

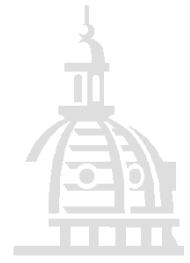


**LEGISLATIVE
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LEGISLATIVE GUIDE

Legal Services Division



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SEPARATION OF POWERS

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I. Introduction and Executive Summary

This Legislative Guide is intended to provide an overview of the doctrine of separation of powers among the three branches of state government in Iowa and to provide a framework for analyzing separation of powers issues. Specifically, this guide will examine the basis of the doctrine and how it impacts the legislative branch in its relationship with both the judicial and executive branches of government.

Separation of powers doctrine is a centerpiece of our system of constitutionally delegated duties to the three branches of government. The doctrine, however, is not static but continues to evolve. The traditional notion that there are separate and distinct roles for the executive, legislative, and judicial branches of government which should remain inviolate has changed over time to reflect the growing interrelationship among the branches of government. Courts have increasingly recognized the necessity of allowing some sharing and transferring of powers among the branches of government to facilitate the efficient operation of government. Although Iowa law clearly reflects this trend, the separation of powers doctrine is not a mere historical anachronism. Instead, Iowa courts have recognized that there are limits on the ability of each branch of government to exercise powers traditionally reserved to another branch.

Key factors in determining whether a particular statutory provision offends the separation of powers doctrine is whether the enactment transfers to a branch of government a specific constitutional power reserved to another branch of government, the extent of the power transferred, whether the transfer of power directly or indirectly impinges on the power of a particular branch of government, and whether the purported transfer of power is accompanied with sufficient protections against the concentration of too much power within that particular branch of government. Based on this doctrine, the power to enact legislation has been limited when it delegates authority to the executive branch without sufficient standards and safeguards, when it improperly infringes on the power of the Governor to veto legislation, and when it infringes on the power of the courts to interpret the meaning of enacted legislation. The doctrine has also been applied in determining that legislators are generally not permitted to serve in a decision-making role on executive branch boards.

II. Guiding Principles of Separation of Powers Doctrine

A. Constitutional Basis

1. Federal Government

The American concept of separation of powers arises out of the United States Constitution in its establishment of the legislative, executive, and judicial departments of government and in the delegation of specific powers to each department.¹ Although the Constitution does not explicitly set forth the rule of separation of powers, the United States Supreme Court has recognized this rule by noting the constitutional

¹ U.S. Const. art. I, II, III.



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significance of investing governmental power in three separate branches of government.²

2. Iowa

In Iowa, the concept of separation of powers is made explicit through the Iowa Constitution. Article III, section 1, of the Iowa Constitution provides for separation of powers of state government as follows:

The powers of the government of Iowa shall be divided into three separate departments — the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

B. Philosophical Basis

The philosophical underpinning of separation of powers doctrine is rooted in an inherent distrust of concentrated governmental power. The separation of the powers of government, then, is a mode of political organization intended to safeguard liberty by preventing the concentration of too much power in the same hands and by establishing a system of checks and balances between the respective branches of government.³

C. Overview — Separation of Powers Doctrine

Separation of powers doctrine is based on the notion that each branch of government has its own unique set of powers and that these powers are exclusive and not to be exercised by another branch of government.⁴ This characterization is not completely mechanistic and the Iowa Supreme Court has recognized that the lines of demarcation between the branches of government are not always so clearly drawn and that the concept of separation of powers must be viewed with a certain amount of pragmatism and cooperation.⁵ In fact, the Iowa Supreme Court has noted that some functions of government can be properly entrusted to more than one branch and some functions inevitably intersect, making “harmonious cooperation” among the three branches of government fundamental to the operation of government.⁶ Still, traditional separation of powers doctrine provides that a violation occurs if a branch of government purports to use powers not granted to it by the Constitution or usurps powers granted by it to another branch.⁷

Important in separation of powers analysis is an understanding of the nature of the powers of each separate branch of government. The traditional characterization of these powers is that the legislative power is the power to make, alter, and repeal laws; the

² O’Donoghue v. United States, 289 U.S. 516, 530 (1933). “The Constitution, in distributing the powers of government, creates three distinct and separate departments This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital . . . namely, to preclude a commingling of these essentially different powers of government in the same hands.”

³ Singer, Sutherland Statutory Construction, Volume I, § 3:2 (2011).

⁴ State v. Ronek, 176 N.W.2d 153, 155 (Iowa 1970).

⁵ State ex. rel. Keasling v. Keasling, 442 N.W.2d 118, 121 (Iowa 1989).

⁶ State v. Hoegh, 632 N.W.2d 885, 889 (Iowa 2001), citing Webster County Bd. of Superiors v. Flattery, 268 N.W.2d 869, 874 (Iowa 1978).

