simple plurality of votes have the effect of enhancing the seat shares of majority parties and diminishing the shares of minority parties. Further, considerations of ethnic and racial fairness may be raised if single-member, simple plurality systems have the effect of excluding sizable minority groups from representation.[85]

As James Gardner indicates, current state constitutions have little to offer as a model for the multimember option. In 1970, Illinois abandoned an experiment with cumulative voting aimed at maximizing opportunities for the minority party in multimember house districts. And, in jurisdictions covered by the federal Voting Rights Act, state constitution makers seeking to remedy the perceived evils of single-member districts may confront a claim that multimember districts dilute the voting strength of African-Americans and Hispanics.[86] Although there are some proponents of multimember districts,[87] most reform proposals focus on changes in voting and election practices, such as various forms of proportional representation.[88]

Size

Many state constitutions fix the exact size and ratio of state legislative chambers.[89] The Citizens Conference on State Legislatures raised two difficulties with such provisions.[90] First, some chambers are too big, resulting either in chaotic decision-making or in undue concentration of power in a few dominant leaders. The suggested remedy is downsizing the legislature, particularly the lower house. Second, a constitutionally prescribed number is too inflexible. Virginia permits the legislature to change the size of each chamber within a minimum and maximum.[91] North Dakota authorizes the legislature to fix the number of senators and representatives by statute.[92] However, there is no discernible trend toward downsizing state legislatures either by constitutional amendment or statutory change.

Sessions

"No man's life, liberty or property are safe while the legislature is in session."[93] This popular adage sums up the attitude of distrust and the philosophy of limited government that resulted in the inclusion of constitutional rules designed to rein in the legislature's lawmaking capacity.[94] Such rules include: restricting the legislature to biennial rather than annual sessions; limiting the length of legislative sessions; limiting the compensation of legislators; forbidding the carryover of bills from one session to the next within the same term; granting the governor exclusive power to call special sessions; and restricting the legislature's jurisdiction in special sessions to matters within the scope of the governor's call.[95]

In 1972, the Citizens Conference on State Legislatures made the case for significant change in each of these rules.[96] The costs associated with constitutionalizing constraints on legislative sessions are well documented and include hasty, ill-considered legislation adopted at end-of-session logjams, frequent ad hoc special sessions, vesting significant agenda control in the governor, and fostering strategic use of delay and obstruction to block legislation. Some changes are in place. For example, in 1940, only four state legislatures held annual sessions but, by 1980, forty-three state constitutions authorized annual sessions.[97] Also, thirty-three states now authorize the legislature to call special sessions.[98] But, some are not. For example, thirty-six states retain constitutional limits on the length of regular sessions.[99]

The strongest argument for removing session constraints is that they have not preserved limited government. The regulatory welfare state is a fact of life at the outset of the twenty-first century, and session constraints may diminish the legislature's capacity to deregulate and privatize, as well as to engage in effective oversight of the bureaucracy.

Adjournment and Dissolution

Adjournment of legislative bodies means "the temporary cessation of business, which is to be resumed on the next legislative day or at a time certain . . ."; dissolution signifies the permanent cessation of the legislature's authority.[100] The inclusion in early state constitutions of constitutional provisions governing adjournment and dissolution, expressly vesting the legislative branch with the power to adjourn and dissolve itself, reflects bitter experience with the power of the king and colonial governors to prorogue and dissolve colonial assemblies. In fact, the king's power to dissolve is one of the grievances proferred in Jefferson's indictment of royal abuses in the Declaration of Independence.[101]

Early state framers anticipated strategic use of these powers by each chamber. And so they began to insert provisions, now found in forty-seven states and in the U.S. Constitution,[102] that permit one chamber to adjourn itself only for a limited number of days. When Vermont created a bicameral legislature in 1836, it gave the governor a default power to adjourn the legislature in case the chambers could not agree to adjourn, and this innovation has been adopted in about half of the states.[103]

The next wave of change occurred during the nineteenth century. Framers evidenced their distrust of legislatures by prescribing dissolution rules that limited legislative sessions to a stated number of days. These provisions have led to legislative strategems to evade the letter of the text including expansive notions of "legislative days," when that is the term used in the constitution, as well as the practice of stopping the clock. They have also created end of session log-

jams and encouraged midnight and twenty-four-hour legislation. Twenty-first-century constitution makers would be well advised to eliminate restrictions on the length of legislative sessions.

