

Separation of Powers in the context of H.179, Sec. 10

- [Vt. Const. Ch. II, § 5](#): “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.” [In re D.L.](#), 164 Vt. 223, 228 (1995).
- [Vt. Const. Ch. I, Art. 5](#): “...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.”
 - This provision is commonly referred to as the Legislature’s police power, meaning the General Assembly can pass laws for the general welfare of the people and “is itself the judge of the necessity or expediency of the means adopted.” [Sowma v. Parker](#), 112 Vt. 241, 22 A.2d 513, 517 (1941).
 - “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.” [Rufus v. Daley](#), 103 Vt. 426, 154 A. 695, 697 (1931).
- [Vt. Const. Ch. II, § 20](#): “The Governor...shall have the power to...appoint officers, *except where provision is, or shall be, otherwise made by law* or this Frame of Government...”
 - Unless the Constitution indicates a specific entity has appointment power, the Legislature, as the law-making branch of government, has the power to decide who or what entity makes appointments.
 - The State Board of Education was created by the Legislature. The appointment process for SBE members is not in the Constitution. Therefore, it is up to the Legislature to decide the appointment process for the SBE.
- “The focus of a separation of powers inquiry is not whether one branch of government is exercising certain functions that 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.” [In re D.L.](#), 164 Vt. 223, 228-229 (1995).
 - Judicial Branch
 - When courts analyze the General Assembly’s exercise of its legislative authority, they presume the Legislative Branch acted constitutionally. “[T]here is a presumption of a constitutional purpose on the part of the Legislature, a presumption as strong, perhaps, as any that is not conclusive . . .” [Sabre v. Rutland R. Co.](#), 86 Vt. 347, 85 A.693, 700 (1913).
 - The courts will not hold a law unconstitutional unless it clearly conflicts with constitutional requirements. “The efficient exercise of police power inherent in the people of this state is not to be frittered away by overnice speculations upon the distribution of powers of government.” *Id.* “Every

presumption is to be made in favor of the constitutionality of an act of the Legislature, and it will not be declared unconstitutional without clear and irrefragable evidence that it infringes the paramount law.” Village of Waterbury v. Melendy, 109 Vt. 441, 447 (1938) (other citations omitted).

- Legislative Branch
 - “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.” Sowma v. Parker, 112 Vt. 241, 22 A.2d 513, 517 (1941) (quoting In re Guerra, 94 Vt. 1, 110 A. 224, 227 (1920)). 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.” State v. Theriault, 70 Vt. 617, 41 A. 1030, 1034 (1898).
 - “The traditional doctrine of separation of powers recognizes that the lawmakers cannot deal directly with all functions of the sovereign. Neither can those functions be precisely divided . . . [citations omitted] The General Assembly cannot transfer its supreme legislative power to enact laws. But it can confer upon the executive and judicial branches of government or grant to a subordinate agency, of its own creation, a wide discretion in the manner and method for the execution of statutes validly adopted.” Vermont Educational Buildings Finance Agency v. Mann, 127 Vt. 262, 267 (1968).
- Executive Branch
 - Aside from any constitutionally conferred authority given to a specific Executive Branch entity, the Legislature determines which laws which executive branch entity shall execute and how they must be executed.
- The Governor’s supreme executive authority is not as broad as the President’s exclusive executive power because there are multiple, independent, separately elected Constitutional officers and entities not under the Governor’s control, while the U.S. Constitution vests *the* executive power in the President. U.S. Const. Art. II, § 1, cl. 1. Additionally, the U.S. Constitution grants the President the power to appoint all major officers of the United States, while the Vermont Constitution limits the Governor’s authority to appoint officers, “except where provision is, or shall be, otherwise made by law or this Frame of Government[.]” Vt. Const. Ch. II, § 20.
- Similarly, the Constitution does not provide the Governor with specific removal authority. In McFeeters v. Parker, the SCOV adjudicated a challenge to the Governor’s authority to remove the members of the Public Service Commission, who the Governor had appointed with the advice and consent of the Senate. The Court stated that “whether the Governor should have this power of removal . . . is for the Legislature to decide. We are not concerned with the expediency of the law.” 113 Vt. 139, 144 (1943).

- H.179 does not propose to amend the Governor’s removal authority.
- “Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.” Bowsher v. Synar, 478 U.S. 714 (1986).Id. at 726 (quoting Synar v. U.S., 626 F.Supp. 1374, 1401 (1986)).
- If the Legislature’s participation ends once it makes a policy choice through the Constitutional process of bicameralism and presentment, and delegates authority to the Executive branch, then there should be no concerns over intervention in Executive Branch decision making once appointments are made. The Legislative process has ended. It is the Governor who has the power to remove Board members.
- The authority for the Executive Branch to adopt rules is a statutory, not constitutional, authority. There is no inherent constitutional authority to adopt rules. Rulemaking is a power delegated to the Executive Branch by the Legislature.
- Other boards or commissions with non-governor appointees
 - [3 V.S.A. § 5025](#): The Commission on Women
 - 8 members appointed by the Governor
 - 4 members appointed by the Senate
 - 4 members appointed by the House
 - [3 V.S.A. § 1221](#): State Ethics Commission
 - Appointment authorities: Chief Justice of SCOV; League of Women Voters of Vermont; BOD of Vermont Society of Certified Public Accountants; BOD of Vermont Bar Association; BOD of Society for Human Resource Management Vermont State Council
 - [3 V.S.A. § 5002](#): Racial Equity Advisory Panel
 - Appointment authorities: Senate; House; Chief Justice of SCOV; Governor; Human Rights Commission
 - [6 V.S.A. § 4606](#): Vermont Working Lands Enterprise Board
 - 5 members appointed by House
 - 5 members appointed by Senate
 - 4 members appointed by Governor
 - ***Board comprised of several other ex officio members
 - [10 V.S.A. § 591](#): Vermont Climate Council
 - 8 ex-officio members
 - 8 members appointed by House
 - 8 members appointed by Senate
- Ultimately, it is only the Judicial Branch that may determine whether an action by one branch of government constitutes a usurpation of a separate branch’s constitutionally defined authority.