⁷ Schwarzkopf v. Sac County Board of Supervisors, 341 N.W.2d 1, 5 (Iowa 1983).

executive power is the power to execute the laws; and the judicial power is the power to construe and interpret the Constitution and laws, and to apply them and decide controversies.⁸

III. Separation of Powers — Legislative and Executive Branch

A. Overview — Powers of the Executive and Legislative Branch

Separation of powers doctrine provides that the legislative power is the power to make, alter, and repeal laws and to make legislative policy while the executive power is the power to put the laws enacted by the Legislature into effect.⁹ Thus, through its lawmaking ability, the Legislature has significant power to affect the authority of the executive branch by providing the parameters within which the executive can operate. The Legislature's power, however, is not unlimited.

B. Executive Encroachment on Legislative Powers

1. Delegation of Power to the Executive

a. Historical View — Delegation Limited. Historically, separation of powers doctrine required that delegations of power to the executive branch include a clear delineation of legislative policy and substantive standards to guide the executive in its implementation of the policy.¹⁰ Over time, the trend in Iowa has been toward greater liberality in approving delegations of legislative authority.¹¹

b. Current View — Adequacy of Safeguards. The current view in Iowa is that precise substantive guidelines or standards are not required in the legislation if adequate procedural safeguards are provided.¹² To ensure that the procedural safeguards satisfy constitutional concerns, they must advance the Legislature's purpose and must preclude arbitrary, capricious, or illegal conduct by the agency.¹³ The adequacy of the procedural safeguards also depends, in part, on whether the nature of the function delegated is legislative or adjudicative in nature.¹⁴ To the extent that the function delegated is legislative, i.e., it involves the promulgation of policies, standards, or rules of general application, then precise procedural safeguards such as notice and an opportunity to be heard are not constitutionally necessary.¹⁵ Conversely, to the extent that the function delegated is adjudicative in nature, i.e., it involves the determination of rights, duties, and obligations of particular individuals as created by past acts, then procedural safeguards such as notice and an opportunity to be heard are constitutionally necessary.¹⁶

⁸ *Hutchins v. City of Des Moines*, 157 N.W. 881, 887 (Iowa 1916).

⁹ *In re C.S.*, 516 N.W.2d 851, 859 (Iowa 1994).

¹⁰ See *Zilm v. Zoning Board of Adjustment*, 150 N.W.2d 606, 610 (Iowa 1967).

¹¹ *Board of Supervisors v. Department of Revenue*, 263 N.W.2d 227, 238 (Iowa 1978).

¹² *In re C.S.* at 859.

¹³ *Id.* at 859.

¹⁴ *Board of Supervisors v. Department of Revenue* at 238-239.

¹⁵ *Id.* at 239.

¹⁶ *Id.* at 239.



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c. Limits on Delegation. Despite the trend toward liberality in approving delegations of legislative power, the courts are unwilling to provide the Legislature unlimited authority to delegate its power. Two cases concerning group foster care placements illustrate the limits on delegations of legislative power. In one case, the Iowa Supreme Court considered, in part, the constitutionality of a committee established to approve or disapprove the referral of children to out-of-state group foster care facilities. The court held that the delegation to the committee of the power to determine who is to receive the funding available for out-of-state placements was an unlawful delegation of power.¹⁷ The court found that the statute provided no procedural safeguards to protect against an arbitrary decision since the statute did not provide the right of the child or the parents to appear before the committee or to seek review of the committee's decision. In addition, no substantive guidelines were provided the committees with respect to their review of individual placements. In the other case, the court concluded that statutorily requiring the juvenile court and the Department of Human Services to establish regional group foster care plans and to require group care placements in accordance with these plans was a violation of the separation of powers and an unlawful delegation of authority to both the executive and judicial branch.¹⁸

2. Gubernatorial Emergency Powers

Iowa Code chapter 29C grants the Governor sweeping emergency powers when a disaster emergency is declared. Specifically, Iowa Code section 29C.6, subsection 6, authorizes the Governor to suspend “the provisions of any regulatory statute prescribing the procedures for conduct of state business . . . of any state agency.” Such authority clearly has separation of powers implications, since, in effect, the statute authorizes the Governor to suspend a duly enacted statute.

