

## **Overview of Vermont State Governmental Structure**

### **I. Federalism**

Under the [U.S. Constitution](#), the Supremacy Clause set forth in Art. VI, cl. 2 provides that federal law “shall be the supreme Law of the Land[.]” However, our federal constitution provides Congress with enumerated powers, and the 10<sup>th</sup> Amendment provides that all powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people.

“The dynamics of state government in the federal system are to allow the formation of consensus respecting the way members of a discrete community treat each other in their daily contact and constant interaction with each other.”<sup>1</sup>

### **II. The Vermont Constitution**

#### ***A. Controls!***

The Vermont Constitution controls the operation of our State government. “The Vermont Constitution is the fundamental charter of our state and is preeminent in our governmental scheme . . . As such, the constitution stands above legislative and judge-made law, and the rights contained therein speak ‘for the entire people as their supreme law.’”<sup>2</sup>

#### ***B. Structure***

Chapter I contains *articles* and is entitled “A Declaration of the Rights of the Inhabitants of the State of Vermont.” Chapter II contains *sections* and is entitled our “Plan or Frame of Government.” According to NCSL, at around 8,500 words, the Vermont Constitution is the shortest state constitution in the nation.<sup>3</sup>

#### ***C. Amendment Process***

[Vt. Const. Ch. II, § 72](#) provides the process to amend our Vermont Constitution. It only allows amendments to be proposed every other biennium by the Senate. The 2023–24 biennium was a “proposing” biennium. Any amendment proposed by the Senate and concurred in by the House in a proposing biennium must be concurred in by both chambers in the subsequent biennium. The 2025–26 biennium is such a “subsequent” biennium. If the General Assembly concurs in a proposal in those two consecutive bienniums, the proposal is then submitted to the voters at the general election for ratification by majority vote.<sup>4</sup>

<sup>1</sup> *U.S. v. Windsor*, 570 U.S. 744, 769 (2013).

<sup>2</sup> *In re Town Highway No. 20*, 191 Vt. 231, 248 (2012) (other citations omitted).

<sup>3</sup> National Conference of State Legislatures, State Legislatures Magazine; *Constitutions: Amend with Care* (9/1/15).

<sup>4</sup> For details, see [Overview of Procedure to Amend the Vermont Constitution](#).

### III. Separation of Powers

#### A. Requirement for Three Separate Core Powers

Vt. Const. Ch. II, § 5 requires that there be a separation of powers among the three branches of State government: “The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.”

“Briefly stated, the legislative power is the power that formulates and enacts the laws; the executive power enforces them; and the judicial power interprets and applies them.”<sup>5</sup> Separating these three core powers is a “fundamental principle” that serves to create a governmental structure “resistant to the forces of tyranny.”<sup>6</sup>

#### B. Overlapping Powers Permitted

But Vt. Const. Ch. II, § 5 “does not contemplate an absolute division of authority among the three branches such that each branch is hermetically sealed from the others.”<sup>7</sup> The Supreme Court of Vermont stated that due to the practical realities of government, and because there are many powers and functions that cannot be easily classified as belonging exclusively to one branch,<sup>8</sup> it will “apply a relatively forgiving standard to separation-of-power claims” that is “tolerant” of overlapping institutional arrangements.<sup>9</sup>

“[W]e must construe the constitutional command consistent with efficient and effective government structures that are able to respond to the complex challenges and problems faced by today’s state government.”<sup>10</sup>

#### C. Test of a Separation of Powers Violation

Under separation of powers, the power exercised by a branch must be “incidental to the discharge of the functions of the [branch] exercising them[.]”<sup>11</sup> Thereafter, “[t]he focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch, but whether the power exercised so encroaches upon another branch’s power as to usurp from that branch its constitutionally defined function.”<sup>12</sup>

<sup>5</sup> In re D.L., 164 Vt. 223, 228 (1995).

<sup>6</sup> Id. (citing James Madison’s statement in *Federalist Paper No. 47* that the accumulation of legislative, executive, and judicial power into one place is the “very definition of tyranny”).

<sup>7</sup> Id. at 228.

<sup>8</sup> Id. at 229.

<sup>9</sup> State v. Nelson, 170 Vt. 125, 128 (1999).

<sup>10</sup> Hunter v. State, 177 Vt. 339, 349–350 (2004).

<sup>11</sup> In re Opinion of the Justices, 115 Vt. 524, 529 (1949) (citing Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 6–7 (1941)).

<sup>12</sup> In re D.L. at 229.

#### IV. The Legislative Branch

[Vt. Const. Ch. II, § 2](#) provides the House of Representatives and Senate with “Supreme Legislative power.” [Vt. Const. Ch. II, §§ 6–19](#) describe the Legislative Branch. These sections require a 150–member House and a 30–member Senate—together entitled “The General Assembly of the State of Vermont”—and further require the two chambers to concur in all acts of legislation that must be presented to the Governor in order to become law.

