Articles

Appointments by the Legislature Under the Rhode Island Separation of Powers Doctrine: The Hazards of the Road Less Traveled*

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1. INTRODUCTION[1]

For over a century, the United States Supreme Court has forbidden Congress from making appointments to offices outside the legislative branch of government.[2] James Madison said: "The power of the legislature to appoint any other than their own officers, departs too far from the theory which requires a separation of the great Departments of Government."[3] Conversely, Rhode Island's General Assembly has for that century and more exercised

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* With apologies to Robert Frost. *See* Robert Frost, *The Road Not Taken*, *in* You Come Too 84 (5th ed. 1962).

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1. Portions of this article appeared in Sheldon Whitehouse, *The Impetuous Vortex*, 43 R.I.B.J. 7, (Apr. 1995).

2. *See infra* Part 2.D.

3. Gordon Wood, The Creation of the American Republic 1776-1787, 452 (1969) (quoting from 6 The Papers of Thomas Jefferson 331 (Julian Boyd ed., 1950)).

virtually unchecked appointment powers.[4] In 1989, presented with the question whether legislative appointments[5] offend the Rhode Island Constitution, the Rhode Island Supreme Court avoided this constitutional issue.[6] The Coastal Resources Management Council, with eight members appointed by the legislature, survived scrutiny on the basis of a procedural ruling that the trial judge had "no standing to attack the constitutionality of the statute."[7] This year, the Court was presented again with the same question. Divided 2 to 2 on the constitutional question, the court was again unable to answer.[8] With three legislators sitting as members, the Judicial Tenure and Discipline Commission survived scrutiny on the basis of a procedural ruling that in a tie vote "the presumption of constitutionality prevails."[9]

Two possible roads diverge from the even split on the court. One would necessarily be the road of federal jurisprudence, customarily taken by the Rhode Island Supreme Court in separation of powers cases.[10] The other would permit these legislative appointments to continue, presumably relying on state precedents and history.[11] If proper separation of the powers is "essential to

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4. The General Assembly presently exerts its influence through appointments to the Rhode Island Lottery Commission, the Retirement Board, the State Investment Commission, the Committee on Judicial Tenure and Discipline, the Port Authority and Economic Development Corporation, the Water Resources Board, the Coastal Resources Management Council, the Solid Waste Management Corporation, the Capital Center Commission, the Narragansett Bay Water Quality Management District Commission, the Public Transit Authority, and the Unclassified Pay Plan Board, to name a few. A bill presently before the Rhode Island General Assembly would bring the independent Public Utilities Commission under legislative control with a majority of legislative appointments. *See infra* Appendix, Partial Listing of Agencies With Members Appointed By the Legislature.

5. The appointments at issue are those made by members of the legislature, usually the Speaker of the House and/or Majority Leader of the Senate, to positions in independent state agencies, boards and commissions that execute some non-legislative function. *See infra* note 75. The appointees may be members of the legislature themselves, or members of the public. If the appointment authority resides in the legislature, they are here deemed "legislative appointments."

6. Easton's Point Ass'n v. Coastal Resources Management Council, 522 A.2d 199 (R.I. 1987).

7. *Id.* at 202.

8. In re Commission on Judicial Tenure and Discipline, 670 A.2d 1232 (R.I. 1996).

9. *Id.* at 1234.

10. *See infra* Part 3.A

11. *See infra* Parts 3.B-3.C.

the successful working of this system,"[12] which road will be taken is a vital question for Rhode Island.

This article looks at the two roads, where they come from, why they diverge, and where they lead. Part Two reviews the federal history and jurisprudence and establishes that separation of powers is our nation's "first principle."[13] Next, this article identifies the legislature as the greatest threat to properly separated powers,[14] and describes the vital importance given to the power of appointment in separation of powers analysis.[15] Part Three describes our somewhat unique Rhode Island history. It demonstrates Rhode Island's general adherence to federal separation of powers jurisprudence and contrasts this with the apparent stress felt for decades by Rhode Island courts where the legislative appointment power is concerned,[16] and offers an example of the practical harm caused by these appointments. Section Four summarizes the decisions of other state courts, which usually forbid legislative appointments under separation of powers doctrine. Finally, this article concludes that Rhode Island's choice is one of great importance and that while we may not be required to follow the federal constitution, both our state constitution and basic principles of good government demand that we take that direction.

2. THE FEDERAL HIGHWAY: SEPARATION OF POWERS IN THE UNITED STATES GOVERNMENT

A. Our "First Principle": Separated Government Powers in American Democracy.

The United States Constitution vests, in Article I, "[a]ll legislative powers . . . in a Congress of the United States;" in Article II, the executive power is "vested in a President of the United States of America," who is charged to "take care that the laws be faithfully executed;" and in Article III, the judicial power is vested in a Supreme Court, and lower courts to be established by the legislature. The separation of powers thereby accomplished is the "national fundamental law,"[17] and is "sacred."[18]

12. Kilbourn v. Thompson, 103 U.S. 168, 191 (1881).
13. *See infra* Part 2.A.
14. *See infra* Part 2.B.
15. *See infra* Part 2.C.
16. *See infra* Parts 3.A-3C.
17. J.W. Hampton & Co. v. United States, 276 U.S. 394, 406 (1928).

It was the "central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."[19] James Madison, writing about the principle of separate powers, said: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty. . . ."[20] Thomas Jefferson called it "the first principle of a good government."[21] Even George Washington, in his farewell address, left a warning of the dangers of encroachment across the separated powers: "The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism."[22] In short, the separation of powers is our highest governmental principle.[23]

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18. Myers v. United States, 272 U.S. 52, 116 (1926) (quoting from 1 James Madison, Annals of Congress, 581 (Joseph Gales ed., 1789).

19. Mistretta v. United States, 488 U.S. 361, 380 (1989).

20. The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961).

21. Wood, *supra* note 3 at 549, 604.

22. Book v. State Office Bldg. Comm., 149 N.E.2d 273, 294 (1958) (quoting Thomas Jefferson). *See also* Irving Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 22 U. Pitt. L. Rev. 755, 758 (1959).

23. The litany of emphasis on this principle is extensive and profound. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 693 (1988) ("Time and again we have reaffirmed the importance in our broad constitutional scheme of the separation of governmental powers into the three coordinate branches."); INS v. Chadha, 462 U.S. 919, 951 (1983) (reasoning that the Constitution created three defined Branches "to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."); Bowsher v. Synar, 478 U.S. 714, 725 (1986) (separated powers are crucial in our system); Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question."); O'Donoghue v. United States, 289 U.S. 516, 530 (1933) ("[e]ach department should be kept completely independent of the others . . . in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments."); Springer v. Gov't of the Philippine Islands, 277 U.S. 189, 201 (1928) ("This separation and the consequent exclusive character of the powers conferred upon each of these departments is basic and vital — not merely a matter of governmental mechanism."); Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) ("The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other."); 1 The Works of James Wilson 367 (James DeWitt Andrews ed., 1896) (arguing each department's proceedings "should be free from the remotest influence, direct or indirect, of either of the two other powers.") *quoting O'Donoghue*, 289 U.S. at 530; 1 James Bryce, The Ameri-

The historical antecedents of this great principle include Baron Charles de Montesquieu's *The Spirit of the Laws.*[24] He warned, "When the legislative and executive powers are united in the same person or body, there can be no liberty."[25] Separated government powers was a cause championed also by John Locke[26] and Sir William Blackstone,[27] and the merits of this cause had the "full approval" of the Founding Fathers.[28]

The significance of properly separated governmental powers is deeply practical: "[w]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."[29]

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can Commonwealth 288 (1888) ("this separation is the merit which the Philadelphia Convention chiefly sought to attain.").