Processes

Legislative Procedure

Among the most striking features of the evolution of state legislatures is the entrenchment in state constitutions of rules of legislative practice and procedure.[104] Twenty-first-century constitution makers must decide whether to retain, pare, or eliminate these constraints. The purpose of these regulatory provisions is more easily understood in light of their history. In early state constitutions, the legislature is typically afforded broad autonomy: "The Senate shall . . . determine its own rules of proceedings"; "The House of Representatives shall . . . settle the rules and orders of proceeding in their own house."[105] Despite the promise of autonomy suggested by such language, the incorporation of rules of parliamentary law into the constitution began early on.[106] This tendency is illustrated by the constitutional history of Pennsylvania. The earliest Pennsylvania Constitution, the "radical" constitution of 1776, contains several provisions designed to assure openness, deliberation, and accountability in governance by the unicameral legislature: a two-thirds quorum requirement for doing business, a provision calling for open sessions, weekly printing of votes and proceedings during session including recording "the yeas and nays on any question, vote or resolution where any two members require it"; and a provision requiring a formal enacting clause for all laws.[107]

The distrust of the legislature, seen by Jacksonian democrats as an engine for churning out special privileges for interest groups, produced a wave of constitution making in half of the states between 1845 and 1855. These reformers created "a blueprint for the due process of deliberative, democratically accountable government."[108]

These process reforms continued through the period 1864–1879, during which thirty-seven states wrote and ratified new constitutions. As G. Alan Tarr summarized these developments:

> In 1835 Alexis de Tocqueville observed that "the legislature of each state is faced by no power capable of resisting it." But beginning in the 1830s, state constitution makers sought to impose limits on these supreme legislatures. Initially, their restrictions focused on the process of legislation. Some state constitutions required extraordinary majorities to adopt certain types of legislation, under the assumption that it

> would be more difficult to marshal such majorities for dubious endeavors. Others imposed procedural restrictions designed to prevent duplicity and promote greater openness and deliberation, assuming that greater transparency in the legislative process would deter legislative abuses or at least increase accountability for them. Thus, state constitutions mandated that all bills be referred to the committee, that they be read three times prior to enactment, that their titles accurately describe their contents, that they embrace a single subject, that they not be altered during their passage so as to change their original purpose, and so on. Other provisions required that the amendment or revision of laws not proceed by mere reference to their titles, that statutes be phrased in plain language, that taxing and spending measures be enacted only by recorded vote, and, most importantly, that no special laws be enacted where general law was possible. By the end of the nineteenth century, most state constitutions included several of these procedural requirements.[109]

The 1873 Pennsylvania Constitutional Convention, whose primary focus was legislative reform, illustrates Tarr's observations. That convention created an interrelated set of provisions implementing a broad vision of deliberative democracy applicable to each phase if the lawmaking process from drafting legislation to final passage.

Most state constitutions do not follow the Federal model, which has little to say about lawmaking procedures.[110] Instead, like Pennsylvania, they incorporate most of the procedural norms that emerged during the nineteenth century. At the drafting phase, each bill must contain a title that "clearly expresses" the subject matter of the body of the proposed law.[111] In addition to the notice function of the title, each bill, except appropriations, is restricted to "one subject" in order to forestall logrolling and to focus the legislature's attention on discrete policy issues.[112] Values of notice and clarity are furthered by the rule that bills that amend or cross-reference existing laws must include the amended or referenced legislation in their text.[113] Particular rules apply to drafting appropriations measures to ensure notice and bar logrolling.[114] An additional safeguard of clarity stems from the void-for-vagueness doctrine rooted in the due process clause of state and federal constitutions.[115]

