judicial determination." Ill. Const., art. IV, § 13 (1970). The Alabama, Alaska, Kansas, Michigan, Minnesota, and Nevada constitutions contain similar provisions.

69. Ill. Const., art. I, § 2 provides: "No person shall . . . be denied the equal protection of the laws."

70. *Grace v. Howlett,* 283 N.E. 2d 474, 479 (Ill., 1974).

71. Pa. Const., art. I, § 26 (1967); *cf.* N.Y. Const., art. I, § 11 (1938) (earlier version of this type of provision). For discussion of similar provisions in other state constitutions, *see* Sturm, "The Development of American State Constitutions," 12 *Publius: J. Federalism* 57, 87–88 (1982); Sturm and Wright, "Civil Liberties in Revised State Constitutions," in *Civil Liberties: Policy and Policy Making* 179, 182–83 (S. Wasby, ed., 1976).

72. *See,* for example, N.J. Const., art. I, par. 5 (1947).

73. L. Tribe, *American Constitutional La*w § 15–10, at 933, n. 77 (1978). For a complete discussion of unconstitutional conditions, see Seth Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State," 132 *U. Pa. L. Rev*. 1293 (1984).

74. These provisions usually concerned only women's suffrage. *See,* for example, Utah Const., art. IV, § 1 (1894); Wyo. Const., art. 1, § 3 (1889).

75. *Rand v. Rand,* 374 A.2d 900, 904–05 (Md. 1977). *See generally* Paul Benjamin Linton, "State Equal Rights Amendments: Making a Difference or Making a Statement?" 70 *Temple L. Rev.* 907 (1997); Wolfgang P. Hirczy de Miño, "Does an Equal Rights Amendment Make a Difference?" 60 *Alb. L. Rev.* 1581 (1997).

76. See Paul L. Tractenberg, "The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947," 29 *Rutgers L.J.* 827, 890–936 (1998).

77. *See generally* M. Bernard, *Constitutions, Taxation and Land Policy* (1979) (abstracting tax provisions from the federal and all state constitutions); W. Newhouse, *Constitutional Equality and Uniformity in State Taxation* (2d ed., 1984) (analysis of state tax uniformity and equality provisions, organized into nine prototypical clauses).

78. The primary effect of tax uniformity provisions is to mandate equality in property taxation. *See* Note, "Inequality in Property Tax Assessments: New Cures for an Old Ill," 75 *Harv. L. Rev.* 1374, 1377–80 (1962).

79. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).

80. *See Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002).

81. Ga. Const., art. I, § III, par. 1; Ky. Const., § 242.

82. Ibid.

83. U.S. Const., amend. XIV.

84. *See* Wendell E. Pritchett, "'The Public Menace' of Blight: Urban Renewal and the Private Uses of Eminent Domain," 21 *Yale L. & Pol'y Rev.* 1 (2003).

85. Alaska Const., art. I, § 18; Miss. Const., art. III, § 17.

86. *See City of Austin v. Travis County Landfill Company,* 73 S.W. 3d 234, 238 (Tex., 2002).

87. Burt Neuborne, "Foreword: State Constitutions and the Evolution of Positive Rights," 20 *Rutgers L.J.* 881 (1989); Helen Hershkoff, "Positive Rights and State Constitutions: The Limits of Federal Rationality Review," 112 *Harv. L. Rev.* 1131 (1999); Jonathan Feldman, "Separation of Powers and Judicial Review of Positive Rights Claims: The Rule of State Courts in a Era of Positive Government," 24 *Rutgers L.J.* 1057 (1993).

88. *See* Lee Hargrave, "Ruminations: Mandates in the Louisiana Constitution of 1974: How Did They Fare?" 58 *La. L. Rev.* 289 (1998).