24. Charles de Montesquieu, The Spirit of the Laws 157 (Anne M. Cohler et al. eds. & trans., 1989) (1748).

25. This statement is described in The Federalist No. 47 (James Madison) as "this celebrated maxim of this celebrated author." *See* Buckley v. Valeo, 424 U.S. 1, 120 (1976). Montesquieu's full statement is related in John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 Temp. L. Rev. 1205 at n. 91:

> Political liberty in a citizen is that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have his liberty the government must be such that one citizen cannot fear another citizen.
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> When legislative power is united with executive power in a single person or in a single body of magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.
>
> Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.

Id.

26. 2 John Locke, Two Treatises of Civil Government Ch. XII (1690).

27. William Blackstone, Commentaries on the Laws of England 146 (7th ed. 1775)

28. Myers v. United States, 272 U.S. 52, 116 (1926).

29. *Chadha*, 462 U.S. 919, 959 (1983); *accord* Metro. Washington Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252, 272 (1991) ("[u]ltimate purpose of this separation of powers is to protect the liberty and security of the governed."); *Mistretta*, 488 U.S. at 380 ("essential to the preservation of liberty."); *Bowsher*, 478 U.S. at 721 (declared purpose "was to diffus[e] power the better to secure liberty.") (citations omitted). *See also* Younger, *supra* note 22 at 755 ("A tendency to corruption, then, is a characteristic of politics and the price of civilization. Containment of that tendency is one end of government: to achieve it, the new nation needed a shrewdly constructed constitution.").

B. *The "Impetuous Vortex": Dangers of the Legislative Branch.*

While there is "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power,"[30] of the separate branches, the legislature has earned the closest scrutiny. First of all, the legislature is the dominant branch.[31] Consequently, "[t]he dangers of congressional usurpation of executive branch functions have long been recognized."[32] James Bryce in *The American Commonwealth* noted "that every legislature tends to so enlarge its power as to encroach on the executive."[33] He called this the legislature's "passion for extending its authority."[34]

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30. *Chadha*, 462 U.S. at 951.

31. The Federalist No. 51, at 350 (James Madison) (J. Cooke ed., 1961) ("In republican government the legislative authority, necessarily, predominates.").

32. *Bowsher*, 478 U.S. at 727. Our bitter historical experience in the years between the Revolution and the Constitution, an interval when state legislatures ruled unchecked, justified particular caution about the legislature:

> Under British rule, the Colonies suffered the abuses of unchecked executive power that were attributed, at least popularly, to a hereditary monarchy. During the Confederation, the States reacted by removing power from the executive and placing it in the hands of elected legislators. But many legislators proved to be little better than Crown. The supremacy of legislatures came to be recognized as the supremacy of faction and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, [and] suspended the ordinary means of collecting debts.
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> It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches.

Chadha, 462 U.S. at 960-962 (citations omitted); *see also* Edward Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371, 374-6 (1976) ("The legislatures had assumed great power, and their rule — for a variety of reasons — was unstable. The supremacy of legislatures cause to be recognized as the supremacy of faction and the tyranny of shifting majorities."); Wood, *supra* note 23 at 380 (citing the "profuse, hastily drawn, capricious, confused and unjust legislation of the 1780's"). Thomas Jefferson described his experience in the Virginia legislature thusly:

> All the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating of these in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one . . . . And little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for.

The Federalist No. 48 at 252 (James Madison) (Wills ed.) (quoting from Thomas Jefferson, Notes on the State of Virginia); *see* Wood, *supra* note 23 at 451-452.

33. Bryce, *supra* note 23 at 297.

34. *Id.* at 303. President Truman agreed. He said: "Unless this principle is observed, it is impossible to have orderly government. The legislative power will

For these and other reasons, the Framers recognized the "particular danger of the Legislative Branch's accreting to itself judicial or executive power."[35] As James Madison stated,

> . . . The legislative department is everywhere extending the sphere of its activity, and drawing all powers into its impetuous vortex.
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> . . . .
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> . . . [I]t is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.
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> . . . Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.[36]

Alexander Hamilton as well warned of "[t]he propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments."[37] In sum, as the Supreme Court has concluded, "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the national government will aggrandize itself at the expense of the other two branches."[38]

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ooze into the executive offices. It will influence and corrupt the decisions of the executive branch. It will affect promotions and transfers. It will warp and twist policies." Younger, *supra* note 29 at 783, quoting from Barth, Government by Investigation 218 (1955).

35. *Mistretta*, 488 U.S. at 382.

36. The Federalist No. 48, at 332-334 (James Madison) (J. Cooke ed., 1961). *See Metropolitan*, 501 U.S. at 273-274.

37. The Federalist No. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

38. *Buckley*, 424 U.S. at 129. Historians relate that the change in American sentiments about the legislatures in the interval between the Revolution of 1776 and the Constitution of 1789 reflected more than just bitter experience, but a change in the American conception of society. *See generally* Wood, *supra* note 23. Under the colonial regime, the people were seen as one of three estates of the realm, represented by the House of Commons in English Parliament in a struggle of interests defined by social class against the Lords and the Crown. In the Revolution, Americans instinctively identified themselves with the Commons, and undertook to defend themselves against Lords and Crown. By the time the Constitution was drafted, it had become apparent to Americans that we, the people, were all commoners, and that it was not necessary to design American government to defend against Lords and Crown. The Federalist No. 48, at 251 (James Madison) (Wills ed.). Rather, the genius of the Constitution was to protect individuals against the dangers of faction and shifting majorities in an egalitarian society. In

C. *A "Bright Line": Appointments to Office Under the Separation of Powers Doctrine.*

Although separation of powers is not an area much given to "bright line" analysis,[39] there is a bright federal line that forbids legislative appointments. Even statutory schemes that "might prove to be innocuous" offend the Constitution where they "provide[ ] a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role."[40] The oft-quoted passage from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[41] enjoining "interdependence" and "reciprocity" upon the branches,[42] has never permitted appointments by Congress to independent or executive agencies. As the following sections will demonstrate, here the line is clearly drawn.

Legislative appointments to offices outside the legislative branch are an encroachment on the other powers,[43] feared specifi-

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this vision, the legislature, which immediately works the prevailing popular will, was recognized as the most dangerous branch. *Cf.* Walt Kelly, Pogo ("We have met the enemy and he is us."). As one famous observer of the American scene noted:

> Men come and go, but an assembly goes on forever; it is immortal, because while members change, the policy, the passion for extending its authority, the tenacity in clinging to what has once been gained, remain persistent. . . . Its pressure is steady and continuous; it is always, by a sort of natural process, expanding its own powers and devising new methods for fettering its rival.

Bryce, *supra* note 23 at 303-304.

39. Commodity Futures Trading Comm. v. Schorr, 478 U.S. 833, 851, 857 (1986).

40. *Metropolitan*, 501 U.S. at 277; *see also* Fed. Election Commission v. NRA Political Victory Fund, 6 F.3d 821, 827 (D.C. Cir. 1993), *cert. dismissed*, 115 S.Ct. 537 (1994).