Constitutional rules were designed to fix accountability and to enhance participation and deliberation. The state house is directly accountable for originating revenue bills.[116] The committee system is recognized and strengthened by the requirement that all bills be referred to a committee and printed.[117] To prevent surprise and foster public notice, no bill could be altered or amended on its passage through either chamber so as to change its original purpose,[118] and every bill must be read at length and printed before the final vote.[119] Principles

of accountability and majority rule are embedded in the requirement that a majority of each chamber cast a recorded vote on every bill, and that the presiding officer of each chamber authenticate by signature the fact that the measure was approved, and the fact of signing must be entered in the journal.[120]

On the one hand, procedural constraints on the state legislature modify both the plenary-power principle and the specific constitutional text granting the legislature the power to determine its rules and proceedings. Procedural constraints seem to embody a historical and retrospective approach to state constitution making by entrenching the results of yesteryear's controversies. On the other hand, one can view procedural constraints as a collective effort by the people of the several states over a period of two centuries to entrench principles of notice, deliberation, and accountability into the legislative process by stipulating rules of due process for legislative bodies.

If twenty-first-century framers choose to include procedural rules, they must confront whether those rules ought to be enforced by the state judiciary exercising its power of judicial review. In many states, judges have refused to enforce all but a few of these procedural constraints. That is because "a substantial number" of state courts adhere to the "enrolled bill" rule,[121] which prevents any evidence outside the text of the enrolled bill itself from being introduced as evidence showing constitutional violations of rules governing the process of enactment.[122] Thus, rules concerning drafting such as the single subject and clear title rules are reviewable, because a violation can be determined from the text of the enactment. But violations of majority vote, referral to committee, printing and reading, limited session, and similar procedural rules are unchallengeable in a jurisdiction adhering to the enrolled bill rule. The pros and cons of the enrolled bill rule as well as various modifications and exceptions to that rule all share the same policy vice—state courts, not constitution makers, are making fundamental decisions about the enforceability of constitutional norms. Even without the enrolled bill rule, a state court can refuse to enforce procedural rules by holding that judicial intervention violates separation of powers doctrine.[123] Therefore, twenty-first-century constitution makers are well advised to clarify in the text of the state constitution as to whether or not judicial enforcement is contemplated.

Local, Special, or Private Laws

Constitutional rules about local, special, or private legislation are vigorous survivors from the nineteenth century. The language and scope of such constitutional provisions varies.[124] Thirty-one states prohibit the enactment of a local or special law when a general law can be made applicable. Six states bar special or local laws when there is an existing general law on the subject. Thirty-seven

states forbid local or special legislation on certain enumerated subjects. In some states, the legislature may enact special or local laws if published notice of the intention to do so is given[125] or if the affected locality assents.[126]

The policies favoring inclusion of some constitutional barrier to local, special or private laws are concisely expressed in a leading case:

> The inherent vice of special laws is that they create preferences and establish irregularities. As an inevitable consequence their enactment leads to improvident and ill-considered legislation. The members whose particular constituents are not affected by a proposed special law became indifferent to its passage. It is customary, on the plea of legislative courtesy, not to interfere with the local bill of another member, and members are elected and re-elected on account of their proficiency in procuring for their respective districts special privileges in the way of local or special laws. The time which the legislature would otherwise devote to the consideration of measures of public importance is frittered away in the granting of special favors to private or corporate interests or to local communities. Meanwhile, in place of a symmetrical body of statutory law on subjects of general and common interest to the whole people, we have a wilderness of special provisions whose operation extends no further than the boundaries of the particular school district or township or county to which they were made to apply.[127]

Putting these goals into controlling effect is no easy matter. Few state constitutions contain a definition of what is referenced by the term "local," "general," "special," or "private" legislation. Working definitions are found in the Alabama Constitution:

