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# Rhode Island's Distribution of Powers Question of the Century: Reverse Delegation and Implied Limits on Legislative Powers\*

Robert F. Williams\*\*

*At the revolution . . . [t]he executive and the judicial as well as the legislative authority was now the child of the people; but, to the two former, the people behaved like stepmothers. The legislature was still discriminated by excessive*

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\* This is an expanded version of a presentation given at Roger Williams University School of Law on April 25, 1998. The faculty at Roger Williams University School of Law and the editors of the *Law Review* must be commended for taking on this important and timely, albeit controversial, topic. After all, as Professor Richard Kay of the University of Connecticut School of Law has observed:

The transformation of a law school from an institution of vocational competence into one of intellectual excellence is often associated with an increased attention to legal subjects that are national in scope . . .

It is also true, however, that this broadening of interest need not be accompanied by an abandonment of a special concern for the legal issues and problems that are peculiar to a law school's home.

Richard S. Kay, *The Jurisprudence of the Connecticut Constitution*, 16 Conn. L. Rev. 667, 667 (1984).

Chief Justice Joseph Weisberger of the Rhode Island Supreme Court has also pointed out:

The mission of a law school is not just to educate persons who wish to become members of the bar, but also to contribute to and enhance the legal culture of every jurisdiction which the law school touches. One of the primary tools in producing this contribution is the law review published by the law school. The law review is a think tank which contributes original thought as well as a synthesis and presentation of the thoughts embodied in the appellate opinions which they analyze. Probably this contribution is as great in the performance of the educational mission as is the training of law school students who aspire to membership in the bar.

Rhode Island is fortunate at long last to have a law school and even more fortunate to have a law school that is about to embark upon the

*partiality; and into its lap, every good and precious gift was profusely thrown.*

James Wilson<sup>1</sup>

## I. INTRODUCTION

It is well known to almost everyone that the early state constitutions, although often textually recognizing the doctrine of separation of powers, in fact "tended to exalt legislative power at the expense of the executive and the judiciary."<sup>2</sup> James Wilson's remarks quoted above reflect this experience. James Madison ob-

publication of what will undoubtedly become a highly respected law review.

Honorable Joseph R. Weisberger, *Foreword*, 1 Roger Williams U. L. Rev. vii, ix (1996).

\*\* Distinguished Professor of Law, Rutgers University School of Law, Camden. I appreciate being invited to participate in this Symposium, made up essentially of *Amici Curiae*, providing out-of-state perspectives on Rhode Island's momentous distribution of powers issue. This invitation was, most likely, based on my academic work with state constitutions. I have, however, also traveled this same road as a practicing lawyer. In 1991, the Pennsylvania Legislature enacted legislation addressing the fiscal crisis in the city of Philadelphia. See Pa. Stat. Ann. tit. 53, §§ 12720.101-709 (West Supp. 1998) (effective June 5, 1991). The statute created an appointed board to oversee the city's finances, with four of the five voting members appointed by, and serving at the pleasure of, members of the Legislature. See *id.* § 12720.202(a). I was retained by the city's public employee unions to challenge the statute. We initiated a *quo warranto* action directly in the Pennsylvania Supreme Court, on separation of powers, as well as other, unrelated grounds. The legislation required any challenge to the act to be brought directly in the Pennsylvania Supreme Court. See *id.* § 12720.702. After four of the seven justices recused themselves, the remaining three held that my clients, the city unions, lacked standing to challenge the makeup of the board on separation of powers grounds. See *Local 22, Philadelphia Fire Fighters' Union v. Commonwealth*, 613 A.2d 522, 526 (Pa. 1992):

In the present case . . . the unions have not demonstrated how their interests are affected by the allegedly unconstitutional means by which PICA Board members are appointed. The first claim must be denied, therefore, for the unions have no standing to bring a *quo warranto* action challenging the manner in which the PICA Board is appointed.

Consequently, this very important issue remains unresolved in Pennsylvania. The Pennsylvania Supreme Court avoided deciding the issue, as has the Rhode Island Supreme Court until now.

