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;

and (2) limitations on the investigative power stemming from the protections of individual rights in the state and federal constitution.

The United States Supreme Court's decision, *United States v. Nixon,*[34] which recognized a privilege of confidentiality of presidential communications in the exercise of executive powers, spawned a flurry of state litigation in which members of the state executive branch sought recognition of an analogous privilege under state constitutions. Most state courts were receptive to the claimed privilege. These decisions not only quashed requests for information from legislative committees but also limited the effect of state freedom of information (sunshine) laws. And in New Mexico, which like many states, has a plural executive, the privilege extended to the attorney general.

This issue is ripe for resolution by twenty-first-century framers. Proponents of a strong executive will be satisfied with the status quo. Proponents of open government will seek to entrench a broad right of access to public records and meetings in the state constitution that applies to both the legislative and executive branches.[35] And proponents of privileged access for the legislative branch will call for language that, like Florida's, confers a robust investigative power coextensive with the plenary powers principle.

Much of the law dealing with the constitutional rights of witnesses has been federalized and is, therefore, beyond the reach of state framers. The new judicial federalism has, however, played a role in this field as well. For instance, the Pennsylvania Supreme Court reads the search and seizure clause of the state constitution as more protective of the privacy interests of witnesses. Inserting a broad investigative powers provision in the state constitution should have the effect of reining in judicial activism.

Confirmation Powers

In most states, the state senate, like its federal counterpart, has the power to advise and consent to proposed gubernatorial appointments.[36] In a few states, the confirmation power is vested in both houses of the legislature. Since many states elect a wide variety of executive branch officials, for example, attorney general, treasurer, secretary of state,[37] the confirmation power may play a less significant role in interbranch relations than it does at the federal level.

Some state constitutional provisions can strengthen the legislature's powers. For example, the Virginia Constitution bars the governor from granting a recess or interim appointment to a rejected nominee.[38] And the Texas Constitution contains detailed rules limiting the governor's power to fill vacant state offices, make recess appointments, and reappoint rejected nominees.[39] The Texas Constitution also bars a governor who was not reelected from filling vacancies.[40] Some state constitutions, for example, New Jersey's, grant the

governor sweeping powers of appointment. But in that state these powers are subject to the custom of senatorial courtesy.[41] Thus, traditions of interbranch comity and state political practice are likely to provide a significant counterweight to the efficiency and accountability concerns that motivated the framers of the New Jersey Constitution to concentrate appointment powers in the governor's hands.

Impeachment

Forty-nine state constitutions provide for impeachment. Few clearly address the issues that have arisen in state impeachment controversies. These defects can be cured by careful drafting. A well-drafted impeachment clause should: (1) name the officers of government subject to impeachment; (2) specify the offenses for which they may be impeached; (3) determine which branch of government shall impeach and try impeachments; (4) if the legislative branch is involved in the process, determine the number of votes required for impeachment and conviction; (5) fix the punishment for conviction; (6) clarify whether a convicted official can be prosecuted for the conduct in question; and (7) resolve whether session limits apply to impeachment.

The Virginia Constitution provides a useful model in that it addresses each of these issues:

> The Governor, Lieutenant Governor, Attorney General, judges, members of the State Corporation Commission, and all officers appointed by the Governor or elected by the General Assembly, offending against the Commonwealth by malfeasance in office, corruption, neglect of duty, or other high crime or misdemeanor may be impeached by the House of Delegates and prosecuted before the Senate, which shall have the sole power to try impeachments. When sitting for that purpose, the Senators shall be on oath or affirmation, and no person shall be convicted without the concurrence of two-thirds of the Senators present. Judgment in case of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the Commonwealth; but the person convicted shall nevertheless be subject to indictment, trial, judgment, and punishment according to law. The Senate may sit during the recess of the General Assembly for the trial of impeachments.[42]

But the Virginia model, although superior in its coverage in comparison to impeachment provisions in other state constitutions, raises several questions

that state constitution makers ought to consider. First, its detailed language deprives the legislature of the flexibility to add to the class of officials subject to impeachment, or to create statutory procedures for the trial and removal of those officials, or to delegate to the judiciary the authority to try impeachments. Second, the breadth and imprecision of the language defining an impeachable offense gives rise to controversies over whether an official may be removed from office on partisan, political grounds or whether the conduct alleged must amount to criminal offense. Third, the provision does not address whether judicial review of impeachment procedures on the grounds for impeachment is permitted or precluded. In view of the diversity of possible outcomes with respect to judicial review, framers are advised to address and resolve this issue. Finally, framers may consider "depoliticizing" the impeachment process by vesting authority to try these charges in the Supreme Court, as is done in Nebraska.[43] However, the effect of this judicialization has been that impeachment is treated as a criminal process necessitating proof of the charges beyond a reasonable doubt.