> "A general law is a law which in its terms and effects applies either to the whole state, or to one or more municipalities in the state less than the whole in a class. A general law applicable to such a class of municipalities shall define the class on the laws of criteria reasonably related to the purpose of the law. . . ."
>
> "A special or private law is one which applies to an individual, association, or corporation. A local law is a law which is not a general law or a special or private law."[128]

The Alabama provisions restate rather than resolve the essential problem, however. That problem is the goodness of fit between the classification scheme adopted by the legislature and the purpose of the law. As is the case with regard to enforcement of constitutional rules governing legislative procedures, much turns on the issue of judicial review.

On the one hand, these provisions reflect "an effort to avoid favoritism, discrimination, and inequalities" that arise out of the pulling and hauling of interest groups in the legislative process.[129] Some commentators have recognized that these provisions bear a close resemblance to the Equal Protection Clause of the U.S. Constitution and, as such, offer significant equality guarantees for individuals.[130] On the other hand, leading cases have shown a strong tendency to defer to the legislature's selection of a classification principle.[131] As a result, the legislature can avoid the rule with ease in most jurisdictions. A few constitutions expressly provide that whether a general act is or can be made applicable shall be a matter for judicial determination.[132] It is not clear, however, that even an express provision produces more judicial enforcement of the ban.

Conclusion

The legislative branch is a key institution in a functioning democracy. Representative government is an institutional response to the complex problems and conflicts that emerge in a free society. The legislature's role involves: identifying problems, clarifying goals, and devising means compatible with those goals to solve problems.

Legislative problem-solving involves debate, deliberation, negotiation, and compromise. Those characteristics differentiate legislative policy-making from the alternatives of executive branch dominance and direct democracy.[133] The legislature takes into account diverse values and interests that check and balance the bureaucratic and centralizing tendencies of a dominant executive branch. The legislature's superior information-gathering capacity, greater understanding of the trade-offs among competing policy alternatives, and ability to cut deals are lacking when single-issue propositions are submitted directly to the voters.

The competition for policy-making dominance between and among the electorate as well as the executive, the legislative, and the judicial branches of government is built into the system of checks and balances entrenched in all fifty state constitutions. By careful reflection on the natural history of the evolution of the state legislative branch, twenty-first-century framers can face the challenges of making constitutional choices that channel competing claims over policy making without unduly affecting the dynamic vigor of the competitive process.

Notes

1. National Municipal League, *Model State Constitution* 42 (6th ed., 1963) [Hereafter cited as MODEL].

2. Frank P. Grad and Robert F. Williams, *State Constitutions for the Twenty-first Century*, vol. II (ed. G. Alan Tarr).

3. Ibid.

4. MODEL, supra n. 1, 42.

5. Mass. Const., pt. I, art. 30.

6. Jim Rossi, "Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States," 52 *Vand. L. Rev.* 1167, 1191 (1999).

7. Federalist No. 37, 227 (Robert Scigliano, ed., 2000).

8. Alaska Const., art. III, § 22, 23; Haw. Const., art. IV, § 6; N.J. Const., art. V, § IV, par. 1.

9. *See,* for example, N.J. Const., art I, § IV, par. 2–5.

10. *See,* for example, Fla. Const., art. V, § 2 (a).

11. *See,* for example, Conn. Const., art. II.

12. Rossi, supra n. 6, 1198–2000.

13. Arthur Earl Bonfield, *State Administrative Rule Making,* 506 (1986).

14. Va. Const., art. IX, § 2.

15. Two states provide for the appointment of a joint committee between sessions with power to suspend administrative regulations until the legislature reconvenes. Mich. Const., art. IV, § 37; S. Dak. Const., art. III, § 30. Iowa and New Jersey require a concurrent resolution to overturn or modify a regulation. Iowa Const., art. III, § 40; N.J. Const., art. 5, § 4 par. 6.