89. N.Y. Const., art XVII, § 1.

90. Ala. Const., art IV, § 88.

91. Colo. Const., art. XXIV, § 3.

92. Mass. Const., amend. XLVII.

93. For a fuller listing, *see* Neuborne, supra note 87 at 893–95, Hirshkoff, supra note 87 at 1140, n. 44.

94. This provision, dating from 1868, is discussed in Dennis R. Ayers, "The Obligation of North Carolina Municipalities and Hospital Authorities to Provide Uncompensated Hospital Care to the Medically Indigent," 20 *Wake Forest L. Rev.* 317, 330–34 (1984). *See also* Michael A. Dowell, "State and Local Governmental Legal Responsibility to Provide Medical Care for the Poor," 3 *J.L. & Health* 1, 6–7 (1988–89) ("Fifteen states have constitutional provisions which authorize or mandate the provision of medical care for the poor").

95. *See* Helen Hershkoff, "Positive Rights and the Evolution of State Constitutions," 33 *Rutgers L.J.* 799 (2002). For a differing view, *see* Frank B. Cross, "The Error of Positive Rights," 48 *UCLA L. Rev.* 857 (2001).

96. *See generally* Ken Gormley and Rhonda G. Hartman, "Privacy and the States," 65 *Temple L. Rev.* 1279 (1992); Timothy O. Lenz, "'Rights Talk' About Privacy in State Courts," 60 *Albany L. Rev.* 1613 (1997); 1 Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims and Defenses,* ch. 2 (3d ed., 2000).

97. *In re T. W.*, 551 So.2d. 1186 (Fla., 1989).

98. *Ravin v. State,* 537 P.2d 494 (Alaska, 1975).

99. *Krisher v. McIver,* 697 So.2d 97 (Fla., 1997).

100. *See generally,* Louis Karl Bonham, Note, "Unenumerated Rights Clauses in State Constitutions," 63 *Tex. L. Rev.* 1321 (1985).

101. 518 P.2d 85 (Alaska, 1974).

102. *Pro-Choice Mississippi v. Fordice,* 716 So.2d 645 (Miss., 1998).

103. Calvin R. Massey, "The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law," 1990 *Wis. L. Rev.* 1229 (1990).

104. Bonham, supra note 100, at 1327.

105. *See* chapter 3 in this volume.

106. La. Const., art. I, § 3.

107. Lee Hargrave, *The Louisiana State Constitution: A Reference Guide,* 23–24 (1991).

108. *See* Edward J. Eberle, "The Right to Information Self-Determination," 2001 *Utah L. Rev.* 965 (2001).

109. Andrew E. Taslitz, "Enduring and Empowering: The Bill of Rights in the Third Millennium: The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions," 65 *Law & Contemp. Prob.* 125 (2002).

110. Lori Andrews, *The Clone Age: Adventures in the New World of Reproductive Technology* (1999); Mark S. Kende, "Technology's Future Impact on State Constitutional Law: The Montana Example," 64 *Mont. L. Rev.* 273 (2003).

111. John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (1993); Janet L. Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (1997); Marsha Garrison, "Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage," 113 *Harv. L. Rev.* 835 (2000); Marsha Garrison, "The Technological Family, What's New and What's Not," 33 *Fam. L.Q.* 691 (1999); Richard F. Storrow, "Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage," 53 *Hastings L.J.* 597 (2002).

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Chapter Two

The Legislative Branch

Michael E. Libonati

Introduction

The state legislative branch is distinctive in comparison with the federal legislative branch in that the Federal Constitution "is an instrument of grant—a document that expressly delegates powers to the federal government," whereas "state constitutions in terms of basic theory, are instruments of limitation."[1] Thus, "the state government, having plenary powers, need not look to the state constitution for any specific grant of powers, but must rather look to it for any limitations it may impose on the state's plenary power."[2] This "basic theory of state constitutional law, namely that state governments has plenary powers, and that, in consequence, any provision included in the constitution will operate as a limitation on its powers"[3] is not uncontroversial. Nevertheless, the plenary power principle has important consequences for the creation, drafting, and interpretation of the article of the state constitution devoted to the legislative branch.