[Vt. Const. Ch. II, § 73](#) requires the General Assembly to reapportion each chamber’s legislative districts at least once a decade following the U.S. Census “in order to maintain equality of representation among the respective districts as nearly as is practicable.” [Vt. Const. Ch. II, § 46](#) provides legislators with two-year terms that begin on the first Wednesday after the first Monday of January following their election.

The Supreme Court of Vermont describes the General Assembly as “the lawmaking branch of government.”<sup>13</sup> But the Vermont Constitution provides that the General Assembly “shall have no power to add to, alter, abolish, or infringe any part of [the Vermont] Constitution.”<sup>14</sup> In other words, the only thing that limits the General Assembly’s lawmaking authority is the Constitution. “The Constitution is not a grant of power to the Legislature, but it is a limitation of its general powers. The Legislature’s power is practically absolute, except for constitutional limitations.”<sup>15</sup>

The scope of the General Assembly’s lawmaking authority is demonstrated by the Vermont Constitution’s provision of “police power.”<sup>16</sup> “Subject to constitutional limitations, a state Legislature is authorized to pass measures for the general welfare of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.”<sup>17</sup> In regard to the police power, “the constitution clearly empowered the legislature to pass such laws as, in its discretion, it might judge would be for the common benefit of the people of the state.”<sup>18</sup> This includes legislating to provide for the public’s health, safety, convenience, and morals.<sup>19</sup>

<sup>13</sup> *Hartness v. Black*, 95 Vt. 190, 114 A. 44, 47 (1921).

<sup>14</sup> [Vt. Const. Ch. II, § 6](#).

<sup>15</sup> *Rufus v. Daley*, 103 Vt. 426, 154 A. 695, 697 (1931). *See also City of Burlington v. Central Vermont RY Co.*, 82 Vt. 5, 71 A. 826, 827 (1909) (“[F]or the law is, by all the cases, that, except where there are constitutional limits upon the Legislature, it is practically absolute.”) and *Dresden School District v. Norwich Town School District*, 124 Vt. 227, 231 (1964) (“Our constitution is, in powers not surrendered to the Federal government, the single great restraint on the autonomy of the Legislature as the repository of the law-making power of the people.”).

<sup>16</sup> [Vt. Const. Ch. I, Art. 5](#) (“That the people of this state by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same.”).

<sup>17</sup> *Sowma v. Parker*, 112 Vt. 241, 22 A.2d 513, 517 (1941) (quoting *In re Guerra*, 94 Vt. 1, 110 A. 224, 227 (1920)).

<sup>18</sup> *State v. Theriault*, 70 Vt. 617, 41 A. 1030, 1034 (1898). *See also State v. Curley-Egan*, 180 Vt. 305, 309 (2006) (“The police power has long been understood to encompass ‘the general power of the legislative branch to enact laws for the common good of all the people.’”) (other citations omitted).

<sup>19</sup> *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 A. 693, 700 (1913) (“Power to provide for the public safety and convenience stands upon the same ground as the power to protect the public health and public morals.”).

## V. The Executive Branch

The conferred authority to execute a law is the executive power.<sup>20,21</sup> Aside from any constitutional requirements, the General Assembly creates Executive Branch entities, including agencies and departments; determines the entities to which it will confer authority and the scope of that authority; provides the manner of executing law; and may amend any of the foregoing.<sup>22</sup>

[Vt. Const. Ch. II, §§ 20–27](#) describe the Executive Branch. [Vt. Const. Ch. II, § 3](#) provides the “Supreme Executive power” to the Governor, or to the Lieutenant Governor in the Governor’s absence. The Governor holds the special authority in [Vt. Const. Ch. II, § 11](#) to act as a check on legislation: This section requires each bill passed by the General Assembly to be presented to the Governor, who has a time-limited period to either sign it, allow it to become law without the Governor’s signature, or veto it.

Unlike the federal government and some other states, the Vermont Constitution and statutory law split the power of the State’s Executive Branch into multiple independent offices separately elected by Vermont voters and independent entities created by the General Assembly:

- *Governor*, elected for a two-year term via [Vt. Const. Ch. II, §§ 43, 47, and 49](#);
- *Lieutenant Governor*, elected for a two-year term via [Vt. Const. Ch. II, §§ 43, 47, and 49](#);
- *Treasurer*, elected for a two-year term via [Vt. Const. Ch. II, §§ 43, 47, and 49](#);
- *Secretary of State*, elected for a two-year term via [Vt. Const. Ch. II, §§ 43 and 48](#);
- *Auditor of Accounts*, elected for a two-year term via [Vt. Const. Ch. II, §§ 43 and 48](#);
- *Attorney General*, elected for a two-year term via [3 V.S.A. § 151](#); and
- *Miscellaneous independent Executive Branch entities* created by the General Assembly, such as the Green Mountain Care Board,<sup>23</sup> the State Ethics Commission,<sup>24</sup> and the Cannabis Control Board.<sup>25</sup>

<sup>20</sup> See [Waterbury v. Melendy](#), 109 Vt. 441, 451–453 (1938) (holding that the Legislature cannot delegate its authority to create law, but it can confer authority or discretion as to a law’s execution).