1. 1 The Works of James Wilson 292-93 (Robert Green McCloskey ed., 1967).
2. William Wiecek, *The Guarantee Clause of the U.S. Constitution* 21 (Milton R. Konvitz ed., 1972); see also Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 216-19 (1989) (stating that, although states introduced separation of powers clauses into their constitutions, in reality, the legislature continued to overshadow the executive branch).

served in the Constitutional Convention that “[e]xperience had proved a tendency in our governments to throw all power into the Legislative vortex.”<sup>3</sup> If Madison had been speaking today, he would probably have asserted that the legislative branch expanded its influence like the gravitational pull of a “black hole.” These observations, based on actual experience under the state constitutions of the Revolutionary period, led to the almost unanimous conclusion of contemporaries that state legislatures were “omnipotent.”<sup>4</sup> Wilson’s experience had been under the Pennsylvania Constitution of 1776.<sup>5</sup> Thomas Jefferson’s experience, as Madison’s, was with the Virginia Constitution of 1776, and he was equally critical of legislative dominance.<sup>6</sup>

### I. ORIGIN OF SEPARATION OF POWERS

When the federal Constitution was adopted, it built on the lessons of legislative dominance learned during the Revolutionary years.<sup>7</sup> Thereafter, though, the state constitutions continued on a process of evolution separate from federal constitutional theory.<sup>8</sup> This process followed the experimental model of federalism that had begun in the decade prior to the adoption of the federal Constitution. In that decade, the states, in the words of Jackson Turner Main, “became the laboratories for testing theories, trying the institutions in the various forms that presently appeared in the constitutions of the United States and other countries.”<sup>9</sup>

3. 2 *The Records of the Federal Convention of 1787*, at 35 (Max Farrand ed., 2d ed. 1937); see also *The Federalist* No. 48, at 322 (James Madison) (Sherman F. Mitchell ed., 1937) (cautioning against legislative encroachment).

4. 2 *The Records of the Federal Convention of 1787*, *supra* note 3, at 35. Madison stated in the Convention: “The Executives of the States are in general little more than Cyphers; the legislatures omnipotent.” *Id.*

5. See Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and its Influences on American Constitutionalism*, 62 *Temp. L. Rev.* 541, 574-75 (1989).

6. See David N. Mayer, *The Constitutional Thought of Thomas Jefferson* 53-88 (1994).

7. See Williams, *supra* note 5, at 574-80.

8. See James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 *Rutgers L.J.* 819, 821-26 (1991).

9. Jackson Turner Main, *The American States in the Revolutionary Era, in Sovereign States in an Age of Uncertainty* 1, 23 (Ronald Hofman & Peter J. Albert eds., 1981).

Justice Brandeis’s better-known description of the states as “laboratories” was made in reference to state legislative innovations at the beginning of the twentieth

Contemporaries of this period understood the experimental nature of those efforts at constitution-making. In 1778, for example, Thomas Paine applauded "the happy opportunity of trying variety in order to discover the best . . . . By diversifying the several constitutions, we shall see which State flourish the best, and out of the many posterity may choose a model . . . ." <sup>10</sup>

Also, during this early period, there came a fundamental shift in conception of the executive branch, particularly the Governor. As Gordon S. Wood has observed,

[T]he Americans went far beyond anything the English had attempted with Magna Carta or the Bill of Rights. They aimed to make the gubernatorial magistrate a new kind of creature, a very pale reflection indeed of its regal ancestor. They wanted effectively to eliminate the magistracy's chief responsibility for ruling the society—a remarkable and abrupt departure from the English constitutional tradition . . . .

The powers and prerogatives taken from the Governors were given to the legislatures, marking a revolutionary shift in the traditional responsibility of government. <sup>11</sup>

Therefore, at the same time the revolutionary state constitutions were providing legislative dominance, they were reformulating the

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century. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (discussing "social experiments . . . in the insulated chambers afforded by the several States").

10. Thomas Paine, *A Serious Address to the People of Pennsylvania on the Present Situation of Their Affairs*, in *Pennsylvania Packet* (Dec. 1, 1778), reprinted in 2 *The Complete Writings of Thomas Paine 277*, 281 (Philip S. Foner Ph.D. ed., 1945).

The author of the 1776 pamphlet, *Four Letters on Interesting Subjects*, recently said to be Thomas Paine, argued:

Perhaps most of the Colonies will have two houses, and it will probably be of benefit to have some little difference in the forms of government, as those which do not like one, may reside in another, and by trying different experiments, the best form will the sooner be found out, as the preference at present rests on conjecture.