The language of art. I (the Legislative Department) of the United States Constitution is relatively unchanged. But since 1776, when the first state constitutions were adopted, the language of state constitutional provisions concerning the legislative branch reflects change, adaptation, and experiment. As a result, the legislative branch article in most states contains specific provisions embodying such values as: (1) accountability; (2) representativeness; (3) transparency; (4) efficiency; (5) institutional autonomy; and (6) clarity in strengthening or diminishing the policy-making role of the legislature in relation to the judicial and executive branches of government.

Powers

Distribution of Powers

All state constitutions contain a provision vesting the legislative power in the legislature, and most have a separation of powers provision.[4] The language of

the Massachusetts Constitution of 1780 typifies the strict separation of powers approach found in thirty-five states:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[5]

Five state constitutions have a general separation of powers clause that "simply divides the powers of government into three branches, without prohibiting one branch from exercising the powers of another." The other ten states lack an express separation of powers clause. "In these states, separation of powers is inferred from the allocation of powers to each of the branches of government, in a manner similar to its inference from the allocation of power among the branches in the U.S. Constitution."[6]

A realistic appraisal of the distribution of policy-making authority reveals a more complex pattern of shared power. The legislature shares policy making with the Executive (veto; executive orders; implementation; administrative agency rule-making), with the Judiciary (common law; rule-making authority over judicial practice and procedure; judicial review), and, in many states, with the electorate (statutory initiative; referendum).

State framers seeking to address the tension between strict separation of powers and the dynamics of the contemporary policy-making process have a variety of options. First, they might try to create a clear, bright line definition of "legislative powers." But like other aspects of the separation of powers, the concept of legislative powers is deeply contested. And, as James Madison observed about a related issue: "[There are] three sources of vague and incoherent definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas."[7] An added difficulty stems from the bounded capacity of framers to foresee future interbranch controversies.

Second, framers might leave it to the judicial branch to come up with clear, bright line standards for resolving interbranch conflicts. Yet there is little reason to expect that the judiciary will be successful. Both the state and the federal judiciary have tended to oscillate between strict and permissive approaches, creating a case-by-case indeterminacy that a skeptical observer might view as another example of government by the judiciary.

Third, framers might identify and resolve, on a piecemeal basis, recurrent interbranch conflicts. For example, several state constitutions explicitly grant the governor authority to reorganize executive branch agencies.[8] Again, a pro-

vision can precisely delineate the roles of governor and the legislature in the appointment and removal of state officials.[9] So too, a well-drafted provision can clarify the legislature's authority over judicial rules of practice and procedure[10] or executive agency rule-making.[11]

Fourth, framers may rely on the political dynamics created by separation of powers and checks and balances to promote incremental, mutual adjustment between and among the branches of government. Reliance on the push and pull of politics has lead to a considerable strengthening of gubernatorial powers without constitutional tinkering.

The Nondelegation Doctrine

The nondelegation doctrine operates as a significant barrier to the legislature's authority to delegate legislative powers by statute. The constitutional basis for the doctrine is the clause vesting the legislative power in the state legislature. The constitutional assignment of power to the legislature is read to forbid the legislature from delegating legislative power to others. The legislature's authority to delegate is subject to judicial review on separation of powers grounds. However, there is no predictable correlation in the states between strict or lax separation of powers provisions and strict or lax judicial application of the nondelegation doctrine.[12]

The twentieth century saw the emergence, proliferation, and growth of administrative agencies empowered to exercise broad policy-making authority over the private sector. Delegation to administrative agencies is not expressly addressed in most state constitutions. In those states, legislative control over administrative agencies is asserted through appropriations, scrutiny of executive appointments (and removals), and committee oversight. State legislatures have also enacted statutes employing various forms of the legislative veto on administrative rule-making. In the absence of state constitutional language expressly authorizing the legislative veto, it is subject to rejection on a variety of state constitutional grounds: legislative vetoes amount to the enactment of legislation by improper means, they improperly denigrate the governors veto power, they authorize the performance of an executive function by the legislature in violation of the separation of powers doctrine, they constitute an undue delegation of legislative authority, or they amount to a usurpation by the legislature of authority vested exclusively in state courts.[13]