16. Conn. Const., art. 2.

17. For a thoughtful presentation pro and con, *see* Bonfield supra, n. 13, 457–60, 507–11.

18. Louis L. Jaffe, "Law Making by Private Groups," 51 *Harv. L. Rev.* 201, 212 (1937).

19. MODEL supra n. 1, 93.

20. Alaska Const., art. IX, § 13.

21. MODEL, supra n. 1, 91.

22. Council of State Governments, 35 *Book of the States,* 145–46 (2003).

23. Pa. Const., art. III, § 11.

24. N.Y. Const., art. VII, § 2.

25. Council of State Governments, supra n. 22, 148.

26. U.S. Census Bureau, 1997 Census of Governments, vol. 4, Government Finances 4 (December 2000) (compiled from table 4, column 2).

27. George D. Brown, "Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs," 28 *Am U.L. Rev.* 279, 280 (1979).

28. Compare *MacManus v. Love,* 179 Colo. 281, 499 P.2d 609 (1972) ("No moneys in the state treasury shall be disbursed by the state treasurer except upon appropriation made by law . . ." Colo. Const., art. V, § 33) (federal payments directly to the state are not subject to the appropriation power) with *Shapp v. Sloan,* 480 Pa. 449, 391 A.2d 595 (1978) ("No money shall be paid out of the public treasury except on appropriations made by law." Pa. Const., art. III, § 24) (federal payments to the state are subject to the appropriations power).

29. Bret Smentkowski, "Legal Reasoning and the Separation of Powers: A State Level Analysis of Disputes Involving Federal Funds Appropriations," 16 *Law and Policy* 395, 403–08 (1994).

30. *See,* Role of State Legislators in Appropriating Federal Funds, Hearing Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Governmental Affairs, 95th Cong., 1st Sess. (1977).

31. Fla. Const., art. III, § 5.

32. Council of State Governments, 34 *Book of the States* 166 (2002).

33. MODEL, supra n. 1, 62.

34. 418 U.S. 633 (1974).

35. *See,* for example, Fla. Const., art. I, § 24.

36. Council of State Governments, supra n. 32, 163–68.

37. Ibid., 161–62.

38. Va. Const., art. V, § 11.

39. Tex. Const., art. IV, § 12 (c), (d), (f).

40. Tex. Const., art. IV, § 12 (h).

41. Robert F. Williams, *The New Jersey State Constitution*, 85–86 (1990).

42. Va. Const., art. IV, § 17.

43. Neb. Const., art. III, § 17.

44. Council of State Governments, supra n. 32, 76–77.

45. A. E. Dick Howard, 1 *Commentaries on the Constitution of Virginia* 366 (1974).

46. Council of State Governments, supra n. 32, 73–74. Twelve states provide for a two-year term. New Jersey, the first senatorial term at the beginning of each decade is two years. In Illinois, all senate seats are at stake every ten years. During that decade, each senate seat is subject to a four-four-two-year term in rotation.

47. John M. Carey, Richard G. Niemi, and Lynda W. Powell, Term Limits in the State Legislature 4–5 (2000). Term limits were implemented in seventeen of the jurisdictions. Ibid., 1.

48. Otto J. Hetzel, Michael E. Libonati, and Robert F. Williams, Legislative Law and Statutory Interpretation 170 (3d. 2001); *see,* for example, Cal. Const., art. IV, § 7.5 (spending caps); Tex. Const., art. III, § 24(a) ($600 per month); Ga. Const., art. III, § IV par. I(a) (forty-day limit on length of legislative session).

49. *See* Jennifer Drage Bowser, *The Effect of Legislative Term Limits,* Council of State Governments, supra n. 22, 87–91.

50. Ibid., 125–35.

51. Ibid., 125.

52. Ibid., 122–23.

53. Ibid., 120–21.

54. Steven F. Huefner, "The Neglected Value of the Legislative Privilege in State Legislatures," 45 *W. & M. L. Rev.* 221 (2003).

55. *Kertulla v. Abood,* 686 P.d 1197, 1202 (Alaska, 1984).

