio observed, "[T]his court has consistently expressed its reluctance to interfere with the legislative process . . ." *State ex rel. Dix v. Celeste*, 464 N.E.2d 153, 157 (Ohio 1984), *limited by Simmons-Harris v. Guff*, 711 N.E.2d 203, 216 (Ohio 1999) (modifying *Dix* "to ensure that it is not read to support the position that a substantive program created in an appropriations bill is immune from a one-subject-rule challenge as long as funds are also appropriated for that program"), *rev'd* 536 U.S. 639 (2002).

207. *Heggs v. State*, 759 So. 2d 620, 622, 627 (Fla. 2000).

208. *In re House Bill No. 1353*, 738 P.2d 371, 372-74 (Colo. 1987).

209. *Kincaid v. Mangum*, 432 S.E.2d 74, 76, 82 (W. Va. 1993).

210. *State v. Prince Georgians for Glendening*, 617 A.2d 586, 587, 589 (Md. 1992).

211. *Carmack v. Mo. Dep't of Agric.*, 945 S.W.2d 956, 957-59, 961 (Mo. 1997).

212. *Johnson v. Walters*, 819 P.2d 694, 695, 698 (Okla. 1991).

213. *Johnson v. Edgar*, 680 N.E.2d 1372, 1374-75, 1381 (Ill. 1997).

214. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1097, 1101 (Ohio 1999).

215. *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 295, 302-03 (Minn. 2000).

#### 4. Special and Local Laws

There is no constitutional prohibition on Congress's power to enact special laws.<sup>216</sup> By contrast, many state constitutions prohibit legislatures from adopting special and local laws.<sup>217</sup> What constitutes a prohibited special law has been the subject of significant litigation. A special law is generally defined as "one relating to, or designed to operate upon, particular persons or things, or one that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal."<sup>218</sup> A local law is defined as "one relating to, or designed to operate only in, a specifically indicated part of the state, or one that purports to operate within classified territory when classification is not permissible or the classification adopted is illegal."<sup>219</sup>

The restriction on special and local laws serves two purposes. First, it is intended to prevent an irregular system of laws that lacks uniformity or grants special legal preferences to particular classes or individuals.<sup>220</sup> Second, it is closely connected to the concept that all residents of a state should enjoy equal protection of law.<sup>221</sup> Some states do permit special laws when a general law

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216. See, e.g., Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005). For a general discussion of this law, see Steven G. Calabresi, *The Terri Schiavo Case: In Defense of the Special Law Enacted by Congress and President Bush*, 100 NW. U. L. REV. 151 (2006). Cf. Arakaki v. Lingle, 423 F.3d 954 (9th Cir. 2005) (noting that Congress could enact special laws to govern public lands in Hawaii), *overruled in part* by Daniel Chrysler Corp. v. Cuno, 547 U.S. 332, 346 (2006).

217. See, e.g., City of S. Bend v. Kimsey, 781 N.E.2d 683, 684 (Ind. 2003).

218. State *ex rel.* Landis v. Harris, 163 So. 237, 240 (Fla. 1934) (citations omitted). The Supreme Court of Missouri has defined a special law as one based on "immutable characteristics" such as "historical facts, geography, or constitutional status." Tillis v. City of Branson, 945 S.W.2d 447, 449 (Mo. 1997). A special law is facially unconstitutional and the party defending the law must demonstrate "substantial justification" for the disparate treatment. See O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. 1993).

219. Harris, 163 So. at 240 (citations omitted); see also Keiderling v. Sanchez, 572 P.2d 545, 546-47 (N.M. 1977).

220. See Sherwood Sch. Dist. v. Wash. County Educ. Serv. Dist., 6 P.3d 518, 523-24 (Or. Ct. App. 2000) (articulating the purpose of the special law restriction in Oregon). The reasons articulated by the Oregon court are generally applicable to all states with such limitations.

221. See County of Bureau v. Thompson, 564 N.E.2d 1170, 1181 (Ill. 1990) (holding that "a law is an unconstitutional special law if there is no rational explanation for why that law cannot be applied to all persons or entities in the State"); Bilyk v. Chi. Transit Auth., 531 N.E.2d 1, 3 (Ill. 1988) (stating that a person or class of persons is denied equal protection when a statute arbitrarily discriminates against that person or class of persons by withholding a benefit or privilege which the state gives to all others).

is not appropriate.<sup>222</sup> In some states, courts give a narrow interpretation to such constitutional restrictions while giving great deference to a legislature's classification of its acts.<sup>223</sup> In other states, courts have read the restriction less deferentially, holding that a special law is presumptively invalid in the absence of significant evidence that a general law does not apply.<sup>224</sup>