Twenty-first century framers are faced with the challenge of explicitly clarifying the distribution of power to review administrative policy-making among the branches of state government. Three departures from the status quo should be considered: One possibility is strengthening the governor's powers over state

administrative agencies. This approach diminishes legislative power in the name of "managerial constitutionalism," which calls for centralization of responsibility and direct accountability for policy making and policy implementation in the executive branch. A second possibility is giving some administrative agencies constitutional status, in order to increase their freedom from legislative interference. For example, in Virginia, the State Corporation Commission has regulatory jurisdiction over corporate charters and public utilities.[14] This autonomy, however, comes at the cost of governmental fragmentation. A final possibility is constitutionalization of some form of the legislative veto, that is providing for various forms of suspension or rejection of administrative rules has been expressly created.[15] In 1982 Connecticut amended its constitution with language that both clearly authorizes delegation of authority and frees the legislature to enact by statute any form of legislative veto:

> The Legislative department may delegate legislative authority to the executive department, except that any administrative regulation of any agency of the executive may be disapproved by the general assembly or a committee thereof in such manner as shall by law be proscribed.[16]

Considerations against the legislative veto include undue delay and politicization of the administrative rule-making process and weakening the governor's veto power. Proponents emphasize that it strengthens the legislative oversight of administrative action.[17]

Fixing the proper boundary between the public and the private sector is a significant issue of state constitutional policy. Vesting legislative power through delegation in the private sector raises the specter of governmental entanglement with and capture by private enterprise. The nondelegation doctrine is used to challenge statutes characterizable as empowering private groups to make law. Perhaps unsurprisingly, judicial determinations as to whether a delegated power is "legislative," whether the entity to which the power is delegated is "private" or "public," and the appropriate standards for appraising the validity of such delegations have produced a body of case law that is unpredictable and inconsistent. There is a tension between legislation authorizing "group self-government democratically organized" and the insistence that "public administration shall be the exclusive mode" of regulation.[18] State constitutions should speak directly to issues surrounding the privatization decision. In the absence of a state constitutional provision expressly authorizing or forbidding contracting out of governmental functions or services to the private sector, state courts will be continually addressing policy issues raised by privatization.

Appropriation and Budgetary Powers

The legislature's appropriations power is entrenched in nearly all state constitutions.[19] Alaska's provision is typical of such clauses:

> No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law.[20]

The power of the legislative branch over appropriations has not been reined in, as a matter of constitutional policy, at the level of national government. Among the states, Vermont is notable for its minimalist approach toward fiscal and budgetary matters "based upon confidence in the system of representative democracy" and reflecting "these beliefs by leaving to the legislature and the governor, the people's elected leaders, broad responsibility for the conduct of the state's fiscal affairs with ample power to adjust needs to the rapid change characteristic of modern times."[21]

Most state constitutions do not follow the federal or the Vermont model. The reach of the legislature's power over appropriations and budgetary matters is both constrained and contested. One significant countervailing power is provided in the forty-three states that give the governor, in some form, an item veto on appropriations bills.[22] The item, or partial, veto enables the governor, unlike the President, to strike out or reduce items of appropriation. Although state courts have had difficulty in defining the terms "item" and "appropriations bill," there is no question that the line item veto tilts the dynamics of the political process in favor of the executive. The governor's veto power is further strengthened by provisions such as Pennsylvania's that limit the scope of general appropriations bills and define the scope of other appropriations bills:

> The 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. All other appropriations shall be made by separate bills, each embracing but one subject.[23]

Provisions in some states constitutions institutionalize the governor's preeminent role in the budgetary process. For example, in New York, the governor submits a complete plan of itemized expenditures together with an estimate of revenues in a unified executive budget in the form of a budget bill.[24] And in nine states, the constitution fixes a deadline for state legislative action on the governor's budget.[25]

Three late twentieth century issues that implicate the legislature's power of the purse present themselves to twenty-first-century constitution makers: (1) the appropriate role of the governor and the legislature with respect to federal grants; (2) the appropriate role of the judiciary and the legislature in funding expenditures mandated by the constitution; and (3) the imposition of constitutionally mandated spending limits.