<sup>21</sup> See also the U.S. Supreme Court’s explanation of the line between legislating and executing: “Congress of course initially determined the content of [the law]; and undoubtedly the content of [the law] determines the nature of the executive duty. However . . . once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.”

[Bowsher v. Synar](#), 478 U.S. 714, 733–734 (1986).

<sup>22</sup> See [Office of State’s Attorney v. Office of Attorney General](#), 138 Vt. 10, 15 (1979) (holding that because the Vermont Constitution only provides for the election and term of State’s Attorneys, but does not provide their powers, it was constitutionally permissible for the General Assembly to enact law delegating coequal prosecutorial authority to the statutory Attorney General). See also [Trybulski v. Bellows Falls Hydro-Electric Corp.](#), 112 Vt. 1, 7 (1941) (Public Service Commission “has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted, and it is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation.”).

<sup>23</sup> [18 V.S.A. § 9372](#) (“It is the intent of the General Assembly to create an independent board to promote the general good of the State[.]”).

<sup>24</sup> [3 V.S.A. § 1221\(a\)](#) (“There is created within the Executive Branch an independent commission named the State Ethics Commission to accept, review, make referrals regarding, and track complaints of alleged violations of governmental conduct regulated by law . . .”).

<sup>25</sup> [7 V.S.A. § 843\(a\)](#) (“There is created within the Executive Branch an independent commission named the Cannabis Control Board for the purpose of safely, equitably, and effectively implementing and administering the laws enabling access to adult-use cannabis in Vermont.”).

## VI. The Judicial Branch

The State’s judicial power is “vested in a unified judicial system . . . composed of a Supreme Court, a Superior Court, and such other subordinate courts as the General Assembly may” establish.<sup>26,27</sup> [Vt. Const. Ch. II, §§ 28–41](#) describe the Judicial Branch. Except for assistant judges and probate judges, who are elected to four-year terms pursuant to [Vt. Const. Ch. II, §§ 43, 50, and 51](#), the Vermont Constitution in [Ch. II, §§ 32–34](#) requires the Governor, with the advice and consent of the Senate, to appoint Supreme Court Justices and other judges for six-year terms from a list of nominees presented by the Judicial Nominating Board, and every six years thereafter subjects their continuation in office to a vote by the General Assembly.

Similar to the federal judicial power, Vermont’s judicial power means “the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.”<sup>28</sup> Therefore—since the Vermont Constitution does not specifically provide for it—the Supreme Court of Vermont has held that Vermont’s Judicial Branch does not have the constitutional authority to give an advisory opinion on a question of law not involving actual and bona fide litigation.<sup>29</sup> “[T]he exercise of judicial authority must lead to a final enforceable result” so that it is not merely informative or advisory.<sup>30</sup>

But the Judicial Branch will not invalidate a law due to disagreeing with its policy. “[I]t is not for this Court to pass upon the propriety of the legislative election to exercise [its regulatory] power, nor to question the wisdom of it. Our function is only to determine whether or not the manner or its exercise meets constitutional standards and violates any fundamental rights.”<sup>31</sup>

In the checks and balances built into the separation of powers among the three branches, “it is the province of the court to decide whether Vermont’s laws comply with the State Constitution”<sup>32</sup>; “[i]t is the function of the courts to maintain constitutional government”<sup>33</sup>; and the Supreme Court of Vermont is the “final interpreter of the Vermont Constitution.”<sup>34</sup>

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<sup>26</sup> [Vt. Const. Ch. II, § 4](#).

<sup>27</sup> For more information on Vermont’s Judicial Branch, see [the Vermont Judiciary’s webpage](#).

<sup>28</sup> *In re Opinion of the Justices*, 115 Vt. 524, 529 (1949) (other citation omitted).

<sup>29</sup> *Id.* This opinion is ironic, since it was precipitated by the Governor’s request for the Court’s opinion on the constitutionality of a bill allowing the Court to give advisory opinions.

<sup>30</sup> *Kennedy v. Chittenden*, 142 Vt. 397, 399 (1983) (holding unconstitutional a statute purporting to grant to the Superior Court the authority to adjudicate a contested House election, since the House has the exclusive constitutional authority to judge its members’ elections via [Vt. Const. Ch. II, § 14](#) and therefore, any such judicial adjudication could be reversed by the chamber). See also *In re Williams*, 154 Vt. 318, 324 (1990) (holding unconstitutional a statute that would have required our former district court to hold a hearing regarding police officer misconduct and certify to the officer’s municipal legislative body facts and findings, since the legislative body could ignore the court’s findings of guilt, resulting in the court’s findings having “none of the authority of a judgment”).

<sup>31</sup> *State v. Giant of St. Albans*, 128 Vt. 539, 544 (1970).

<sup>32</sup> *Brigham v. State*, 179 Vt. 525, 528 (2005).

<sup>33</sup> *C.O. Granai v. Witters, Longmoore, Akley & Brown*, 123 Vt. 468, 470 (1963).

<sup>34</sup> *State v. Read*, 165 Vt. 141, 153 (1996).