56. *Coffin v. Coffin,* 4 Mass. 1 (1808) (interpreting Mass. Const., Pt. I, art. 21).

57. Tex. Const., art. III, § 21.

58. *United States v. Brewster,* 408 U.S. 501 (1972).

59. *Abercrombie v. McClung,* 55 Haw. 595, 525 P.2d 594 (1974).

60. *See generally* Council on Governmenal Ethics Laws, Campaign Finance, Ethics and Lobby Law Blue Book (8th ed., 1990).

61. N.Y. Const., art. III, § 6.

62. Miss. Const., art. IV, § 45.

63. Pa. Const., art. III, § 13.

64. R.I. Const., art. III, § 8.

65. Fla. Const., art. II, § 8.

66. For example, Mich. Const., art. IV, § 16.

67. *See generally* Jack H. Maskell, Recall and Expulsion of Legislators, 1 *Encyclopedia of the American Legislative System* 547–61 (Joel H. Silbey, ed., 1994).

68. For example, Cal. Const., art. 4, § 5(a).

69. Mich. Const., art. IV, § 16.

70. Idaho Const., art. III, § 11; Mont. Const., art. V, § 10.

71. Vt. Const., art. II, IV, § 16.

72. Mich. Const., art. IV, § 16.

73. *See* Thomas E. Cronin, *Direct Democracy* 125–56 (1989).

74. Cronin, Ibid., 126–27.

75. Idaho Const., art. VI, § 6.

76. Colorado Const., art. XXI.

77. Wis. Const., art. III, § 12.

78. Cal. Const., art. II, § 14(a).

79. Minn. Const., art. VII, § 6.

80. John Dinan, "Bicameralism and the American State Constitutional Tradition," 4 (unpublished paper in files of the author).

81. Citizens Conference on State Legislatures, *The Sometime Governments: A Critical Study of the Fifty American State Legislatures* 251 (1971).

82. Bruce E. Cain, *Epilogue* in George C. Lubernow and Bruce E. Cain, eds., *Governing California* 331 at 333 (1997). For a presentation of arguments for and against unicameral legislatures, see, Maryland Constitutional Convention Commission Report 125–26 (1967).

83. James A. Gardner, *Voting and Elections* (p. 45).

84. Supra. n. 82, 82.

85. Bruce Edward Cain, *Legislative Redistricting,* supra n. 67, 392–93.

86. *See generally* Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy* 673–713 (2d. rev. ed., 2002).

87. For a brief discussion of the variety of multimember district options, *see* Anthony Girzynski, *Elections to the State Legislature,* supra n. 67, 439–41.

88. *See* Lani Guinier, *The Tyranny of the Majority* (1994).

89. Council of State Governments, supra. n. 32, 73–74.

90. Citizens Conference on State Legislatures, supra n. 81, 66–69, 155–56.

91. Va. Const., art. IV, § 2, § 3.

92. N. Dak. Const., art. IV, § 2.

93. Suzy Platt, ed., Respectfully quoted 198 (1963).

94. Jon C. Teaford, *The Rise of the States,* 13–14 (2002).

95. Citizens Conference on State Legislatures, supra n. 81, 156.

96. Ibid. 41, 56, 57–62, 103–04.

97. Teaford, supra n. 94, 200.

98. In eleven of these states the legislature may not determine the subjects considered at the special session. Council of State Governments, supra. n. 32, 69–73.

99. In twelve of these states, a supermajority may vote to extend the length of the regular session. Ibid.

100. Robert Luce, *Legislative Assemblies* 181 (1924).

101. Ibid., 181–87.

102. Citizens Conference on State Legislatures, *State Constitutional Provisions Affecting Legislatures* 26 (1967).

103. Ibid.

104. Robert F. Williams, "State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement," 48 *U. Pitt. L. Rev.* 797 (1987).

105. Mass. Const., pt. II, ch. I, § II, art. VII; § III, art. X.