In discussing the constitutionality of Iowa Code section 29C.6(6), the Attorney General concluded that,

If (the subsection is) construed as applicable only in disasters clearly fitting within the definition in section 29C.6(2) and as allowing suspension only of intraagency procedures and only to the extent necessary to cope with such disaster, it would . . . be facially constitutional (under Article III, Section 1).¹⁹

Strictly construing the Governor's power is critical, if the power is to withstand a separation of powers attack, since the suspension of a statute which provides procedural safeguards could remove such procedural safeguards which are otherwise necessary to establish the constitutionality of the initial delegation of legislative power.²⁰

C. Legislative Encroachment on Executive Powers

1. Limitations on the Legislature's Lawmaking Power

¹⁷ In re C.S. at 869. (The court also held that statutory limits on the ordering of out-of-state placements did not unconstitutionally infringe on the power of the courts. See discussion in this guide at p. 9).

¹⁸ In re D.C.V., 569 N.W.2d 489, 498-99 (Iowa 1997).

¹⁹ 1980 Op. Iowa Att'y. Gen. 349, 355 (8/14/79).

²⁰ Id.



a. Veto Authority of the Executive. A key limit on the Legislature’s authority is the executive branch’s ability to approve or disapprove legislation passed by the Legislature prior to the legislation becoming law. In Iowa, the Governor is granted the authority to veto general legislation and the ability to item veto appropriation bills.²¹

In part to protect the Governor’s authority to veto general legislation, Article III, section 29, of the Iowa Constitution provides that each act shall encompass only one subject and the subject shall be expressed in the title to the legislation. Under the “one subject” rule, the challenged portion of an act will be deemed constitutional if all matters in the act are germane and generally fall under some one general idea.²² Only if the unconstitutionality of the act appears beyond a reasonable doubt will the courts intervene. Similarly, the bill title requirements of the Constitution will be met unless matter utterly incongruous to the general subject expressed in the title of the statute is contained in the act.²³ Together the “one subject” and bill title requirements of the Constitution prohibit the Legislature from combining unrelated legislation in one nonappropriation bill and forcing the Governor to either accept or reject the entire bill. Still, the Iowa Supreme Court has been hesitant to act in resolving disputes based on these constitutional provisions. The Iowa Supreme Court has held that any potential constitutional defect in legislation based upon a single subject or bill title analysis is generally cured and not subject to challenge once the Act being challenged is codified.²⁴ Even if a challenge is timely, the Iowa Supreme Court has found that unless the person challenging the statute has suffered some injury from the challenged legislation, the court will generally decline to decide the merits of the constitutional challenge.²⁵

In discussing the Governor’s item veto power over appropriation bills, the Iowa Supreme Court has noted that the Governor’s item veto power should be construed narrowly based upon separation of powers principles since the item veto power grants the Governor a limited legislative function as it relates to appropriations bills.²⁶ To limit this exercise of legislative power by the Governor, the Iowa Supreme Court has held that a bill that was linked to and referenced in another pending appropriation bill was not itself an appropriation bill that could be item vetoed.²⁷ In addition to rejecting an expansive view of what constitutes an appropriation bill subject to item veto, the Iowa Supreme Court has found that if the Legislature has conditioned or qualified the appropriation of money in a bill on the money’s use for a particular purpose, the Governor cannot veto the condition or

²¹ Iowa Const. art. III, section 16. See, Appel, Item Veto Litigation in Iowa, 41 Drake Law Review 1 (1992), for a comprehensive discussion of item veto litigation in Iowa.

²² Utilicorp United v. Iowa Utilities Board, 570 N.W.2d 451, 454 (Iowa 1997).

²³ Id. at 455.

²⁴ State v. Kolbert, 638 N.W.2d 653, 661 (Iowa 2001) (concerned single subject and bill title challenge).

²⁵ Godfrey v. State, 752 N.W.2d 413 (Iowa 2008).

²⁶ Rants v. Vilsack, 684 N.W.2d 193, 202 (Iowa 2004).

²⁷ Id. at 207-208.



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qualification without also vetoing the appropriation.²⁸ However, the power of the Legislature to attach conditions to appropriations and restrict the veto authority of a Governor is not unlimited. The Iowa Supreme Court has stated that “the legislature, by attaching an unrelated ‘rider’ as a contingency to an appropriation, cannot invade the governor’s constitutional power to veto bills of general legislation.”²⁹

In this case, the Iowa Supreme Court allowed a veto of the rider without the requirement of vetoing the appropriation.³⁰

b. Limitations on Legislation — Invasion of Executive Functions. The courts have also recognized that the Legislature has some limits in affecting the ability of the executive branch to execute the laws through legislation:

*We do not suggest that the legislature may, under the guise of a qualification upon an appropriation, violate the separation of powers by invading the Governor’s authority to exercise executive functions Obviously, for example, the legislature could not constitutionally make an appropriation to a department conditional upon the Governor’s appointing a specified individual to be head of the department. Such a provision would contravene section 1 of article III of our constitution*³¹