41. 343 U.S. 579, 635 (1952)

42. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Id. See also* Mistretta v. United States, 488 U.S. 361, 381 (1989) (reasoning "a hermetic division among the Branches" not required); Nixon v. Adm'r of Gen. Services, 433 U.S. 425, 443 (1976) (rejecting "airtight departments of government"); 1 James Landis, The Administrative Process (1938) (one cannot "distinguish minutely and definitively between these powers"); The Federalist No. 37, at 235 (James Madison) (J. Cooke ed., 1961) (noting "the obscurity which reigns in these subjects, and which puzzles the greatest adepts in political science").

43. It should be recognized that the three great Powers — Legislative, Executive and Judicial — are each capable of performing internal legislative, executive and judicial functions. The usual terminology that recognizes the proper internal use of one of these functions by a coordinate power is the prefix "quasi". A state

cally by the Founding Fathers.[44] Mr. Madison said in the First Congress,

> The powers relative to offices are partly legislative and partly executive. The legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with designating the man to fill the office.[45]

Madison warned, "[i]f there is any point in which the separation of the legislative and executive powers ought to be maintained with great caution, it is that which relates to officers and offices."[46] The Framers concluded from this history that "[t]he proper cure . . . for corruption in the legislature was to take from it the power of appointment to office."[47]

The duty to resolve questions of separation of powers falls to the judicial branch.[48] The principle of judicial review was established to "defend the constitution against violations by the other departments, particularly the legislature."[49] As the following section demonstrates, the United States Supreme Court has been faithful to the Framers' concern. Each time Congress has arro-

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legislature exercises a "quasi-executive" function in the hiring and supervision of its own employees. An executive agency exercises a "quasi-judicial" function when it holds a contested hearing. An appellate court exercises a "quasi-legislative" function when it establishes local rules of conduct and procedure. An independent agency may perform legislative, judicial and executive functions in this manner. 1 J. Stein et al., Administrative Law, §§ 4.10-4.14; *see also* Fed. Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487-488 (1952) (Jackson, J. *dissenting*).

44. A reason for this particular concern over appointments was the Crown's historic use of patronage appointments and pensions to influence voting in the Houses of Parliament. This interference was the predominant "separation of powers" concern at the time of the Revolution. *See* Wood, *supra* note 23 at 33, 143-149, 157, 407, 435, 488; *see also*, Bryce, *supra* note 23 at 298 n.1. As the Founders' concern over the alarming practices of state legislatures grew, it was observed that "vesting the power of appointment to offices . . . in the legislature destroyed all responsibility and created a perpetual source of faction and corruption." Wood, *supra* note 23 at 435 (internal quotations omitted). In the Revolutionary era, "corruption" was a term of art in the political science of separated powers. *Id.* at 32-33.

45. *Myers*, 272 U.S. at 128. *See also* The Federalist No. 51 (Alexander Hamilton).

46. *Myers*, 272 U.S. at 116, *quoting* James Madison in 1 Annals of Congress 581 (Joseph Gales ed., 1789).

47. Bryce, *supra* note 23 at 551.

48. Baker v. Carr, 369 U.S. 186, 211 (1962).

49. Wood, *supra* note 22 at 462; *see also* The Federalist No. 78 (Alexander Hamilton) ("[c]ourts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments.").

gated to itself the power of appointment, the United States Supreme Court has rebuffed the encroachment under the broad principle of separation of governmental powers.[50]

D. *Judicial Bulwarks: United States Supreme Court Appointments Decisions.*

Over a century ago, Congress created a commission to develop Rock Creek Park in the District of Columbia, and appointed to it the Chief of Engineers of the United States Army and the Engineer Commissioner of the District of Columbia.[51] The Supreme Court upheld the designation of the engineers to the park commission on grounds that Congress was merely devolving additional functions *ex officio* on an executive office, and not making legislative appointments. The *Shoemaker* decision stated the maxim: "while Congress may create an office, it cannot appoint the officer."[52]

The sockdolager came in *Springer v. Gov't of the Philippine Islands*,[53] in which the Court addressed appointments by the Philippine Islands legislature to boards of directors of the National Coal Company, the National Bank, the National Petroleum Company, the National Development Company, the National Cement Company, and the National Iron Company of the Philippines. The Court applied the American constitutional model to the provisional government of the Philippines and rejected these legislative appointments as violating the principle of separation of governmental powers. The *Springer* Court said that the separation of powers principle was the "general rule inherent in the American constitu-

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50. *See Metropolitan*, 501 U.S. at 277 n. 23.

> Because we invalidate the Board of Review under basic separation-of-powers principles, we need not address respondents' claim that Members of Congress serve on the Board in violation of the Incompatibility and Ineligibility Clauses. *See* U.S. Const., Art. I, § 6. We also express no opinion on whether the appointment process of the Board of Review contravenes the Appointments Clause, U.S. Const., Art. II, § 2, cl. 2.

Id. Reliance on broad separation of powers principles is common to all of the appointments decisions, as the following section demonstrates.

51. Shoemaker v. United States, 147 U.S. 282, 284 (1893).

52. *Id.* at 300.

53. 277 U.S. 189 (1928).

tional system,"[54] and specifically refused to found its decision on narrow or individual constitutional provisions:

> Some of our state Constitutions expressly provide in one form or another that the legislative, executive, and judicial powers of government shall be forever separate and distinct from each other. Other Constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments.[55]

Reliance on broad separation of powers principles to decide appointments cases continued through *Myers v. United States*,[56] *Humphrey's Executor v. United States*,[57] and *Wiener v. United States*,[58] which together held that Congress cannot exercise any removal authority over appointees outside the legislative branch, but can by the establishment of terms of office restrict a president's removal of appointees to independent agencies.

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54. *Id.* at 201-202; *accord Humphrey's Ex'r*, 295 U.S. at 629-630 ("[i]mplied in the very fact of the separation of the powers of these departments by the Constitution.").

55. *Springer*, 277 U.S. at 201. The foundation for *Springer*'s rejection of the legislative appointments was an American principle presumably common to state constitutions. This suggests that legislative appointments must offend state constitutions as well. However, state legislative authority is "plenary," *see* Town of Lincoln v. Lincoln Lodge No. 22, 660 A.2d 710, 715 (R.I. 1995); City of Pawtucket v. Sundlun, 662 A.2d 40, 44 (R.I. 1995), while Congress' is not. Thus the argument may be made that a state legislature must have more authority to appoint than has Congress. This argument has surface appeal, but shrivels under scrutiny. The argument's flaw is that it confuses two separate doctrines. Federalism is the doctrine that prohibits certain areas of substantive jurisdiction to Congress and leaves them exclusively to the states. Principles of federalism limit Congress' plenary authority to those areas that are proper for Congress to legislate. *Cf.* United States v. Lopez, 115 S.Ct. 1624 (1995). State legislatures' plenary authority is not so limited. However, this fact bears not at all on principles of separation of powers, and the two should not be confused. Even where plenary power is exercised, its exercise must still yield to separation of powers requirements. "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction." M'Culloch v. State, 17 U.S. 316 (1819); Buckley v. Valeo, 424 U.S. at 133. Yet it must still yield to separation of powers principles in those areas. *Buckley*, 424 U.S. at 132-133; *see also* Bryce, *supra* note 23 at 43-45. In a nutshell, the "first principle," separation of powers, trumps "plenariness," not vice versa.

56. 272 U.S. at 161 (appointments held to be executive under duty to faithfully execute the laws).

57. 295 U.S. 602, 629-630 (1935) (holding Congress has power to limit executive power to remove administrative officials by establishing terms of office).

58. 357 U.S. 349 (1958) (following *Humphrey's Ex'r*).