*Four Letters on Interesting Subjects* (Philadelphia, 1776), reprinted in 1 *American Political Writing During the Founding Era, 1760-1805*, at 368, 387 (Charles S. Hyneman & Donald S. Lutz eds., 1983); *see also* David F. Hawke, *In the Midst of a Revolution 196-97* (1961) (quoting contemporary Thomas Smith as writing rather bitterly about the 1776 Pennsylvania constitutional convention: "You know that experimental philosophy was in great repute fifty years ago, and we have a mind to try how the same principles will succeed in politics!").

11. Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 *Rutgers L.J.* 911, 915, 916 (1993).

governor's position from a policy-making to a policy-implementing role.

Bringing the other two branches to some form of parity, or at least bringing them closer to being "co-equal" with the legislature would continue to occupy state constitutional framers for at least the next century.

## II. THE LEGISLATIVE BRANCH: IMPLIED LIMITS

More so than either the executive or judicial branches, the legislative branch is different at the state level from the Congress at the federal level. State legislative power is plenary, whereas federal legislative power is enumerated.<sup>12</sup> This basic distinction is somewhat oversimplified because state constitutions also do contain authorizations for the legislature to act. Still, however, it is this basic distinction that led to the observation that the most important questions of judicial interpretation of the federal Constitution have to do with implied powers, while at the state level implied limitations are most important.<sup>13</sup>

### A. *The Nontextual Boundaries of Legislative Power*

In resolving this matter which confronts the State of Rhode Island, it is important to focus on what is meant by "legislative" power<sup>14</sup> and "executive" power.<sup>15</sup> These are both terms of art used in the Rhode Island Constitution but not in the former Charter. Focus on the meaning of "legislative power" is still necessary even where broad, plenary state legislative power is recognized, as by the Rhode Island Supreme Court:

The State Constitution defines the powers granted to the executive and judicial departments of government, leaving all other powers to the legislative branch, unless prohibited to it

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12. See Walter F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 Yale L.J. 137, 137-38 (1919).

13. See *id.* at 160; see also Michael J. Besso, *Connecticut Legislative Power in the First Century of State Constitutional Government*, 15 Quinnipiac L. Rev. 1, 15 (1995) (discussing the search for grants of legislative power within the U.S. Constitution, as opposed to the search for limitations on legislative power within state constitutions).

14. For a discussion of legislative power, see Robert F. Williams, *Comment: On the Importance of a Theory of Legislative Power Under State Constitutions*, 15 Quinnipiac L. Rev. 57 (1995).

15. See R.I. Const. art. VI, § 2 (legislative); *id.* art. IX, § 1 (executive).

by the constitution . . . . Because the General Assembly does not look to the State Constitution for grants of power, we have invariably adhered to the view that the General Assembly possesses all the powers inherent to the sovereign other than those that the constitution textually commits to the other branches of state government.<sup>16</sup>

The legislative power is, itself, conceptually limited to the notion of "legislating." Concepts such as "legislative" and "executive" power are, of course, indeterminate.<sup>17</sup> They can be words of *limitation* as well as words granting power. There are unwritten limitations, or internal constraints, on this plenary power, such as the "public purpose" doctrine.<sup>18</sup> This implied limitation on legislative power was clearly recognized as early as 1853 in *Sharpless v. Mayor of Philadelphia*,<sup>19</sup> where the Supreme Court of Pennsylvania noted:

Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere *private* purpose. *No such authority passed to the Assembly by the general grant of legislative power.* This would not be legislation. Taxation is a mode of raising revenue for *public* purposes.<sup>20</sup>

In certain situations limitations on legislative power are implied, and arise from the legal *concept* of legislative power. Where does legislating end and executing or administering begin? Many years ago Walter Dodd confronted the question of the concept of "legislative power":

The view is frequently expressed that state legislatures have inherently all power not denied to them by state and national constitutions. This view is based upon the notion that state legislatures inherited the powers of the British parliament and possess such powers in full unless denied

. . . .

The result is very nearly the same whether we say (1) that the state constitution confers "legislative powers," and that this means all power not denied by constitutional texts,

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16. *City of Pawtucket v. Sundlun*, 662 A.2d 40, 44 (R.I. 1995) (citations omitted).

17. See William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 Wm. & Mary L. Rev. 263 (1989).

18. Besso, *supra* note 13, at 14 n.56.

19. 21 Pa. 147 (1853).