One area in which legislative action may impinge upon the executive branch concerns the power of appointment. Generally, the power of appointment is considered an executive function, although all branches of government may utilize this power.³² The general test as to whether the appointment power is constitutional as to a branch of government is whether the appointment is essential to the proper and independent discharge of the appointing branch’s functions.³³ Based upon this test, the Attorney General has concluded that the appointment of juvenile probation officers by the juvenile court would likely not violate separation of powers as the functions of the officers were central to the role of the juvenile court.³⁴ Conversely, the Attorney General concluded that the appointment of members to the Iowa Economic Protective and Investment Authority³⁵ by legislative leaders would likely violate separation of powers as there was no nexus between the appointees carrying out the duties of the agency and the discharge of legislative functions.³⁶ The Attorney General noted that the mere inclusion of informational duties of the agency was insufficient to render the multipurpose agency sufficiently legislatively related to justify the legislative appointments.³⁷ In Iowa, the Governor’s appointment power is

²⁸ Homan v. Branstad, 812 N.W.2d 623, 632-34 (Iowa 2012).

²⁹ Colton v. Branstad, 372 N.W.2d 184, 190 (Iowa 1985).

³⁰ Id. at 190-191.

³¹ Welden v. Ray, 229 N.W. 2d 706, 710 (Iowa 1975).

³² 1986 Op. Iowa Att’y Gen. 73, 74 (1/15/86).

³³ 1986 Op. Iowa Att’y Gen. at 75.

³⁴ 1980 Op. Iowa Att’y Gen. 606.

³⁵ Iowa Code ch. 16A, Code and Code Supplement 2007; repealed by 2008 Acts, ch 1156, §53.

³⁶ 1986 Op. Iowa Att’y Gen. at 75.

³⁷ 1986 Op. Iowa Att’y Gen. at 76.



also conditioned, in many instances, by the requirement of Senate confirmation.³⁸ As the confirmation authority is statutory and not constitutional, separation of powers concerns are implicated and while the cases do not agree, the Attorney General has concluded that the statutory confirmation process in Iowa would likely survive a separation of powers attack.³⁹

2. Legislative Veto — Delaying and Voiding Executive Regulations

a. Overview. The legislative branch clearly has the authority to effectively modify or repeal executive regulations through the process of enacting legislation. However, some states have considered and adopted legislation establishing a mechanism whereby the Legislature may void or delay executive regulations without the requirement of passing new legislation. Such legislation is normally referred to as a “legislative veto.”

b. Iowa Law. Iowa law provides for both the ability of the Legislature to void and delay executive regulations without enacting new legislation. Article III, section 40, of the Iowa Constitution provides that the Legislature can nullify an adopted administrative rule by passage of a resolution by a constitutional majority of both chambers of the General Assembly, without the Governor’s approval. Similarly, the Iowa Code provides that the Administrative Rules Review Committee has the authority to delay the effective date of a rule for 70 days or until the adjournment of the next session of the General Assembly.⁴⁰

c. Constitutional Constraints. To the extent that the legislative veto is a statute and not a constitutional provision, separation of powers issues are clearly implicated. In fact, the general rule is that the use of the legislative veto to register disapproval of delegated executive action, or of administrative rulemaking, violates the separation of powers doctrine.⁴¹ Although all the cases do not agree, the power to delay the effectiveness of a rule may also be violative of separation of powers.⁴² As of yet, the Iowa Supreme Court has not addressed the constitutionality of the delay powers of the Administrative Rules Review Committee pursuant to the Iowa Code.

3. Legislators Performing Executive Functions

Separation of powers doctrine provides that it is unconstitutional for a legislator to be a member of an agency that is performing executive functions.⁴³ An executive function has been considered to include the power to contract in the state’s name or the responsibility to determine how appropriations are to be spent.⁴⁴ With this in mind, the Attorney General has found that legislators are prohibited from appointment to the

³⁸ Iowa Code §2.32.

³⁹ 1986 Op. Iowa Att’y Gen. 3, 4.

⁴⁰ Iowa Code §§ 17A.4(7) (70-day delay) and 17A.8(9) (delay until adjournment of the next regular session of the General Assembly).

⁴¹ Singer, Sutherland Statutory Construction, Volume I, §3:19 (2011); I.N.S. v. Chadha, 462 U.S. 919 (1983).

⁴² Legislative Research Commission v. Brown, 664 S.W.2d 907, 918-19 (Ky. 1984) (delay power held violative of separation of powers); contra, Martinez v. Department of Industry, 478 N.W.2d 582, 586-587 (Wis. 1992) (statutory delay power not a violation of separation of powers).

⁴³ 1994 Op. Iowa Att’y. Gen. 6 (1/27/93).

⁴⁴ 1976 Op. Iowa Att’y. Gen. 6, 12.