The next major decision on legislative appointments was *Buckley v. Valeo.*[59] Congress established the Federal Election Commission, of whose eight members two were appointed by the President pro tempore of the Senate, and two by the Speaker of the House of Representatives.[60] Defining the question as whether the legislative appointment of those members "runs afoul of the separation of powers embedded in the Constitution,"[61] the Court turned to "the fundamental principles of the Government established by the Framers of the Constitution" and struck down the appointments.[62] In the wake of *Buckley*, Congress sought to reestablish its appointments to the Commission. The new members were *ex officio*, and exercised no voting power. These appointments too were rejected, as "their mere presence as agents of Congress conveys a tacit message to the other commissioners. The message may well be an entirely appropriate one — but it nevertheless has the potential to influence the other commissioners."[63]

The Court of Appeals that rejected the new appointments elaborated:

> Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role. In that capacity, Congress enjoys ample channels to advise, coordinate, and even directly influence an executive agency. It can do so through oversight hearings, appropriation and authorization legislation, or direct communication with the Commission. What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents "beyond the legislative sphere" by naming them to membership on an entity with executive powers.[64]

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59. 424 U.S. at 113

60. *Id.*

61. *Id.*

62. *Id.* at 120, 143.

63. Fed. Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) (the Constitution "imposes a structural ban on legislative intrusions into other governmental functions," 6 F.3d at 827, and so "the mere presence of agents of Congress on an entity with executive powers offends the Constitution.") *cert. dismissed*, 115 S.Ct. 537 (1994).

64. *Id.* (citations and footnote omitted); *accord Bowsher*, 478 U.S. at 733 ("[o]nce 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[65] presented the obverse of *Buckley*. Congress delegated executive budgetary functions to an official in the legislative branch: the Comptroller General. The Court relied again on separation of powers principles expounded by the Framers, and held the delegation of executive functions to an agent of Congress unconstitutional.[66] Similarly, in *Morrison v. Olson*,[67] the Court applied broad separation of powers principles in its review of the independent counsel statute.[68]

Most recently, *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise*[69] struck down an Airport Authority Board of Review comprised of members of Congress because it wielded veto power over certain executive functions of the Authority. The Court once again defined the issue as one of separation of powers[70] and founded its decision in a structural analysis of this historic principle.[71] Heeding Madison's warnings that "power is of an encroaching nature" and that "[the legislature] can with greater facility, mask . . . the encroachments which it makes,"[72] the Court concluded that the Board of Review, even though it "might prove to be innocuous,"[73] was an impermissible encroachment by the legislature beyond the legislative sphere. The Court laid out a simple rule: "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7."[74]

This phalanx of decisions holds in unanimous array that the separation of powers doctrine prohibits the legislature from appointing individuals to offices outside of the legislative branch of government.[75] The decisions rely not on specific provisions of the

65. 478 U.S. at 714 (1986).
66. *Id.* at 721-27, 733-34.
67. 487 U.S. 654 (1988).
68. *Id.* at 685-96.
69. 501 U.S. 252 (1991).
70. *Metropolitan*, 501 U.S. at 271.
71. *Id.* at 272-274.
72. *Id.* at 277, *quoted in* The Federalist No. 48, at 334 (James Madison).
73. *Id.* at 276.
74. *Id.*
75. A governmental body with members subject to legislative appointment may only exercise powers "of an investigative and informative nature" such as those exercised by a congressional committee. *Buckley*, 424 U.S. at 113 *cf.* Tenney

federal constitution, but on elemental tenets of American democracy that Rhode Island presumably shares. "Legislative power . . . is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement."[76] Or, as Chief Justice Marshall more generally observed: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."[77]

3. The Local Road: Separation of Powers in Rhode Island Government.

A. *Smooth Travel: Rhode Island Following the Federal Constitutional Model of Separate Government Powers.*

Article V of the Rhode Island Constitution, "Of the Distribution of Powers," states: "The powers of the government shall be distributed into three departments: the legislative, executive and judicial." Articles VI, "Of the Legislative Power," VII, "Of the House of Representatives," and VIII, "Of the Senate," vest the legislative power in and establish the composition of the houses of the General Assembly. Article IX, "Of the Executive Power," vests the "chief executive power" of the state in the governor and, like the United States Constitution, commands the governor to "take care that the laws be faithfully executed." This article also establishes the powers and duties of our other constitutional executive officers: the secretary of state; the attorney general; and the general treasurer. Article X vests the judicial power of the state in our supreme court, and provides for establishment by the legislature of lower courts.

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v. Brandhove, 341 U.S. 367, 378 (1951). In Stockman v. Leddy, 129 P. 220 (1912), a case quoted with approval in *Springer*, the Supreme Court of Colorado provided the following limits on bodies appointed by the legislature:

> [T]he investigation which [the legislature] authorizes, and the ascertainment of facts which it proposes, are to aid it in future legislation, or to assist it in its legislative capacity in supplying a remedy for some existing evil, or to furnish such information as a guide to the attorney general, or some other appropriate officer of the executive department, in the performance of his duties.

Id. at 30-31. Further the legislative branch may not go.

76. Buckley v. Valeo, 424 U.S. at 140 (quoting *Springer*, 277 U.S. at 189).

77. Fletcher v. Peck, (6 Cranch) 10 U.S. 87, 136 (1810), *cited in Chadha*, 462 U.S. at 967.

There are only minor textual differences between the separation of powers provisions of our state's constitution and the federal constitution, and they are not of great significance.[78] In addition to the textual similarity, both constitutions trace their separation of powers principles back to the same fundamental wellsprings of democracy: the writings of John Locke and Charles de Montesquieu; the Founding Fathers' constitutional debates; and The Federalist Papers. More obviously, the federal constitution preceded

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78. The primary differences are three in number:

(1.) There is no single "Distribution of Powers" Clause in the United States Constitution to equate to Article V of the Rhode Island Constitution. This specific clause in the Rhode Island Constitution provides additional emphasis to the separation of powers, a point left implicit in the United States Constitution. *Humphrey's Ex'r*, 295 U.S. at 629-630.

(2.) Article II Section 2 of the United States Constitution provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." There is no similar "Appointments Clause" in the Rhode Island Constitution.

However, simply separating the governmental powers implicitly removes the constitutional propriety of legislative appointments. *Springer,* 277 U.S. at 201-202. The most recent appointments decision from the Supreme Court, for instance, expressly eschews analysis under the Appointments Clause, and stands its analysis exclusively on our common principle of separation of the governmental powers. *Metropolitan*, 501 U.S. at 277 n.23 (1991).

(3.) Finally, the Rhode Island Constitution vests in the governor the "chief" executive power. R.I. Const. Art. IX; *see* Taylor & Co. v. R.G. & J.T. Place, 4 R.I. 324, 354 (1856). The sensible reading of the limitation "chief," if indeed it is a limitation, is that it reflects the independent election within the state's executive branch of the Attorney General, the Secretary of State, and the General Treasurer. The equivalent offices are appointed by the President in the federal government. *See* R.I. Const. Art. IX, § 12; *In re House of Representatives*, 575 A.2d at 179.

The key, in any event, is not the executive power, but the legislative power. The *Dorr* court held that the clause "[t]he General Assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this Constitution," means *legislative* powers, since the separation of powers clause prohibits other than legislative powers to it. In re Dorr, 3 R.I. 299, 304 (1854). The separation of governmental powers principle does not confide all appointment powers in the executive, or the chief executive. *See Morrison*, 487 U.S. at 690-91, 695. Rather it forbids the appointment power to the legislative branch. Fed. Election Comm'n v. NRA Political Victory Fund, 6 F.3d at 826-827; *see also* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 Temp. L. Rev. 1205, 1265 ("differences in the respective texts of various state constitutions" exist, but have not "proven to be outcome determinative in the cases.").

the Rhode Island constitution by more than half a century, and was likely its model.