20. *Id.* at 168-69 (partial emphasis in original).

or (2) that "legislative power" is inherent, and unlimited except as restricted by constitutional texts. The first statement is perhaps the better, for there is little ground in our history since the Revolution for inherent or original powers in any department of government. In fact, when reference is made to inherent power, what has usually been meant is that "legislative power," granted in general terms, must be interpreted as conferring all governmental power, except so far as restricted by constitutional texts, i.e., that all such power inheres in the general grant.<sup>21</sup>

First, the "public purpose" doctrine has current importance, for example, in such areas as legislation authorizing vouchers for private school education<sup>22</sup> and authorizing the government to pursue child support obligations on behalf of nonindigent persons.<sup>23</sup> Another way of thinking about the limitation of legislative power to public purposes is to analyze the legislature's "police power."<sup>24</sup> This limitation is also not expressly contained in state constitutions, but is viewed as an inherent limiting concept within the notion of "legislative power."

Second, the issue of legislators, and, to a lesser extent their designees, serving on executive boards and commissions can also be seen as a matter of dual office-holding as a subcategory of separation of powers concern. Dual office-holding, or "incompatibility," was a major concern of the framers of the first state constitutions.<sup>25</sup> Recent commentators concluded:

It is important to note that broad bans on plural office holding of the type found in the North Carolina, Maryland, and New Jersey Constitutions were conceived first and foremost as anti-corruption measures. Surprisingly, the separation-of-powers aspect of incompatibility seems not to have been the major theme.<sup>26</sup>

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21. W. F. Dodd, *The Function of a State Constitution*, 30 Pol. Sci. Q. 201, 201, 205 (1915).

22. See *Davis v. Grover*, 480 N.W.2d 460, 474-77 (Wis. 1992).

23. See *In re Marriage of Lappe*, 680 N.E.2d 380, 388-92 (Ill. 1997).

24. Besso, *supra* note 13, at 13 n.54. In 1969 the Illinois Supreme Court declared a motorcycle crash-helmet law unconstitutional as outside the legislature's police power. See *People v. Fries*, 250 N.E.2d. 149, 151 (Ill. 1969).

25. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045, 1057-61 (1994).

26. *Id.* at 1060; see also M.J.C. Vile, *Constitutionalism and the Separation of Powers* 134 (1967) (noting the separation of powers doctrine was originally used to prohibit dual office-holding).



Rhode Island's constitution does not contain a specific ban on dual *state* office-holding,<sup>27</sup> but the concept can be viewed as within separation of powers concerns in the area of personnel.

A third implied limitation on an otherwise plenary state legislative power is the rule that a present legislature cannot bind future legislatures. The Supreme Court of Nebraska recently confronted this issue and, after surveying the doctrine in other jurisdictions, concluded: "[t]he proposition that one legislature cannot bind a succeeding legislature is derived from the constitutional power of the Legislature to legislate."<sup>28</sup> This is an implied restriction, or limit, on legislative power arising from the very concept of what it means to legislate.

This way of looking at implied limits on state legislative power is, to some extent, conceptual or formalistic. It draws on the idea that one can define the concept of "legislative power." As one scholar has explained, "[t]he formalist approach is committed to strong substantive separations between the branches of government, finding support in the traditional expositions of the theme of 'pure' separated powers, such as the maxim that 'the legislature makes, the executive executes, and the judiciary construes the law.'<sup>29</sup> Formalism in this regard has been criticized as yielding mechanical outcomes, but providing the benefit of bright-line rules.<sup>30</sup>

The alternative to the formalist approach is a functionalist analysis:

In contrast, advocates of the "functionalist" approach urge the Court to ask a different question: whether an action of one branch interferes with one of the core functions of another . . . . The functionalist view follows a different strand of separation-of-powers tradition from that of the formalists: the

27. See R.I. Const. art. III, § 6 (prohibiting dual *federal* and state office-holding).

28. *State ex rel. Stenberg v. Moore*, 544 N.W.2d 344, 349 (Neb. 1996).

29. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1523-24 (1991) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825)).

30. See *id.* at 1524-26. Sheldon Whitehouse points out that the federal "bright-line" rule prohibits legislators and their appointees from serving on independent or executive agencies. 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, 8 (1996).