MEMBERSHIP

Qualifications and Disqualifications

Nineteenth- and twentieth-century state constitutions show a pattern of eliminating restrictions on eligibility for legislative office holding based on religious affiliation or belief, property ownership, race, and gender. This parallels the trend described by James A. Gardner in chapter 6 with respect to voter eligibility. The remaining qualifications in nearly every state are based on U.S. citizenship, minimum age, and district residency.[44] In many states, a state legislator must be a qualified voter, thus adding such disqualifications as felony conviction or mental incompetence contained in the franchise clause of the state constitution. And most states prohibit individuals from holding federal or state office while serving in the state legislature.

A number of issues confront state framers with respect to the decision to entrench qualifications and disqualifications in the constitution. First, there is the question of which, if any, criteria for legislative office holding are to be put beyond the reach of majority rule politics. There is a clear trend of change with respect to the minimum age requirement. In the last thirty-five years, seventeen states have made eighteen-year-olds eligible for election to either chamber of the state legislature. The district residency requirement may preclude experimentation with statewide or regional at-large representation as well as with forms of proportional representation based on party lists, and the felony disqualification may have a disparate impact on minority groups as well as con-

flicting with the policy of rehabilitating offenders. It is unlikely that noncitizens will be made eligible for state legislative office, although Germany permits certain noncitizens to vote and hold office at the local government level. Since the qualifications clause only applies to state legislators, local governments are and ought to remain free to experiment.

Second, current state constitutions do not address the issue of whether the relevant provisions are "both a floor and a ceiling in that they can neither be added to nor subtracted from, save as expressly allowed by some other section of the Constitution."[45] A strict interpretation of the qualifications clause prevailed in two seminal United States Supreme Court decisions that are consistent with state court decisions. The plenary powers approach to constitutional interpretation, by contrast, would permit the legislature to add qualifications. Or the clause could be redrafted to read "including, but not limited to, age, citizenship and residency."

Third, combining single-district representation with a district residency requirement for holding office tends to strengthen the link between representative and constituent at the expense of party discipline.

Fourth, the ban on dual or incompatible office holding precludes experiments with cabinet-type government in which executive and legislative functions are mixed.

Term of Office

All states operate on the basis of fixed terms for legislative office. The states differ both from the national legislature and among themselves concerning the length of the term. Thirty-six states fix the term of offices for the senate at four years.[46] In about half of these states, senatorial terms are staggered. In five states, a four-year rather than a two-year term of office is standard for the lower house.

Another issue affecting the term of office will be salient for twenty-first century framers—term limits. From 1990 to 1995 voter initiatives imposed term limits on state legislators in twenty-one states.[47] The policy of term limitations revives a debate familiar to eighteenth-century framers of state and federal constitutions. And it is consistent with the "citizen legislator" concept that is embedded in many state constitutions in the form of restraints on the length and frequency of sessions, low levels of pay, and spending caps on expenditures for the legislature.[48] But it is not in tune with the demand of earlier reform advocates that call for the professionalization of state legislatures. Current research indicates that term limits have neither enhanced the policy responsiveness of state legislatures nor put an end to political careerism.[49] Too little time has passed since the adoption of term limits to determine whether the legislature's capacity to provide a check on the executive branch is unduly weakened by the reform.

Compensation

Twentieth-century reformers targeted constitutional provisions fixing the level of compensation for legislators as a significant barrier to the creation of a full-time, professional legislative body. Their efforts have met with some success. The number of state constitutions specifying compensation levels diminished from twenty-four in 1972 to nine in 2004. In most of states, legislative compensation is set by statute.[50] Many of these states also authorize additional compensation for legislators in leadership positions. In twenty states, the compensation question is first addressed by some type of compensation commission independent of the legislature.[51] The independent-commission device combats public perceptions that compensation increases are motivated by legislators' self-interest. In most states, commission recommendations are subject to ratification or disapproval by the legislature. In Maryland and West Virginia, the recommendations may be reduced or rejected, but not increased. In Arizona and Texas, the commission's recommendations are submitted to the electorate.

These varying arrangements reflect levels of resistance in each state's political culture to the merits of a full-time, professional legislature rather than a part-time, citizen legislature. These opposed views are also evident in constitutional provisions mandating term limits and session limits discussed elsewhere in this chapter.