Florida courts have been particularly vigilant in this area, observing that "we must also recognize that . . . the Legislature is constitutionally barred from passing general laws that impact only specific parties or areas of the state unless constitutional requirements are met."<sup>225</sup> The Supreme Court of Florida has struck down numerous legislative acts, finding in one instance that a "general statute" was so narrowly tailored to a specific location that it constituted a special law adopted for the benefit of a particular entity.<sup>226</sup> Similarly, the Supreme Court of Missouri struck down a general law creating special boundary commissions, finding the law so narrowly tailored that it could only apply to certain areas of the state, to the exclusion of the rest of the state.<sup>227</sup> Additionally, the Supreme Court of Oklahoma struck down a law that conditioned the filing of a medical malpractice action on the plaintiff filing an affidavit of merit.<sup>228</sup> In so doing, the court found that the statutory requirement as applied to medical malpractice plaintiffs was "underinclusive and special," in effect singling out a discrete set of tort litigants and imposing on them distinctive requirements as a precondition to accessing the courts.<sup>229</sup>

222. See e.g., UTAH CONST. art. VI, § 26; *State v. Bishop*, 717 P.2d 261, 265 (Utah 1986) (holding the constitution permits special laws in limited circumstances to achieve reasonable and legitimate state ends).

223. See *Med. Soc'y of S.C. v. Med. Univ. of S.C.*, 513 S.E.2d 352, 357 (S.C. 1999) (holding a law is not unconstitutional as a special law "unless its repugnance to the [c]onstitution is clear beyond a reasonable doubt").

224. See *Harris v. Mo. Gaming Comm'n*, 869 S.W.2d 58, 65 (Mo. 1994) (holding that a "party defending [a] facially special statute must demonstrate a 'substantial justification' for the special treatment").

225. *Fla. Dep't of Bus. & Prof'l Regulation v. Gulfstream Park Racing Ass'n*, 967 So. 2d 802, 808 (Fla. 2007).

226. *St. Vincent's Med. Ctr., Inc. v. Mem'l Healthcare Group, Inc.*, 967 So. 2d 794, 801-02 (Fla. 2007).

227. *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. 1993). The court also noted that under the Missouri constitution, "no special law may take effect 'where a general law can be made applicable.'" *Id.* at 99 (quoting MO. CONST. art. III, § 40(30)).

228. *Zeier v. Zimmer, Inc.*, 152 P.3d 861, 862-63 (Okla. 2006).

229. *Id.* at 868. The court also found that the provisions of the statute acted as a monetary bar to access to the courts in violation of the open courts provisions of the state constitution. See *id.* at 869.



Other state courts have found similar legislative acts unconstitutional as special laws.<sup>230</sup>

### C. *Initiative and Referendum*

Many state constitutions provide for a direct voter check on legislative power known as initiative and referendum.<sup>231</sup> No discussion concerning limitations on state legislative power is complete without at least a passing reference to these processes. Initiative and referendum involve two separate means of constitutional limitation on legislative power. Initiative allows voters to adopt directly constitutional amendments and laws, disregarding the traditional legislative process.<sup>232</sup> Referendum allows voters to repeal legislative acts or permits the legislature to refer specific legislative or constitutional matters directly to the voters.<sup>233</sup> Initiative and referendum buttress the proposition that state legislative power derives from the people not by delegation, but subject to limitation. As the Supreme Court of Arizona observed,

Although our constitution vests legislative authority "in a Legislature, . . . the people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature; and they

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230. See, e.g., *Keiderling v. Sanchez*, 572 P.2d 545, 547 (N.M. 1977) (holding that a law creating special judicial disqualifications provisions for a specific district is unconstitutional); *Pa. Tpk. Comm'n v. Commonwealth*, 899 A.2d 1085, 1087 (Pa. 2006) (holding that a law singling out the Pennsylvania Turnpike Commission and mandating collective bargaining is unconstitutional); *City of South Bend v. Kimsey*, 781 N.E.2d 683, 684, 697 (Ind. 2003) (holding that a law creating special annexation procedures for limited communities is unconstitutional).

231. Twenty-seven states have some form of initiative and referendum. See INITIATIVE AND REFERENDUM INSTITUTE, STATE-BY-STATE LIST OF INITIATIVE AND REFERENDUM PROVISIONS, [http://www.iandrinstute.org/statewide\\_i&r.htm](http://www.iandrinstute.org/statewide_i&r.htm) (last visited Dec. 11, 2008). Two states allow initiative of constitutional amendments only. See *id.* Three states have referendum only. See *id.* It is generally accepted that South Dakota was the first state to adopt the initiative and referendum process. Nathaniel A. Persily, Comment, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 16 (1997).

232. WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 52 (8th ed. 1993). Initiative has two subcomponents: (1) citizens can initiate a constitutional change through a ballot measure, or (2) citizens can initiate substantive legislation through a ballot measure. See *id.*

233. See *id.* at 52–53. Referendum has two subcomponents: (1) citizens can seek to repeal an act of the legislature, or (2) the legislature can refer a matter to a vote of the people. See *id.*

also reserve . . . the power to approve or reject at the polls any Act, or item, section, or part of any Act of the Legislature.”<sup>234</sup>

Many state constitutions give legislatures some control over the process of initiative and referendum in order “to secure the purity of elections, and guard against abuses of the elective franchise.”<sup>235</sup> A legislature’s authority to adopt legislation directed at regulating the initiative and referendum process must be balanced against the particular right reserved by the people. Regulatory legislation must “‘facilitate the operation’ [of the process]”<sup>236</sup> and may not create unreasonable barriers or interfere with the reserved power.<sup>237</sup> State courts thus find themselves balancing the legislature’s constitutional obligation to secure the integrity of the electoral process with a right specifically reserved by the people to directly reject legislative acts or to initiate substantive changes to the law independent of the legislature.<sup>238</sup>

## V. CONCLUSION

Throughout the history of the United States, the policy function of the judiciary has been analyzed largely through the role that federal courts have played in governing the nation. Little attention has been paid to the unique function that state courts play in this arena, or the many and varied state constitutional provisions that implicate both the legislative policymaking process and judicial review of that process. This lack of attention not only underrates the significant contribution of state courts in resolving many pressing policy questions, but it also discounts

234. *Fairness & Accountability in Ins. Reform v. Greene*, 886 P.2d 1338, 1340–41 (Ariz. 1994) (quoting ARIZ. CONST. art. IV, pt. 1, § 1).

235. See WYO. CONST. art. 6, § 13.

236. See *Nevadans for Prop. Rights v. Heller*, 141 P.3d 1235, 1240 (Nev. 2006) (quoting NEV. CONST. art. 19, § 5).

237. See *State ex rel. Stenberg v. Moore*, 602 N.W.2d 465, 475–77 (Neb. 1999) (holding a law requiring an exact match of signatures placed on initiative petitions with the voter registration records unconstitutional because it did not facilitate the process or prevent fraud, but rather frustrated the ability of the public to engage in the initiative process).

238. Laws adopted by initiative can generally be repealed by the state legislature. However, a state legislature may not interfere with the right of the people to initiate legislation where that right is reserved in the constitution. See *Gibbons v. Cenarrusa*, 92 P.3d 1063, 1068 (Idaho 2002) (Kidwell, J., concurring) (“A proposed initiative cannot be amended, reviewed, or thwarted by the legislature. The initiative power is reserved to the people and is to be exercised without intrusion by the legislature. It is this power reserved to the people that this Court must adamantly preserve and protect.”).

the principle that state courts perform a different policy function. That function is fundamentally to ensure that virtually unlimited state legislative power remains within the prescribed bounds established by the voters. While choruses of scholars, observers, and pundits have mounted either a spirited defense of judicial review or a spirited repudiation of the principle, few have considered the matter within the context of the role of state courts.<sup>239</sup> Both opponents and proponents of judicial review center their arguments on the federal judiciary and extend these arguments to emerging debates in the states, without contextualizing the exercise of state judicial power within the constitutional framework of each state. Perhaps this has much to do with the public's erroneous perception that the nation's primary judicial power is vested at the federal level. Perhaps it has to do with the stature given to federal courts. Or perhaps it has to do with the inherent conflict between the judiciary's fundamental power in the system of checks and balances, and its seemingly anti-democratic approach to resolving policy questions.<sup>240</sup>

Judicial review in the states is framed by legitimate voter interest in imposing limitations on largely unlimited legislative power. To frame the current debate on the role of the judiciary in policy matters without distinguishing its exercise in the states makes for easy accusations of judicial abuse, and perpetuates a rather monolithic and minimalistic appreciation of the diversity of the American judiciary and the various constitutional regimes that voters have chosen for their states. There is not one constitutional system in the United States any more than there is one jurisprudential tradition. Rather, there are multiple systems and traditions, each presenting a peculiar set of cultural, legal, and

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239. See *Judges in the Culture Wars Crossfire*, 91 ABA J., Oct. 2005, at 44, 46–47. Professor Michael Tigar stated,

Well, I think the biggest threat to judicial independence is once again the executive branch of government. We have a situation in which the executive branch has, first, decided to trivialize the obligations of the United States under treaties such as the Geneva Convention and then, systematically . . . prevent[ed] judicial oversight of the rights of people who are subject to actions such as detention and torture. And it has compounded that by being less than candid with the courts.

*Id.* Professor John McGinnis noted, "Beginning with the Warren court, the judiciary has, at least in some decisions, erased the difference between legislation and interpretation." *Id.* at 46.

240. This proposition ignores the fact that the overwhelming number of judges in the United States are elected in some form. See JUDICIAL SELECTION IN THE STATES, *supra* note 132.

structural dynamics. The policy role of state judiciaries, framed by considerations flowing from their respective constitutions, produces a rich diversity of governing. It is unfortunate that in the current polemic debates over the role of courts in governing the nation, the variety of unique principles and structures emanating from the states is not valued as a critical attribute of federalism and an important qualifier in considering the proper policy role of America's courts.

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