Rhode Island is not bound by the federal constitution to follow federal separation of powers doctrine.[79] But Rhode Island shows great deference to federal separation of powers jurisprudence and, nearly invariably, Supreme Court of Rhode Island decisions have applied federal separation of powers analysis.[80] In *In re Advisory Opinion to the Governor*,[81] the court adhered to the view that, "the doctrine [of separation of powers] is an inherent and integral element of the republican form of government and as an element thereof is expressly guaranteed to the states by the Guaranty Clause."[82]

Were it not an advisory opinion,[83] this decision would appear to mandate application of federal jurisprudence through the republican form of government guarantee of Article IV, Section 4 of the United States Constitution. Thus, even Rhode Island Supreme

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79. Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957); Weeks v. Personnel Board of Review, 373 A.2d 176, 177 (1977); 1 George Sutherland, Statutes and Statutory Construction § 3.02 (4th ed., 1985 Revision).

80. Older Rhode Island separation of powers cases that turned to the principles of the federal constitution and the Founding Fathers for guidance include In re Dorr, 3 R.I. 299 (1854); Taylor & Co. v. R.G. & J.T. Place, 4 R.I. 324 (1856); and Gorham v. Robinson, 57 R.I. 1 (1936). Recent cases include Chang v. University of Rhode Island, 375 A.2d 925 (1977), where the court turned to federal precedent to determine whether the governor could by executive order override a directive of the legislature. The court accepted:

> that the relevant provision of our constitution have the same meaning as the comparable provisions of the Federal Constitution, and . . . that federal cases dealing with executive power establish standards by which to measure the power of the Governor to issue executive orders on Fair Employment Practices.

Id. Accordingly, the court looked to federal jurisprudence as the "appropriate analytical framework for determining the extent of executive power." *Id.*; *see also* State v. Jacques, 554 A.2d 193, 196 (R.I. 1989) (quoting Chadha v. INS, 634 F.2d 408 (9th Cir. 1980) *aff'd*, INS v. Chadha, 462 U.S. 919 (1983)). In re House of Representatives (Special Prosecutor), 575 A.2d 176 (R.I. 1990), adverted to the federal constitution separation of powers framework and then stated: "The principle of separation of powers is *also* mandated by Rhode Island's Constitution. Article V provides, 'The powers of government shall be distributed into three departments: the legislative, executive and judicial.' " *Id.* at 178 (emphasis added).

81. 612 A.2d 1 (R.I. 1992).

82. *Id.* at 18 (citations omitted).

83. An advisory opinion obtained pursuant to R.I. Const. Art. X, Section 3 does not constitute a decision of the court, does not finally determine any question, and has no binding effect on any person whose legal rights are involved. Opinion to the Governor, 149 A.2d 341 (1959).

Court decisions urge the road of federal jurisprudence on separation of powers issues. But as we shall see, this road has diverged.

B. *Divergence: Rhode Island Legislative Appointments Decisions.*

In one specific area of separation of powers doctrine, we encounter a divergence in the road. This area is the General Assembly's power to appoint to offices outside the legislature. In this area, the Rhode Island Supreme Court's decisions are troubled.

In recent cases, where legislative appointments have been questioned, the Rhode Island Supreme Court has avoided reaching the issue,[84] or has found itself unable to render a constitutional decision.[85] In older decisions, as to legislative appointments the court has said in dicta that "[t]he executive power had been nominal, merely under the charter, and the constitution extends it very little"[86] that the legislature "holds the purse, and, under our constitution, appoints as well as pays"[87] and that the executive's "official power, under our constitution, amounts to nothing."[88] Subsequently, the court described the background of the 1842 constitutional convention as follows:

> Those who had the political power did not want to surrender the old royal charter . . . by which the legislature had become the supreme power in the State. They looked askance upon a

84. Easton's Point Ass'n. v. Coastal Resources Management Council, 552 A.2d 199 (R.I. 1989). *Easton's Point* avoided the constitutional separation of powers issue on the theory that the judge below, who had raised the constitutional issue *sua sponte*, erred in doing so because the parties had waived the separation of powers objection by appearing voluntarily before the commission. *Id.* at 202. The court's waiver rationale appears ill-founded. *See, e.g.,* Commodity Futures Trading Comm'n v. Schorr, 478 U.S. at 850-851 (in separation of powers cases, "notions of consent and waiver cannot be dispositive"); *cf.* Freytag v. Comm'n of Internal Revenue, 501 U.S. 868 (holding that taxpayers did not waive challenge under Appointments Clause because this was a structural constitutional objection); Welcher v. Sobol, 636 N.Y.S.2d 421 (holding that a failure to object at an administrative hearing did not waive a constitutional challenge because the challenge went to the statute itself).

85. In re Comm'n on Judicial Tenure and Discipline, 670 A.2d 1232 (R.I. 1996).

86. *Taylor*, 4 R.I. 324 at 349-351

87. *Id.* at 354.

88. *Id.* at 343.

> constitution that would reduce this department to a plane of equality with the executive and judicial departments.[89]

With a bare majority, and over a spirited dissent that to modern readers appears to have the better of the argument, the court then produced its own dictum, stating that those political power brokers "stoutly refused . . . to vest the executive department with full executive powers."[90]

These vintage dicta are irrelevant to the specific holdings in the cases in which they appeared[91] and produce irreconcilable internal conflicts and flaws.[92] Beyond the internal contradictions,

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89. *Gorham*, 57 R.I. at 22.

90. *Id.* at 23.

91. Dicta, we know, can fall out of even famous decisions. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), had its "general expressions" chopped back in Cohens v. Comm'n of Virginia, 19 U.S. (6 Wheat.) 264 (1821). *See Humphrey's Ex'r*, 295 U.S. at 627. *Myers* underwent similar treatment at the hands of *Humphrey's Ex'r*. The Court's remedial surgery on the *Myers* opinion took the form of "putting aside *dicta*, which may be followed if sufficiently persuasive but which are not controlling." *Id.* The Court stated:

> These opinions examine at length the historical, legislative and judicial data bearing upon the question, beginning with what is called 'the decision of 1789' in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which . . . are beyond the point involved and, therefore, do not come within the rule of *stare decisis*. In so far as they are out of harmony with the views here set forth, these expressions are disapproved.

Humphrey's Ex'r, 295 U.S. at 626. The Court also quoted the following passage from the *Cohens* decision, which trimmed the reach of *Marbury*:

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. *Humphrey's Ex'r*, 295 U.S. at 627, *quoting Cohens*, (6 Wheat) 19 U.S. at 399.