Leadership

In each state with a bicameral legislature, the house is free to elect and empower a speaker.[52] However, the constitutional rule is different for the senate. In twenty-six states, the lieutenant governor serves, by virtue of office, as president of the Senate.[53] That elected constitutional executive officer is, as is the case in the Federal Constitution, given a deciding vote when the Senate is equally divided. In six states, the lieutenant governor may debate and vote in the committee of the whole. Most likely, issues surrounding the legislative role of the lieutenant governor will be subsumed in consideration of whether to retain that office or to abolish it, as nine states have done. As long as the role exists, much of its impact on the legislative process will turn not on formal constitutional language but on senatorial custom and practice.

Legislative Immunity

Forty-three state constitutions offer legislators some speech or debate immunity.[54] In twenty-three states, the wording of the clause matches the language

of the Federal Constitution "and for any speech or debate in either House, they shall not be questioned in any other place." In twelve states, words spoken or uttered in debate are privileged. In five states, legislators get only an immunity from "civil arrest" or "civil process" during legislative sessions and for a brief period prior to and after a session. In two states, legislators have no specified immunity of any sort.

The aims underlying speech or debate immunity are well summarized by the Alaska Supreme Court: protecting disfavored legislators from intimidation by a hostile executive; and protecting legislators from the burdens of forced participation in private litigation.[55]

A variety of outcomes are found in the states as to the scope of immunity. In an early case, the Massachusetts Supreme Judicial Court refused to extend the privilege to a libelous statement made as an aside to another member on the floor of the legislature rather than in formal debate.[56] That limited reading is consonant with the wording of the Texas Constitution, which covers only "words spoken in debate in either House."[57] Another judicial response is to follow federal precedents that focus on whether the legislator's conduct is "within the sphere of legitimate legislative activity."[58] Textual differences between the wording of the Federal speech or debate clause and the language of the state constitution have guided state supreme courts to a broader immunity doctrine than that prevailing in the Federal case law. Accordingly, the Alaska Supreme Court held that "legislative duties" immunity extends to a senator's conversation with the governor in preparation for the performance of the senator's duties at a contemplated joint session of the legislature. And the "legislative function" immunity, granted by the Hawaii Constitution and supported by clear legislative history, privileged off-floor statements made by a legislator to a reporter seeking clarification of the legislator's speech.[59]

"Legislative function" immunity more nearly captures the contemporary roles of legislators. Today's legislators deal with citizen grievances, shape public opinion by taking positions, and oversee the administration of the laws outside the legislative chamber and the committee room. Twenty-first framers should weigh whether legislators' activities in the public sphere, in particular their efforts at informing and representing constituent interests, ought to fall unambiguously within the scope of the privilege. If so, they may adopt "legislative function" language that fulfills that aim.

Legislative Ethics

Individuals who seek and hold public office in the twenty-first century are subject to extensive regulation designed to safeguard the integrity of the deliberative process surrounding the consideration of legislation. Most states now

require disclosure of campaign contributions, personal financial disclosure for legislators and their families, and disclosure of lobbying expenditures.[60] Most of these reforms came via statute rather than constitutional change. In view of the demonstrated capacity of most legislatures to respond to the public's demand for higher ethical standards twenty-first-century constitution makers must appraise the merits of entrenching ethical norms in the state constitution.

Nineteenth-century constitutions favor constitutionalizing some ethical norms. Most of these provisions focus on reining in pecuniary conflicts of interest. Some form of ban on dual office holding is nearly universal. Several states prohibit legislatures from giving themselves a pay raise that will take effect during the session in which it was voted.[61] Mississippi bars legislators from eligibility, during their term of office, to any nonelective office of profit created or whose emoluments were increased during that term.[62] Pennsylvania requires "any member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly" to "disclose the fact to the House of which he is a member" and to refrain from voting on that matter.[63]

The Rhode Island Constitution mandates a more sweeping and detailed definition of the content of a code of legislative ethics. The provision covers conflicts of interest, confidential information, use of position, contracts with government agencies, and financial disclosure.[64] Florida goes further by mandating full public disclosure of financial interests by candidates for legislative office and full public disclosure of campaign finances.[65] Florida also bans legislators from personally representing clients for compensation before any nonjudicial state agency. Both states create an independent State Ethics Commission to implement the policies spelled out in the constitution. Neither state empowers the Ethics Commission to remove the offending legislator from offices. However, the Florida Commission can conduct investigations and make public reports concerning any breach of public trust by a legislator. Both provisions view lawmaking as an essentially moral activity and are aimed not only at the fact but also the appearance of impropriety in the conduct of public affairs. Both provisions also manifest the same distrust of the legislature's capacity for self-regulation that led to the creation of independent commissions to determine legislative salaries and legislative apportionment.