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Alcoholism Commission, the Capitol Planning Commission, and the Statewide Health Coordinating Council.⁴⁵ However, if a commission's only duty is to make recommendations, or to ascertain facts ancillary to legislation and the lawmaking power, service by legislators on commissions for that purpose alone may not violate separation of powers.⁴⁶ With this in mind, the Attorney General concluded that legislators could constitutionally serve as members of the Iowa Sister States Board "when the function of that Board is to simply research and recommend official exchanges between Iowa and other countries"⁴⁷

4. Pardon

Article IV, section 16, of the Iowa Constitution grants the Governor the authority to grant reprieves, commutations, and pardons, after conviction, for most offenses. Thus, a statute that provided for the disqualification of a civil service applicant due to a prior felony was found to be unconstitutional, on separation of powers grounds, if it was used to disqualify an applicant who had been subsequently pardoned.⁴⁸ Still, this constitutional grant of authority to the Governor is extremely limited and can be legitimately subject to legislative limitations and oversight.⁴⁹ As a result, a statutory provision restricting eligibility for parole and work release was found constitutional and not an improper impingement on any constitutional authority of the executive branch.⁵⁰

IV. Separation of Powers — Legislative and Judicial Branch

A. Legislative Encroachment on Judicial Powers

1. Overview

a. Traditional Doctrine. Separation of powers doctrine provides that "the legislature cannot exercise judicial powers, and cannot reverse, vacate, or overrule the judgment or decree of a court."⁵¹ In addition, the Legislature cannot mandate to the judiciary how to interpret a particular statute nor can the Legislature change by retroactive legislation a purely court-based rule.⁵² Still, the Legislature is not without some authority to impact the judicial branch. The Iowa Supreme Court has recognized that the Legislature has the general authority, within certain constitutional limits, to establish rules and procedures that ultimately impact the operation of the courts.⁵³

b. Legislative Authority to Impact the Judicial Branch. The tension between the authority of the judicial branch to determine cases and the Legislature's general lawmaking authority was discussed in two Iowa Supreme Court cases

⁴⁵ 1976 Op. Iowa Att'y. Gen. 6; 1978 Op. Att'y. Gen. 251.

⁴⁶ 1976 Op. Iowa Att'y. Gen. at 357-358.

⁴⁷ 1994 Op. Iowa Att'y. Gen. 6, 6-7 (1/27/93).

⁴⁸ Slater v. Olson, 299 N.W. 879 (Iowa 1941).

⁴⁹ State v. Phillips, 610 N.W.2d 840, 842-3 (Iowa 2000).

⁵⁰ Id. at 843.

⁵¹ Wilcox v. Miner, 205 N.W. 847, 848 (Iowa 1925).

⁵² See Schwarzkopf at 6.

⁵³ Cf. Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564, 568-569 (Iowa 1976); Western International v. Kirkpatrick, 396 N.W.2d 359-364 (Iowa 1986). (The Iowa Constitution prohibits the Legislature from expanding or enlarging the Iowa Supreme Court's appellate jurisdiction.)



concerning the placement of children in group foster care. In one case, the Supreme Court held, in part, that the Legislature's attempt to limit the power of the juvenile court to order out-of-state placements of children through child in need of assistance proceedings by enacting statutes that restrict such placements did not violate the doctrine of separation of powers.⁵⁴ The court reasoned that it is a legislative function to decide what type of placements will be funded and the amount of moneys to be appropriated for each type of placement.⁵⁵ The fact that the law limited the discretion of the juvenile court as to the placement of any particular child was held not to constitute an unconstitutional infringement on the power of the courts but instead represented the exercise of authority within the scope of the Legislature's power.⁵⁶ However, in the subsequent case, the court concluded that the statutory requirement that the juvenile court coordinate with the Department Human Services to establish group foster care placement plans was a violation of the separation of powers.⁵⁷ The court found that the mandate of the juvenile court to accomplish the Legislature's goal of cost containment for group foster care placements was neither a judicial function nor did it aid some judicial function.⁵⁸ Unlike *In re C.S.*, the court found that the legislative mandate on the judicial branch in this case clearly required the juvenile court to engage in policy and funding decisions which are essentially a legislative and not a judicial function.⁵⁹

The tension between the judicial and legislative branch is also manifested through legislation creating broad authority for the executive branch, through administrative agencies, to adjudicate certain disputes.⁶⁰ Generally, the courts have held that an agency may legally be vested with quasi-judicial powers, including the power to hear and determine facts, so long as the agency does not purport to enter a judgment that is enforceable without the involvement of the courts.⁶¹ However, the ability to delegate to the executive branch the adjudication of certain disputes is not without limits. The Supreme Court has held that the transfer of jurisdiction over probation revocation cases from judges to administrative law judges was an unconstitutional violation of the separation of powers.⁶² The court concluded that the sentencing of a defendant, albeit through a probation revocation hearing, falls within the clear realm of judicial power, making any encroachment of this power unconstitutional.⁶³ The fact that the decision of the administrative law judge would be reviewable by a court was not deemed sufficient to cure this constitutional defect.⁶⁴ In contrast, the Iowa Supreme Court has found that parole, as primarily an

⁵⁴ *In re C.S.* at 851, 858-59. (In considering a different aspect of the challenged legislation, the court held that the delegation of power to an out-of-state placement committee was unconstitutional as an unlawful delegation of power. See discussion, *supra* at p. 4.)