92. The *Taylor* court's stated fear of the legislature and its "impetuous vortex," *Taylor*, 4 R.I. at 355, belies *Gorham's* assertion that: "The framers of our State constitution entertained no such fears of the general assembly. On the contrary, . . . they trusted that department more than the others." *Gorham*, 57 R.I. at 28. *Cf. Myers*, 272 U.S. at 123.

the principles of Montesquieu and the Founding Fathers[93] simply cannot be reconciled with the *Gorham* and *Taylor* dicta. The United States Supreme Court and the Rhode Island Supreme Court have too often said that the federal and state constitutions are comparable.[94]

Confusion and conflict in the older decisions, paralysis in recent decisions; what is it about the legislative appointment power that has so confounded the Rhode Island court? The explanation may lie behind Chief Justice Holmes' aphorism that "a page of history is worth a volume of logic."[95]

C. *"Great Discrepancy": Rhode Island's Constitutional History.*

i. *The Appointment Power.*

The General Assembly had near-absolute authority before the Rhode Island Constitution was adopted in 1842, and "vast appointive power."[96] Indeed, the General Assembly on extraordinary oc-

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Elsewhere the *Gorham* court denied that dissatisfaction with the general assembly's power over the judiciary "played any part in the agitation for constitutional reform which finally resulted in our present constitution." *Gorham,* 57 R.I. at 12. *Taylor*, on the other hand, spoke of "the evils of this unhallowed union of judicial and legislative powers in one body," *Taylor,* 4 R.I. at 342, and asserted that an "independent, responsible judiciary" was an "inestimable treasure" to which "the people of this state have been steadily advancing . . . until, in the constitution adopted a by them only in 1843, they supposed that they held it firmly and securely in their grasp." *Id.* at 343.

Taylor said in one place, "No jealousy of [the executive branch], or of its assumption by the enterprising and all absorbing legislative department of the government, did, or could exist." *Taylor,* 4 R.I. at 349-351. It said in another: "The constitution was set up . . . to rescue, though the aid of the judicial department, the powers of that *and the other department of government* from the eddying current of [the legislature's] 'impetuous vortex.'" *Id.* at 355 (emphasis added).

93. *See supra* Part 2.A.

94. See, e.g., *Buckley,* 424 U.S. at 140; *Springer,* 277 U.S. at 201; *Chang*, 118 R.I. at 638. The *Taylor* court itself stated that the separation of powers principle has been illustrated and enforced "in the federal constitution, and in every state constitution of these United States," *Taylor*, 4 R.I. at 342, that "the different powers of government . . . under our political systems, *federal and state*, are, without exception, carefully distributed between the legislative, the executive and the judicial departments." *Id.* at 332 (emphasis added). *In re Advisory Opinion to the Governor*, 612 A.2d at 18, reported the view that "the doctrine of separation of powers is extremely important and fundamental to both federal and state governments." *Id.*

95. *See* New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

96. Patrick Conley, Democracy in Decline 37 (1977).

casion appointed the governor.[97] The General Assembly deposed the Loyalist-leaning Governor-elect and recognized the Deputy Governor in his stead in 1775 in furtherance of the Revolution against England,[98] and in 1806 in Grand Committee, the General Assembly appointed an "acting governor."[99] Additionally the General Assembly chose the Governor in 1890 when none of the candidates received a majority of the popular vote.[100]

The General Assembly was a unicameral body, of which the governor was a member, under the Charter of 1663.[101] All the powers of government were exercised by the General Assembly since the governor and judges[102] were all members. In 1696, the General Assembly first sat in two houses, and the governor then sat as a member of the house of magistrates — later to become the Senate.[103] In 1901, the governor still presided in the Senate, though no longer a member.[104]

The appointment power wielded by the General Assembly was yielded slowly and reluctantly. After the governor was no longer a member, an appointments statute kept close control in the legislature. Under the Brayton Act of 1901, if the governor's appointee did not obtain consent of the Senate in three days, the Senate could make its own election to the office.[105] This measure was repealed as part of the "Bloodless Revolution" of 1935. Only then did the governor obtain substantial and independent appointive power, but the General Assembly shared rather than yielded this power, maintaining appointments to many non-legislative offices to this day.

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97. *Dorr*, 3 R.I. at 309.

98. C. Carroll, Rhode Island: Three Centuries of Democracy 98, 194 (1932).

99. Conley, *supra* note 96 at 176.

100. Carroll, *supra* note 98 at 660.

101. *Id.* at 465.

102. As a judicial body under the Charter, the General Assembly heard appeals from trials at which the Governor and his assistants had presided. Conley, *supra* note 96 at 40-43; Carroll, *supra* note 98 at 195, 226. In 1729, the Governor, Deputy Governor, and his Assistants were formally established as a Superior Court of Judicature, *id.* at 229, and election of the chief justice and four associate justices by the Grand Committee began in 1746-47. *Id.* at 744. At one point, the offices of Governor and Chief Justice were occupied by the same person. *Id.* at 226.

103. Conley, *supra* note 96 at 39; Carroll, *supra* note 98 at 194, 468.

104. Carroll, *supra* note 98 at 718.

105. *Id.* at 720.

Rhode Island's halting steps towards the American model of separated powers reflect the "great discrepancy between the affirmation of the need to separate the several governmental departments and the actual political practice the state governments followed."[106] They also clearly reflect the General Assembly's "tenacity in clinging to what has once been gained."[107]

ii. Legislative Power Over the State's Supreme Court.

The *Taylor* decision of 1856 followed the period of greatest political upheaval in Rhode Island history. The "Dorr War"[108] ended in the summer of 1842, and the state's new constitution, which dramatically expanded the franchise, was ratified in 1843.[109] Feelings ran high surrounding the adoption of the state constitution. In the "abortive and farcical" Dorr war,[110] two lives were lost,[111] Dorr himself was jailed for treason,[112] and request was even made to the United States government to intervene militarily in Rhode Island and put down the Dorr rebellion.[113] These issues smoldered into the next decade and in 1854 reform Democrats in the legislature revoked Dorr's conviction.[114]

Additionally, an anti-immigrant, anti-Catholic movement called the Know-Nothings[115] that grew in reaction to the new polit-

106. Wood, *supra* note 23 at 153-154.

107. Bryce, *supra* note 23 at 303.

108. The Dorr War was a brief conflict that erupted at the conclusion of bitter political struggle over a new constitution that would extend the franchise beyond the predominantly rural landholders who controlled the political process. Thomas Dorr led a "people's convention" that adopted a new constitution. The General Assembly responded with a less radical constitution of its own. An effort by Dorr to take an armory and enforce the people's constitution caused this political conflict to be called a war. Dorr's arrest and conviction for treason, the irregularity of his trial, and a brutal life sentence to solitary imprisonment at hard labor, "ma[d]e him seem a martyr." Hoffman and Hoffman, Brotherly Love: Murder and the Politics of Prejudice in Nineteenth Century Rhode Island 81 (1993); Carroll, *supra* note 98 at 506. Dorr was eventually released after less than two years. *See generally* W.F. McLoughlin, Rhode Island: A History 129-137; Carroll, *supra* note 98 at 483-511, 579-581; *Dorr*, 3 R.I. at 299.

109. *See* Carroll *supra* note 98 at 472, 474, 475.

110. Conley, *supra* note 96 at 350.

111. Carroll, *supra* note 98 at 498.

112. *Id.* at 507

113. *Id.* at 492-3, 508.

114. McLoughlin, *supra* note 108 at 36.

115. The name of this group was derived from the supposed pledge of its members; who, if asked about the organization would say "I know nothing."

ical arrivals "reached a peak in Rhode Island in the early 1850s"[116] and swept out the reform Democrats to take over the General Assembly in 1855.[117] This episode is described by McLoughlin as "a prime example of 'the paranoid style' in American politics."[118]

The *Taylor* Court of 1856 would not under the prevailing *realpolitik* likely have been willing to inject into this turbulence an unwelcome restructuring of the legislature's habitual powers. At the time, the justices served by legislative grace. Indeed, in September of 1853, the reform Democrats of the House of Representatives had voted to remove the judges of the Supreme Court by declaring their seats vacant. The justices were spared only by Senate opposition to the purge.[119] The political lesson could not have been lost on the justices.