Recent figures show that approximately 20 percent of state revenues come from the federal government.[26] State legislatures sought to assert control over these funds by statutes that subject "federal funds to the same legislative appropriations process as state revenue"; that require "legislative screening of grant applications prior to their submission to federal agencies"; that impose "legislative control over the identity and structure of state agencies administering federal grant funds."[27] The legislature contended that the appropriations power justified these measures. Governors responded that these measures violated the separation of powers. Court decisions were split. For example, two leading decisions disagreed on the effect of similarly worded appropriations clauses in their state constitutions.[28] And separation of powers based challenges turned on whether the function performed is characterized as "administrative" or "legislative" in nature.[29] The latter characterization led some courts to sustain significant delegations of power over the administration of federal grant funds to legislative committees or to boards on which legislators served with elected executive officials.

The range of solutions to this constitutional problem includes: (1) an amendment to the appropriations clause expressly affirming the legislature's authority to approve expenditures of available federal funds and to appropriate matching funds; (2) an amendment permitting the legislature to increase the governor's authority over federal funds by statute; or (3) an amendment authorizing the legislature to appoint a joint committee to control federal funds when the legislature is not in session.[30] If twenty-first-century constitution makers fail to address and resolve this question, the ultimate policy decision will be left to the judicial branch.

Interbranch controversies have also arisen over the judiciary's power to compel the legislature to appropriate funds in the context of litigation over school funding, court funding, and public funding of elections. Some state courts have sidestepped the issue by determining that such cases present a nonjusticiable political question. Proponents of strong legislative and executive powers over budgetary and spending priorities are well advised to raise this issue when deliberating over the inclusion of affirmative rights, such as an education clause, in the state constitution.

The appropriations power is also constrained by debt limitation and balanced budget provisions that entrench fiscal values antedating the creation of the welfare state. Elimination of such provisions is unlikely. Indeed, recent amend-

ments in four states have added spending limits. Appropriations caps are imposed with reference to a variety of benchmarks including: an absolute dollar amount ($2.5 billion in Alaska); 7 percent of state personal income (in Arizona); and previous fiscal-year expenditures (California). Growth in appropriations is limited by linkage to such factors as population growth (Alaska, California); inflation (Alaska, California); and economic growth (Texas). Otherwise the spending ceiling can only be exceeded by a two-thirds super majority of the legislature (Arizona, California) or majority vote (Texas). Spending limits entrench antitax, limited-government policies as well as a distrust of majority-rule politics. Opponents stress the loss of policy flexibility and responsiveness. Since these provisions are so new, there is insufficient evidence to show whether the hopes of proponents or the fears of opponents will be realized.

Investigative and Informational Powers

The legislature's power to investigate, including the power to compel the attendance of witnesses and the production of documents, has deep historical roots in British Parliamentary practice. A robust investigative power, coextensive with the scope of the legislative power, flows from the plenary power principle. The Florida constitution contains a detailed provision that may serve as a model for other states:

> Investigations; witnesses. Each house, when in session, may compel attendance of witnesses and production of documents and other evidence upon any matter under investigation before it or any of its committees, and may punish by fine not exceeding one thousand dollars or imprisonment not exceeding ninety days, or both, any person not a member who has been guilty of disorderly or contemptuous conduct in its presence or has refused to obey its lawful summons or to answer lawful questions. Such powers, except the power to punish, may be conferred by law upon committees when the legislature is not in session. Punishment of contempt of an interim legislative committee shall be by judicial proceedings as prescribed by law.[31]

In twenty states, auditing of executive branch expenditures is assigned to an official directly accountable to and elected by the legislature.[32] This strengthens the legislature's hand by insuring that "officials of the Executive branch have made their expenditures in line with priorities established by the legislature."[33]

Two recurrent issues with respect to the legislature's investigative power confront twenty-first-century framers: (1) judicial recognition of an executive privilege implied out of the separation of powers provision in the state constitution;