American variant that stresses not the independence, but the interdependence of the branches.<sup>31</sup>

The functionalist approach permits much more judicial discretion than the formalist approach.<sup>32</sup>

The point of all these examples—public purpose, dual office-holding and binding future legislatures—is not that they have direct bearing on the question before the Rhode Island Supreme Court now, but rather that they illustrate the range of limits on otherwise plenary state legislative power that are implied from the very concept of legislating. Separation of powers is similar,<sup>33</sup> although it has a textual basis in Rhode Island, and it does have a direct bearing on the current issue.

### B. *The Rhode Island Situation*

The stage is now set in Rhode Island, over two centuries after the legislative dominance of the Founding period, for a definitive advisory opinion concerning the propriety of legislators and legislative appointees serving on executive branch, or administrative, boards and commissions.<sup>34</sup> This is an important “recurrence to fundamental principles.”<sup>35</sup> The Supreme Court of Rhode Island has, in the past, approached this question but failed to resolve it.<sup>36</sup>

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31. Brown, *supra* note 29, at 1527-28.

32. *See id.* at 1528.

33. The separation of powers doctrine operates as a limit on the legislative branch, as it also limits the other branches. As one commentator has noted, “[i]t is axiomatic that the authority of the state legislature is plenary except as limited by the state constitution and federal law. Separation of powers is one of those limitations.” Roy Pulvers, *Separation of Powers Under the Oregon Constitution: A User's Guide*, 75 Or. L. Rev. 443, 449 (1996) (citing *Brusco Towboat Co. v. State Land Bd.*, 589 P.2d 712, 717 (Or. 1978) and *Ryan v. Harris*, 2 Or. 175, 176 (1866) for the proposition that state legislative authority is limited by its constitution and federal laws. Pulvers also cites *State ex rel. Oregon State Bar v. Lenske*, 407 P.2d 250, 254-55 (Or. 1966) for the proposition that separation of powers is a limitation on legislative power). *See id.*

34. *See generally* Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 Roger Williams U. L. Rev. 207 (1997) (discussing Rhode Island's advisory opinion process).

35. Va. Const. art. I, § 15.

36. *See, e.g., In re Commission on Judicial Tenure and Discipline*, 670 A.2d 1232, 1234 (R.I. 1996) (holding that the presumption of constitutionality prevails where the court was evenly divided over whether the presence of members from the legislature on the commission violated the separation of powers principle); *Easton's Point Ass'n v. Coastal Resources Management Council*, 522 A.2d 199, 201-02 (R.I. 1987) (declining to rule on whether the legislature's appointment of

The matter has been treated in academic literature before.<sup>37</sup> However, the issue must be decided within Rhode Island's interesting and unique state constitutional context.<sup>38</sup>

Resolving the questions presented will require the Rhode Island Supreme Court to confront, in the words of former Oregon Supreme Court Justice Hans Linde, the tension "between fidelity to the state's own charter" and the sense that constitutional law is a shared enterprise.<sup>39</sup> Is the question one for a state-specific form of positivism, or rather one calling for a more generalized, or universalist, American-constitutional separation of powers doctrine?<sup>40</sup> Should the Rhode Island Supreme Court follow federal constitutional separation of powers doctrine?<sup>41</sup> Professor John Devlin has argued that following federal doctrine in this area of separation of powers is no more required than in other areas:

The thesis of this article is that there are systematic differences between the federal government and the states with respect to their constitutions and their place in the American scheme of government. These differences make the develop-

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eight of the seventeen members of the Coastal Resources Management Council violated separation of powers).

37. See generally Whitehouse, *supra* note 30 (discussing Rhode Island's reluctance to acknowledge the dangers of legislative encroachment); Sheldon Whitehouse, *The Impetuous Vortex*, 43 R.I. B.J. 7 (1995) (arguing that the legislature has almost unchecked appointment power).

38. For a discussion of Rhode Island's constitutional history, see Patrick T. Conley, *Democracy in Decline: Rhode Island's Constitutional Development, 1776-1841* (1977); Kevin D. Leitao, *Rhode Island's Forgotten Bill of Rights*, 1 Roger Williams U. L. Rev. 31 (1996).

39. Hans A. Linde, *Are State Constitutions Common Law?*, 34 Ariz. L. Rev. 215, 216 (1992); see also Hans A. Linde, *E Pluribus - Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 196 (1984):

Constitutional text is important not for what a court must decide but for what it cannot plausibly decide. Text can confine a judicial interpretation when it cannot compel one. Judicial review can be not only interpretive or noninterpretive but misinterpretive. A long buried grub surprisingly metamorphoses into a butterfly and remains the same insect, and an underwater tadpole turns into an airbreathing frog; but some decisions have made butterflies grow from tadpoles, to the applause of theorists who prefer butterflies. There are limits to what can be explained as constitutional law before turning it into genetic engineering.