The *Gorham* court of 1936 was appointed in the greatest political upheaval in Rhode Island since the Dorr War: the "Bloodless Revolution" of 1935. All five of the new judges' predecessors were sacked.[120] The five new judges who decided *Gorham* served at the will and pleasure of the legislature[121] and were naturally allied with their patrons in the new legislative majority. With the seats of their sacked predecessors practically still warm, they could have seen little value in provoking the General Assembly.

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116. McLoughlin, *supra* note 98 at 141.

117. *Id.* at 142. The Dorr War, Irish Immigration and Know-Nothingism were closely related.

> This movement for reform of the state constitution coincided with events in Ireland that led to a vast increase in the number of Irish immigrants to the United States in the 1840s, particularly in Massachusetts and Rhode Island, changing an old homogeneous Protestant Yankee culture to a heterogenous (sic) one.

Hoffman and Hoffman, *supra* note 108 at xii. William McLoughlin notes that "[m]uch of the tension in the Dorr War stemmed from the anti-Irish and anti-Catholic feeling among Dorr's opponents." McLoughlin, *supra* note 108 at 139-140. Historians Patrick Conley and Matthew Smith, who are to be credited with much of the original research in this area, relate that "the Yankees of 1855 saw the Irish as a threat to traditional American institutions and values," and that the outcome in the political arena was "turbulent conflict between Yankee and Celt." Patrick Conley and Matthew Smith, Catholicism in Rhode Island: The Formative Era 81, 83.

118. McLoughlin, *supra* note 108 at 139-140.

119. Carroll , *supra* note 98 at 581.

120. Patrick Conley, Album of Rhode Island History 1636-1986 166; McLoughlin, *supra* note 108 at 202.

121. Mcloughlin, *supra* note 108 at 202.

The *Taylor* and *Gorham* decisions must be read in this historical context, and in light of an incident provoked in 1787 by the case of *Trevett v. Weeden*.[122] Although the actual holding of this case was quite mild, the arguments "sustained an impression in the public mind that the Superior Court had defied the General Assembly."[123] The General Assembly took umbrage and the justices were promptly haled before the legislature to show cause. Four of the five Justices appeared, and endorsed the general proposition of an independent judiciary with a duty to God higher than to the General Assembly.[124] "[A]t the next election the General Assembly removed the offending justices from office."[125]

In seeking an explanation for judicial decisions that are so confounded where legislative appointments are at issue, one must recognize the political value to the General Assembly of these appointments. In this vein, it is impossible to ignore the General Assembly's tradition of sacking offending justices, the practical regard for the power of the General Assembly this must have instilled, and the legislature's recognized "tenacity in clinging to what has once been gained."[126]

4. "If Men Were Angels": Why This Matters to Rhode Island

"If men were angels, no government would be necessary," wrote James Madison.[127] "In framing a government which is to be administered by men over men," he wrote, properly separated powers supply "by opposite and rival interests, the defect of better motives."[128] For those close to government, it is sometimes hard to see how these "opposite and vital interests" are of practical utility. The terms of 18th century political discourse, such as "liberty" and "tyranny" and "corruption," may not resonate for all of us.

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122. This decision predated reporting cases in Rhode Island, and is primarily of historical interest. The arguments engaging the novel principle of judicial review were widely circulated. Carroll, *supra* note 98 at 745.

123. *Id.* at 745.

124. *Id.*

125. *Id.* Carroll concluded that after this decision, "[t]here would be no reason to sustain a lingering doubt . . . that the General Assembly had justified its rights to be called an omnipotent legislature." *Id.*

126. Bryce, *supra* note 24 at 297.

127. The Federalist No. 51 at 262-263 (James Madison).

128. *Id.* at 262-263.

Of course, we can simply take the Founders' word for it, if we find James Madison, Thomas Jefferson and George Washington credible.[129] But we also have a clear example of one of the most practical of the checks and balances, legislative oversight, that is a sacrifice to these legislative appointments.

Healthy rivalry between the branches permits the legislature to be what Bryce called "a jealous observer and restrainer of the others."[130] The United States Supreme Court has described legislative oversight as "an essential and appropriate auxiliary to the legislative function,"[131] and noted, "[t]he power of Congress to conduct investigations is inherent in the legislative process. That power is broad. . . . It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."[132]

Congress' power to inquire into and publicize corruption, maladministration or inefficiency in agencies of the government was described by President Woodrow Wilson as a function of Congress to "be preferred even to its legislative function."[133] The long and often proud history of legislative investigations reaches back into the mists of English parliamentary history[134] and includes in modern times examples such as the Watergate Committee of 1973, the Senate Labor Rackets Committee of 1959, the Kefauver Committee of 1950-1951 and the Truman Committee of 1942-1944, in addition to the notorious Committee on Un-American Activities. Arthur Schlesinger said, "Legislative inquiries have informed, enlightened, entertained, confused, divided, and at times even demoralized the republic."[135] However, the better spirit of legislative oversight is embodied in the following statement of a legislator:

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129. *See supra* Part 2.A.

130. Bryce, *supra* note 24 at 407.

131. McGrain v. Dougherty, 273 U.S. 135, 174 (1927).

132. Watkins v. United States, 354 U.S. 178, 187 (1957).

133. *Id.* at 200 n.33.

134. *See* James Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926). *See also Watkins,* 354 U.S. 178; *McGrain,* 273 U.S. 135. The author is aware of no such similar history of legislative inquiries in Rhode Island, except after disaster. *E.g.*, Select Commission to Investigate the Failure of RISDIC-Insured Financial Institutions (after failure of the institutions); House Judiciary Committee Investigation Into Impeachment of the Chief Justice (after photographs of chief justice at motel were published in the *Providence Journal Bulletin*).

135. *Quoted in Congress: Internal Investigator*, Prov. J. Bull. (July 24, 1994).

> Sir, it is our duty to make this inquiry. The public money is expended on these establishments; the labor of the nation supports them. We extract money from the pockets of the people to appropriate to these purposes, and it is proper to ascertain that those who reap the earnings of the people are worthy of the public confidence.[136]

Although legislative inquiries have been and can be abused, they are an important mechanism in our checks and balances of government. Where legislative appointees lead and oversee the departments and agencies of the other branches of government, this mechanism is compromised.[137]

5. The Separation of Powers Principle in Other States

The United States Supreme Court stated in *Kilbourn v. Thompson*:

> The increase in the number of states, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the [government], presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them.[138]

This section reviews how other state courts have responded to those "powerful and growing temptations" and overcome the "great discrepancy"[139] between constitutional theory and local practice.

In *State ex rel. Wallace v. Bone*,[140] the Supreme Court of North Carolina set forth a partial list of states[141] endorsing the

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136. Landis, *supra* note 129 at 174.

137. Other writers have also noted the importance of legislative oversight. *See, e.g.*, Ronald Claveloux, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 Duke L. J. 1333, 1339 ("Congress by 'acquainting itself with the acts and dispositions of the administrative agents of Government' will be able to uncover corruption, waste, inefficiency. . ."); Theodora Galacatos, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intrabranch Conflict Over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 Fordham L. Rev. 587, 604 ("Congressional oversight of the executive branch serves important political and constitutional purposes.").

138. 103 U.S. at 191-92.

139. *See supra* Parts 3A-3B; note 106 and accompanying text.

140. 286 S.E.2d 79 (N.C. 1982).