⁵⁵ *Id.* at 858.

⁵⁶ *Id.* at 859.

⁵⁷ *In re D.C.V.* at 497.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Iowa Code ch. 17A (Iowa Administrative Procedure Act).

⁶¹ *Keasling* at 121.

⁶² *Klouda v. Sixth Judicial District Department*, 642 N.W.2d 255, 263 (Iowa 2002).

⁶³ *Id.* at 261-62.

⁶⁴ *Id.* at 262.



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executive or administrative decision, is subject to legislative modification that does not violate the separation of powers doctrine.⁶⁵

2. Curative Acts — Legislation Impacting Court Cases

a. Overview. Although courts recognize that the Legislature has clear authority to declare law for the future, separation of powers issues are often raised when a legislative change is attempted to be applied to affect pending or completed litigation.⁶⁶ These legislative changes are often referred to as curative or legalizing acts. Curative acts are generally passed to cure defects in prior law, or to validate prior official or private administrative actions which, in the absence of the curative act, would be void for lack of conformity with existing legal requirements.⁶⁷ The issue in these cases, as it relates to separation of powers, is whether the legislation impermissibly invades upon the province of the courts to decide the law.

b. General Rule — No Separation of Powers Violation. From a separation of powers perspective, the general rule is that if the curative legislation is not a direct legislative assertion of judicial power but merely a belated assertion of a power inherently possessed by the Legislature, the curative act does not violate the separation of powers principle.⁶⁸ Stated another way, the key, from a separation of powers viewpoint, is whether the Legislature would have had the power to enact the challenged curative legislation in the first place. As a result, there is generally no separation of powers violation to curative legislation merely because it affects pending, or even completed, litigation.⁶⁹ Of course, such belated assertions of power might be held unconstitutional for other reasons.⁷⁰

c. Valid Curative Act. In *Schwarzkopf v. Sac County Board of Supervisors*,⁷¹ the Iowa Supreme Court determined that a curative statute granting retroactive easement authority to a county board of supervisors was constitutional despite a court decision handed down prior to the curative act determining that the county was without authority to grant the easement. The court stated that,

*(w)hile the effect of the (prior appellate) . . . decisions was nullified by the curative act, the legislature merely furnished authority for the board of supervisors which the (appellate) court . . . had found lacking in the prior statute; it did not challenge the power of the court to make that decision.*⁷²

⁶⁵ State v. Wade, 757 N.W.2d 618, 628 (Iowa 2008).

⁶⁶ See, e.g., State ex. rel. Lankford v. Mundie, 508 N.W.2d 462, 463 (Iowa 1993).

⁶⁷ Schwarzkopf at 1, 4.

⁶⁸ Id. at 6-7.

⁶⁹ Id. at 6.

⁷⁰ Id. at 7, see footnote 1. "It should be noted that belated assertion of the power might be unconstitutional if it affects "vested" rights. This is not a separation-of-powers matter, however, but rather one based on due process . . ." See also, State ex. rel. Lankford v. Mundie, 508 N.W.2d 462 (Iowa 1993) (Held: a prior court decision dismissing a paternity suit on statute of limitations grounds could not be changed by a later statute extending the statute of limitations or by another later statute granting a cause of action for children born before a certain date where a prior action concerning that child had been dismissed on statute of limitations grounds. Although separation of powers is discussed, the case was probably decided on "vested rights" grounds as the court reasoned that the Legislature lacked the power to change a valid judgment after it was entered.)

⁷¹ 341 N.W.2d 1 (Iowa 1983).

⁷² Id. at 7-8.