40. See James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 Roger Williams U. L. Rev. 109 (1998).

41. See generally Whitehouse, *supra* note 30, at 14-17 (advocating that Rhode Island follow federal separation of powers doctrine).

ment of an independent theory of state constitutional allocation of governmental powers both possible and desirable.<sup>42</sup>

However, on at least one occasion, the Rhode Island Supreme Court has turned to federal separation of powers doctrine in the absence of Rhode Island precedent:

Although no authority bearing directly on this issue has been called to our attention, complainant comments in her brief that the relevant provisions of our constitution have the same meaning as the comparable provisions of the Federal Constitution, and she suggests 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."

That suggestion commends itself to us . . . .<sup>43</sup>

Looking specifically at the Rhode Island Constitution, it is clear that Article V, by contrast to the federal Constitution, provides an express, textual affirmation of the doctrine of separation of powers.<sup>44</sup> Interestingly, state courts have split on the question of whether such an express separation of powers statement mandates a more strict judicial separation of powers doctrine, possibly illustrating Professor Gardner's positivist/universalist dichotomy.<sup>45</sup>

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42. See John Devlin, *Toward A State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 Temp. L. Rev. 1205, 1211 (1993); see also Hon. Ellen A. Peters, *Getting Away From the Federal Paradigm: Separation of Powers in State Courts*, 81 Minn. L. Rev. 1543, 1554-62 (1997) (discussing the effects of separation of powers in state courts as compared to federal courts).

43. *Chang v. University of R.I.*, 375 A.2d 925, 928 (R.I. 1977); see also *Whitehouse*, *supra* note 30, at 16 n.80 (referring to other cases where the Rhode Island Supreme Court has looked to the federal Constitution for guidance).

44. "The powers of the government shall be distributed into three departments: the legislative, executive and judicial." R.I. Const. art. V. The three branches are also explicitly recognized in the paragraph introducing the Rhode Island Declaration of Rights. See R.I. Const. art. I.

45. See Gardner, *supra* note 40. Compare *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924-25 (Fla. 1978) (applying a strict interpretation of the separation of powers doctrine, which would prohibit the delegation of legislative powers. This is an example of the positivist theory), with *Brown v. Heymann*, 297 A.2d 572, 576-77 (N.J. 1972) (upholding a delegation which authorized the governor to prepare a reorganization plan for the Department of Labor and Industry. This is an example of the universalist theory). See generally Robert W. Martin, Jr., *Legislative Delegations of Power and Judicial Review-Preventing Judicial Impotence*, 8 Fla. St. U. L. Rev. 43 (1980) (discussing the relationship between separation of powers principles and the delegation of legislative power).

It is possible to see Rhode Island's current constitution as still suffering from the key constitutional problem of the founding decade—namely, the emerging relationship of separation of powers rhetoric and concrete checks and balances mechanisms. The Pennsylvania Constitution of 1776 lacked checks and balances. Vile makes this point as follows:

It is often stated that the Constitution of Pennsylvania did not embody the separation of powers, whereas in fact it was the basis of the whole Constitution. It is the failure to distinguish clearly between the separation of powers on the one hand, and checks and balances on the other, which leads to the confusion. The founders of the 1776 Constitution were bitterly opposed to any semblance of the checks and balances of the monarchic or aristocratic constitution.<sup>46</sup>

The period of state experiments with legislative appointments to executive agencies has just about been completed. The weight of authority, of course, both under federal and other states' separation of powers doctrines, is that legislators and legislative appointees may not serve on executive or administrative boards and commissions.<sup>47</sup> One in-depth academic commentary concluded:

It is generally recognized that the power to appoint Executive Officers is *inherently* executive, and that to hold otherwise is to deprive the Chief Executive of the right to control his own branch of government. The Governor's obligation to faithfully execute the law *implies*, as a necessary incident, the power to appoint those who will act under his direction in discharging this obligation.<sup>48</sup>

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46. Vile, *supra* note 26, at 136.