141. The list in *Bone* included Indiana, West Virginia, Georgia, Colorado, Alaska, Arizona, Florida, Massachusetts, Michigan, and Wisconsin. *Id. But see*

federal approach, concluding: "Numerous decisions from sister states show strict adherence to the separation of powers principle and do not tolerate legislative encroachment or control over the function and power of the executive branch."[142] On separation of powers grounds, the court invalidated several legislative appointments to the state's Environmental Management Commission. The court stated, "There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal government."[143]

Our neighboring Massachusetts in *Opinion of the Justices*[144] held unconstitutional a proposed Electronic Data Processing and Telecommunications Commission that included members appointed by the legislative leadership. The court held that the executive functions performed by the commission precluded either legislative or judicial appointments to its membership.[145]

Thirty years ago, in *State ex rel. State Building Comm'n v. Bailey*,[146] the West Virginia Supreme Court knocked the president of the state senate, the speaker of the house of delegates, the minority leader of the senate and the minority leader of the house of delegates off of the State Office Building Commission, whose principal mission was to issue and sell construction bonds. The court concluded: "In enacting the statutory provision that members of the Legislature shall be members of the State Building Commission the Legislature has attempted to confer executive or administrative power and impose executive or administrative duties upon

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State ex rel. McLeod v. Edwards, 236 S.E.2d 406 (S.C. 1977) (South Carolina State Budget and Control Board held not to violate separation of powers provision); State ex rel. Craven v. Schorr, 131 A.2d 158 (Del. 1957) (legislative appointments to the State Highway Department, the Department of Elections and the Liquor Commission upheld). *See* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions,* 66 Temp. L. Rev. 1205, for a summary of these and other state court decisions; *see also* John Orth, *Forever Separate and Distinct: Separation of Powers; North Carolina*, 62 N.C. L. Rev. 1, 10-16 (1993) (compiling cases). Legislative appointments are most commonly upheld where part-time legislatures establish councils or commissions to sit when the legislature is out of session. Devlin, *supra* note 25 at 1205, nn. 198-201 and accompanying text.

142. *Bone,* 286 S.E.2d at 84.

143. *Id.* at 84.

144. 309 N.E. 2d 476, 479-80 (Mass. 1974)

145. 309 N.E. 2d. at 480.

146. 151 W.Va. 79, 150 S.E. 2d. 449 (1966).

the legislative members of the commission which . . . they can not constitutionally exercise or perform."[147]

In *Greer v. State*,[148] the Georgia Supreme Court declared members of the General Assembly ineligible to serve on the 26-member authority established to construct and operate the Georgia World Congress Center. While admitting that the doctrine of separation of powers "is not a rigid principle" and should be "sufficiently flexible to permit practical arrangements in a complex government", the court stated, "it is plain to us in this case that the functions performed by the World Congress Center Authority are primarily, if not exclusively, executive."[149]

In *Alexander v. State ex rel. Allain*,[150] the Mississippi Supreme Court found seven boards and commissions containing legislative appointments unconstitutional, including a Commission of Budget and Accounting, Board of Economic Development, Board of Trustees of Public Employees' Retirement System, and Central Data Processing Authority.

In *State ex rel. Schneider v. Bennett*,[151] the court ousted eight members who constituted the leadership of the Kansas legislature from a state finance council created to approve the rules and regulations of the state Department of Administration. The court found that in theory:

> Individual members of the legislature may serve on administrative boards or commissions where such service falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of the government. The separation of powers doctrine prohibits individual members of the legislature from serving on administrative boards or commissions where such service results in the usurpation of powers of another department by the individual legislators.[152]

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147. *Bailey*, 150 S.E.2d at 456; *see also* Book v. State Office Bldg. Comm'n, 149 N.E. 2d 273 (1953) (striking members of the legislature off a state building commission); J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n, 336 N.W.2d 679 (Wisc. App. 1983) (legislative appointments to state building commission spared where independent statute gave the governor absolute approval authority).

148. 212 S.E.2d 836 (1975).

149. *Greer*, 212 S.E.2d at 838. *See also* Parcell v. State, 620 P.2d 834 (Kan. 1980).

150. 441 So.2d 1329, 1345 (Miss. 1983).

151. 547 P.2d 786 (1976); *see also Parcell*, 620 P.2d 834 (following *Schneider*).

152. *Id.* at 792.

Here, the court found, the council exerted "both directly and indirectly, a coercive influence on that executive department."[153]

Although the record is certainly not unblemished, the majority of other states that have addressed this issue follow the principle of American democracy that legislative appointments offend the fundamental structure of our constitutions.

6. Conclusion

James Madison forewarned us that "mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which led to a tyrannical concentration of all the power of government in the same hands."[154]

In Rhode Island, the legislature has widely infiltrated the state's public boards, commissions and corporations.[155] This extension of legislative power beyond the legislative branch comes at a price.[156] Soon, the Rhode Island Supreme Court will be obliged to define in the structure of our government Rhode Island's parchment demarcation of powers, and will select one of two roads. One road leads to the broad and sunlit uplands of federal precedent, and is constructed on the basic and vital principles of our country's founding. This road enjoys a prospect that is both fairly predictable, and largely immune to local political intercession. The state road, on the other hand, comes from an obscure and troubled origin; it is complex enough to confound the court even today; and it leads back into the great swamps of a political history from which we are still struggling to emerge. With apologies to Robert Frost, this would seem a poor occasion to "take the road less traveled." Indisputably, however, the choice will indeed make "all the difference."

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153. 547 P.2d at 797-98.

154. Nixon v. Sirica, 487 F.2d 700, 797 n.177 (D.C. Cir. 1973) (*quoting* The Federalist No. 47 (James Madison)); *see also* Morrison v. Olson, 487 U.S. at 698 (Scalia, J. *dissenting*) (quoting The Federalist No. 73 (Alexander Hamilton)).

155. *See infra* Appendix, Partial Listing of Rhode Island Agencies with Members Appointed by the Legislature.

156. *Supra* Part 3.D.

APPENDIX
PARTIAL LISTING OF AGENCIES WITH MEMBERS APPOINTED BY THE LEGISLATURE

Economic Development Council. R.I. Gen. Laws § 42-63-5 (1993)

Rhode Island Port Authority and Economic Development Corporation. *Id.* § 42-64-8 (1995)

State Building Code Commission. *Id.* § 23-27.3-100.1.4 (1995)

Water Resources Board. *Id.* § 46-15.1-2 (1995)

Narragansett Bay Water Quality Management District Commission. *Id.* § 46-25-6 (1995)

Commission on Judicial Tenure & Discipline. *Id.* § 8-16-1 (1995)

Public Transit Authority. *Id.* § 39-18-2 (1990)

Retirement Board. *Id.* § 36-8-4 (1995)

Rhode Island Lottery Commission. *Id.* § 42-61-1 (1993)

The Rhode Island Solid Waste Management Corporation. *Id.* § 23-19-6 (1995 Supp.)

Rhode Island Arts and Tourism Commission. *Id.* § 42-75.1-3 (1995)

Capital Center Commission. 1981 R.I. Pub. Laws ch. 332; 1983 R.I. Pub. Laws ch. 167

Governor's Council on Mental Health. R.I. Gen. Laws § 40.1-6-1 (1995)

Substance Abuse Advisory Council. *Id.* § 42-50-6 (1993)

Coastal Resources Management Council. *Id.* § 46-23-2 (1991)

Unclassified Pay Plan Board. *Id.* § 36-4-16 (1990)

E911 Uniform Emergency Telephone System Authority. *Id.* § 39-21-4 (1990)

Newport Tourism and Convention Authority. 1981 Pub. Laws ch. 263