In *Zaber v. City of Dubuque*,⁷³ the Iowa Supreme Court determined that the Legislature was constitutionally authorized to cure the city's lack of authority to impose franchise fees on cable television services through a retroactive ratification of the city's unlawfully collected cable television franchise fees. The court concluded,

*In summary, the legislature's ratification of the city's unauthorized tax is a curative statute whose purpose — to safeguard the public fisc and the financial stability of local municipalities — is rationally related to its retroactivity. Therefore, this statute does not violate the plaintiff's substantive due process rights.*⁷⁴

d. Invalid Curative Act. Another case, however, provides an example of a curative act that was determined to violate the principle of separation of powers. In *Sioux City v. Young*,⁷⁵ the Iowa Supreme Court determined that Young was not entitled to a survivor's pension of a policeman despite legislative attempts to expand the law to allow Young, as a widower, to receive benefits. In two previous cases, the court had determined that the law at the time Young applied for benefits did not allow for a widower to receive benefits and that subsequent legislation expanding coverage to widowers was not retroactive. After these cases, the Legislature passed a law indicating that the law expanding coverage to widowers should be interpreted retroactively to include all spouses. In finding this attempt to provide Young with coverage improper on separation of powers grounds, the court found that the Legislature was without authority to direct the courts on how its statutes were to be construed with reference to matters already decided.⁷⁶ The court reasoned that "(t)he legislative intent that controls in the construction of a statute has reference to the legislature that enacted it, not a subsequent one."⁷⁷ Thus, the critical flaw in the attempted curative act was the Legislature's attempt to intrude upon the province of the courts by seeking, through legislation, to itself mandate a particular interpretation of a prior statute.

B. Judicial Encroachment on Legislative Powers

1. Overview

Courts have recognized that their primary role is to interpret the law, not make the law. This issue often arises when the courts are asked to interpret a law or constitutional provision. The Iowa Supreme Court has stated that it may not, under the guise of construction of a statute, enlarge or otherwise change the terms of a statute.⁷⁸ However, under limited circumstances, judicial alteration of a statute may be allowed to correct inadvertent clerical errors or omissions which clearly frustrate obvious legislative intent or to avoid absurd, meaningless, or unreasonable results.⁷⁹

⁷³ 789 N.W.2d (Iowa 2010).

⁷⁴ *Zaber v. City of Dubuque*, 789 N.W.2d 634, 656 (Iowa 2010).

⁷⁵ *Sioux City v. Young*, 97 N.W.2d 907 (Iowa 1959).

⁷⁶ *Id.* at 910.

⁷⁷ *Id.* at 911.

⁷⁸ *Lacina v. Maxwell*, 501 N.W.2d 531, 533 (Iowa 1993).

⁷⁹ *Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47, 49 (Iowa 1990).



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2. Judicial Lawmaking

a. Common Law. One exception to the general rule that the courts do not make law is the common law. By its very definition, the common law consists of those principles and rules of action which derive their authority from the judgments and decrees of courts and not upon any express declaration of the will of the Legislature.⁸⁰ This authority to determine the common law is tempered by the recognition that it can be modified and changed by legislative action.⁸¹ Still, where the Legislature has not acted, courts have stated that they possess a residuum of inherent common-law power to adopt rules to enable them to meet their independent constitutional and statutory responsibilities.⁸² This common-law power has been used by the courts to reject contributory negligence as a bar to recovery in tort cases and to adopt comparative fault, to adopt rules governing the admission of attorneys to the bar and for supervising the conduct of attorneys, and for permitting local court rules governing the conduct of cases.⁸³ Still, courts are reluctant to use their common law power if the Legislature has made some effort to make a judgment as to the values involved. In one case, the Iowa Supreme Court refused to establish a common law defense of medical necessity in a marijuana manufacturing case.⁸⁴ The court concluded that the statutory provision granting some authority to the Board of Pharmacy Examiners to recognize marijuana for medicinal purposes evidenced a determination by the Legislature that it had made a value judgment as to the use of marijuana for medical reasons that effectively foreclosed the recognition of a court-established common law medical necessity defense.⁸⁵

b. Inherent Powers. Similarly, courts have recognized that they possess broad inherent powers to do what is necessary to discharge their judicial responsibilities.⁸⁶ The exercise and limitations on this inherent power are both derived from the separation of powers doctrine. Courts may exercise this inherent power as necessary to properly function as a separate branch of government, but this power cannot be exercised to usurp powers delegated to another branch of government.⁸⁷ As a result of this tension, the nature of the power exercised is critical in determining whether the Legislature may properly control, restrict, or override this power.⁸⁸ In one case, the Iowa Supreme Court examined a district court's exercise of inherent power in appointing a special prosecutor.⁸⁹ The court concluded that the court had the inherent authority to do so but had not established that the statutory

⁸⁰ Black's Law Dictionary (6th ed. 1990).

⁸¹ Iowa Civil Liberties Union at 564, 568-569.

⁸² Id. at 569.

⁸³ See *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982) (established comparative negligence); Iowa Court Rules ch. 39 (rules govern client security and attorney disciplinary system); and *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564 (Iowa 1976) (local court rules governing time limits for pretrial procedures in criminal cases held valid).

