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"More a Distinction of Words than Things": The Evolution of Separated Powers in the American States

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Symposium: Separation of Powers in State Constitutional Law

Introduction

Carl T. Bogus*

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

The Federalist No. 47 (James Madison)¹

In what may be its most important case of the century, the Rhode Island Supreme Court will decide later this year whether the principle of separation of powers among the three branches of government is contained in the Rhode Island Constitution on the same basis as the United States Constitution.

The principle of separation of powers has always been controversial in Rhode Island. When James Madison penned the statement above, he noted that unlike most of the other states, Rhode Island might not have adopted the doctrine of separation of powers since its charter was written before the principle “had become an object of political attention.”²

When the state constitution was drafted in 1843 as a result of the Dorr Rebellion, separation of powers was still controversial.³ “The People’s Constitution,” ratified by the voters in 1841, clearly

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1. The Federalist No. 47, at 313 (James Madison) (Sherman F. Mittell ed., 1937).

2. *Id.* at 247.

3. See Patrick T. Conley, *Separation of Powers in Rhode Island*, 44 R.I. B.J. 9 (1995).

incorporated the principle of separation of powers.⁴ However, the legislature and the state Supreme Court refused to recognize the People's Constitution.⁵ By using martial law and threatening political opponents with treason, the legislature ultimately succeeded in having the electorate ratify a different constitution.⁶ That document—which is, perhaps deliberately, vague on the issue of separation of powers—is the Rhode Island Constitution.

Each side in the debate can point to aspects of the document that favor its position. Those who argue that the state constitution recognizes the principle of separation of powers find support, for example, in Article V, which states: "The powers of the government shall be distributed into three departments: the legislative, executive and judicial."⁷ Those who argue that the legislature is the dominant branch of government often cite Article VI, Section 10, which provides: "The general assembly shall continue to exercise the powers it has heretofore exercised, unless prohibited in this Constitution."⁸

The current constitutional struggle involves efforts by the General Assembly to further extend its power into what, in the federal system, are considered executive functions—most particularly, appointing the officers of regulatory agencies.⁹ For example, the enforcement of environmental laws in Rhode Island is now split among several agencies, including most prominently the Department of Environmental Management (DEM) and the Coastal Resources Management Council (CRMC). The General Assembly is seeking to transfer powers from DEM, which is administered by a director appointed by the Governor, to CRMC, which is controlled by a board comprised, in large part, of members of the General Assembly and other individuals appointed by the Speaker of the House of Representatives.¹⁰

Some argue that legislative participation in the enforcement of the law helps to ensure that regulatory agencies enforce the law in

4. William G. McLoughlin, *Rhode Island: A History 130-31* (1978).

5. *See id.* at 133.

6. *See id.*

7. R.I. Const. art. V.

8. *Id.* art. VI, § 7.

9. *See Conley, supra* note 3, at 10.

10. *See Peter B. Lord, General Assembly Under Siege in Historic Challenge*, *Prov. J. Bull.*, March 30, 1998, at A1, available in 1998 WL 6510744.

a manner consistent with the public policy.¹¹ Others contend that it destroys the checks and balances necessary to prevent power from being misused.¹²

11. See Russel Garland, *Almond, Legislators Square Off in Court Case*, *Prov. J. Bull.*, Dec. 28, 1997, at A1, available in 1997 WL 17531644.

12. See Sheldon Whitehouse, *Appointments by the Legislature Under the Rhode Island Separation of Powers Doctrine: The Hazards of the Road Less Traveled*, 1 *Roger Williams U. L. Rev.* 1 (1996).