Expulsion, Exclusion, and Recall

Expulsion, exclusion, and recall are constitutional devices that may affect the legislator's term of office. The legislature's power to exclude is based on a common provision in state constitutions: "Each house shall be the sole judge of the elections, returns, and qualification of its members."[66] This provision is uncontroversial when applied to election contests. But it is unclear whether the leg-

islature can add to expressly enumerated qualifications. State framers are advised to address the issue of whether the legislature should have unreviewable discretion as to member's qualifications, since such discretion could permit the legislature to exclude a member chosen by the people by majority vote.

Forty-five state constitutions expressly authorize each chamber to expel a member.[67] The expulsion power is often curtly phrased: "Each house . . . may with the concurrence of two-thirds of all members elected thereto and serving therein expel a member."[68] In most states, the power to expel is standardless. Michigan adds a procedural requirement that the reasons for the expulsion be entered in the journal with the votes and names of the members voting on the question.[69] Montana and Idaho provide a "for good cause" standard.[70] Vermont bars expulsion "for causes known to constituents antecedent to the election."[71] And Michigan prohibits a second expulsion for the same cause.[72]

On the one hand, state framers should be aware that each phrase added to the bare-bones grant of the power to expel opens possibilities for judicial review. On the other hand, Michigan's procedural constraint promotes deliberation about and accountability for the expulsion decision. And a good-cause requirement deters arbitrary and capricious use of the power. The Vermont provision emphasizes that the judgment of constituents, not colleagues, should determine who represents them. Michigan's policy prohibiting a second sanction for the same offense articulates a deeply rooted legal principle.

Recall is a device embodying the values of direct democracy.[73] Recall authorizes a constituent of members, rather than their colleagues as in the case of exclusion and expulsion, to remove them from office by referendum. Recall is controversial because it is viewed as violating a fundamental principle of representative government—that legislators can act autonomously during their term of office. Nevertheless, recall is a matter of constitutional policy in eighteen states.[74]

Great variety is found in the expression of that policy in state constitutions. Idaho simply authorizes recall and leaves procedural details to be filled in by the legislature.[75] By contrast, Colorado exhibits distrust of legislative discretion by devoting an entire article of the state constitution to a comprehensive exposition of recall procedures, including the form and sufficiency of recall petitions.[76] States also differ as to the grounds for recall. In Wisconsin, no reasons need be stated.[77] In California, the recall petition must disclose the reasons for recall, but the sufficiency of these reasons is not reviewable.[78] In Minnesota, the constitution limits grounds for recall to "serious malfeasance or nonfeasance" in the performance of the duties of office or "conviction during the term of office of a serious crime."[79]

Framers of a recall provision are thus confronted with two fundamental issues. The first is whether the legislature can be trusted to implement the policy or whether statute-like detail should be enshrined in the constitution. The second is whether standards for the exercise of the electorate's decision should

be included, as in Minnesota, thus inviting judicial review, or whether the merits of the cause for recall is for the electorate to determine.

In any case, both state legislatures and the electorate are limited in their power to exclude, expel, or recall a legislator by the rights guarantees of the Federal Constitution.

STRUCTURE

Bicameral/Unicameral

The initial question for constitution makers is whether to opt for a single-chamber (unicameral) or two-chamber (bicameral) legislature. The early constitutions of Pennsylvania (1776), Georgia (1777), and Vermont (1777) provided for unicameral legislatures. Since then, state constitutions makers have extensively debated the wisdom and purpose of maintaining a second chamber,[80] although only Nebraska currently has a one-house legislature. Proponents of a one-house legislature argue that it eliminates problems of interhouse coordination, controlling or regulating conference committees or management of joint committees and also furthers the principle of accountability.[81] Too, a single-chamber legislative body is well accepted at the local government level. Opponents worry that unicameralism lowers the consensus threshold for legislative action, increasing the possibility of drastic policy reversals with each change of government.[82]

Single Member/Multimember Districts

As James Gardner observes in his contribution to this volume: "Today, the great majority of state constitutions provide either expressly or implicitly for the election of state representatives and senators exclusively from single member districts."[83] The Citizens Conference on State Legislatures advanced the following rationale for its endorsement of single-member districts:

> the very idea of democratic government in which a citizen delegates power to a representative and holds him responsible for the exercise of it implies a one-to-one relationship, a single clear connection between representative and constituent. As soon as a constituent must contend with more than one relationship, that connection is weakened, the relationship is blurred.[84]

Countervailing considerations include a tradition of multimember districting in a few states. In addition, single member-district elections determined by a

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]