⁸⁴ *State v. Bonjour*, 694 N.W.2d 511 (Iowa 2005).

⁸⁵ *Bonjour* at 513.

⁸⁶ *Hoegh* at 888.

⁸⁷ Id. at 889.

⁸⁸ Id.

⁸⁹ Id. at 886.



authority granting this power to the board of supervisors was insufficient for the court to carry out its essential duties.⁹⁰

3. Political Question Doctrine — Judicial Nonintervention in Separation of Power Controversies

a. Overview. Courts have determined that in certain matters involving another branch of government, the court’s adjudicative function should not be exercised and the matter should be reserved to that respective branch of government. This principle stems primarily from the separation of powers doctrine which requires that the respective roles and regions of independence of the coordinate branches of government remain intact.⁹¹ Thus, when a challenge to a legislative action involves a “political question,” the judiciary may not intervene or attempt to adjudicate the matter.⁹²

b. Factors to Establish a Political Question. To establish the existence of a political question, the court must find that the matter involves one or more of the following factors:

- i. A textually demonstrable constitutional commitment of the issue to a coordinate political department.
- ii. A lack of judicially discoverable and manageable standards for resolving the issue.
- iii. The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.
- iv. The impossibility of a court’s undertaking independent resolution without expressing a lack of the respect due the coordinate branches of government.
- v. An unusual need for unquestioning adherence to a political decision already made.
- vi. The potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁹³

c. Senate Phone Records Case. In *Des Moines Register v. Dwyer*,⁹⁴ the Iowa Supreme Court determined that a dispute as to whether the Iowa Senate’s policy concerning the release of detailed phone records was subject to the open records requirements of Iowa Code chapter 22 was a political question not subject to judicial resolution. The court concluded that Article III, section 9, of the Iowa Constitution, which states that each house of the Legislature has the power to determine its own rules of proceedings, provided the authority for the Senate to establish its phone records policy. Thus, since the matter involved constituted “a textually demonstrable constitutional commitment of the issue to a coordinate political department,” namely, to the Senate, the court concluded that it was without authority to resolve the issue of the applicability of the open records law to the Senate policy and that the proper

⁹⁰ Id. at 890.

⁹¹ *Des Moines Register v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996).

⁹² Id. at 495.

⁹³ Id. at 495, quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962). Accord: *King v. State*, ___N.W.2d___ (Iowa 2012)

⁹⁴ 542 N.W.2d 491 (Iowa 1996).



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forum for a challenge of the policy was not with the courts but through the political process.⁹⁵

4. Legislative Delegation to Judiciary

a. Overview. Although separation of powers doctrine would suggest clear boundaries between the branches of government, in practice, the lines between branches of government are often blurred. One aspect of this is when a branch of government delegates some of its powers to another branch. Typically, legislative powers are delegated to the executive branch. However, examples exist of delegations of legislative power to the judiciary.

b. Delegation of Power to Judiciary and Executive Treated Similarly. The Iowa Supreme Court has stated that the principles for determining the constitutionality of a delegation of power to the executive branch may be used in testing a delegation of power to the judiciary. In *Warren County v. Judges of Fifth Judicial District*,⁹⁶ the court applied the analysis used in determining the validity of a delegation of power to the executive. The court concluded that a statute allowing a majority of district court judges in a judicial district to substitute a full-time magistrate for three part-time magistrates, despite the lack of a requirement for notice or hearing prior to the substitution, was a constitutional delegation of power to the judiciary. The court indicated that a legislative function may be delegated to another branch of government only if adequate guidelines for its exercise accompany the delegation and if standards or safeguards, or both, are present in conjunction with the delegation.⁹⁷ In determining the sufficiency of the standards or safeguards, the practical necessities of the public interest and the difficulty or impossibility of calling for the Legislature to function in a given area will be considered.⁹⁸ This same analysis was applied by the court in determining that the delegation of power to determine individual group foster care placement to a joint juvenile court and Department of Human Services committee was unlawful.⁹⁹ The court found that the delegation of power was “without procedures or guidelines necessary to prevent arbitrary and capricious decisions about individual placements in group foster care.”¹⁰⁰

Given the court’s conclusion that the principles involved in testing the constitutionality of a delegation to the executive and the judiciary are comparable, analysis of future delegations of power to the judiciary should take into account any modifications in the principles applicable to a delegation of power to the executive branch.¹⁰¹

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⁹⁵ Id. at 501.

⁹⁶ 243 N.W.2d 894, 898 (Iowa 1976).

⁹⁷ Id. at 898-900.

⁹⁸ Id. at 900.

⁹⁹ In re D.C.V. at 497.

¹⁰⁰ Id. at 498.

¹⁰¹ See this Guide, pp. 3-4.