47. See generally Devlin, *supra* note 42, at 1242-50 (discussing the different approaches that various states have taken with respect to legislative appointments); Sheryl G. Snyder & Robert M. Ireland, *The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and Historical Analysis of L.R.C. v. Brown*, 73 Ky. L.J. 165, 210-16 (1984-85) (discussing the Kentucky Supreme Court's decision in *L.R.C. v. Brown*, 664 S.W.2d 907 (Ky. 1984), which held the power of appointment is an executive function); Whitehouse, *supra* note 30, at 25-28 (referring to other states that have addressed the separation of powers issue and ruled that legislative appointments offend the separation of powers principle).

48. Snyder & Ireland, *supra* note 47, at 210-11 (emphasis added) (citations omitted).

Weight of authority, though, is not controlling on this Rhode Island constitutional question. The advice provided by Chief Justice Randall Shepard of Indiana, is relevant here:

Fifty state supreme courts have examined the questions about which my colleagues write today and forty-nine of them have reached the opposite conclusion. The fact that Indiana stands alone on this issue does not mean that we are wrong, but it certainly does not prove we are right. Instead, I think it suggests that this might be a moment to heed the advice we often give to juries: "Re-examine your own views in light of the opinions of others."<sup>49</sup>

### III. THE ROLE OF THE JUDICIARY

If the dispute currently coming to a head in Rhode Island is between the legislature and the executive, what stake is there for the judiciary? Paul Verkuil posed the question in the federal context: "The debate typically arises over congressional and executive initiatives in government administration, but the judicial branch has a fundamental stake in the outcome. The question for the judiciary is how closely should it umpire the activities of the policymaking branches."<sup>50</sup>

As important as the "protection" of one branch from another is, in this case the executive from the legislature, the underlying goal of judicial enforcement of separation of powers principles is the liberty of the citizens. The judicial role in separation of powers cases, particularly those involving encroachment, "ought to be as vigilant arbiter of process for the purpose of protecting individuals from the dangers of arbitrary government."<sup>51</sup> When legislators pass laws, including appropriations, and then administer those laws and funding with questionable legislative oversight, there is the potential and even the probable reality of arbitrary government.

The problem currently before the Rhode Island Supreme Court involves an example of attempted encroachment by one branch into the affairs of another, rather than the problem that arises

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49. *In re Indiana State Bar Ass'n*, 550 N.E.2d 311, 316 (Ind. 1990) (Shepard, C.J., dissenting).

50. Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 Wm. & Mary L. Rev. 301, 302 (1989).

51. Brown, *supra* note 29, at 1565; see Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 Roger Williams U. L. Rev. 79 (1998).

when one branch seeks to abdicate authority to another branch. Encroachment is the more disturbing of the two types of problems, and is closer to the "vortex" phenomenon observed in action during the Revolutionary period. The New Jersey Supreme Court has recently stated that encroachment problems require much greater judicial scrutiny than do abdication problems.<sup>52</sup> Appointment by the legislature of its own members or its designees to executive boards constitutes a sort of "reverse delegation"—an encroachment that should be subjected to the most rigorous judicial scrutiny.<sup>53</sup>

If, in fact, legislative appointment of its members or appointees to administrative or executive boards constitutes a form of "reverse delegation," what light is shed on the problem by examining the nondelegation doctrine itself? First, reverse delegation is a form of legislative *encroachment* on the executive, where delegation constitutes, rather, a ceding of authority. It can be argued persuasively that reverse delegation, therefore, should receive more rigorous judicial scrutiny than delegation. A commentator who recently surveyed the state courts' approaches to the delegation doctrine concluded that Rhode Island exemplified a "loose' standards and safeguards" approach.<sup>54</sup> Citing *Bourque v. Detore*,<sup>55</sup> this commentator placed Rhode Island in his "Category II,"

Category II states allow delegations of lawmaking power to administrative agencies as long as the statute contains a general rule to guide the agency in exercising the delegated power. Guiding rules may take the form of general standards, procedural safeguards, or a combination of the two . . . . This standard embodies the principle that in modern society, Congress and state legislatures address complex problems in industry, economics, and general public health and safety. Because Congress often is unable or unwilling to

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52. See *Communication Workers v. Florio*, 617 A.2d 223, 232 (N.J. 1992) ("Although both the giving and taking of power can be constitutional if not excessive, the taking of power is more prone to abuse and therefore warrants an especially careful scrutiny.").

53. *Id.*

54. Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 Admin. L.J. Am. U. 567, 588-91 & n.109 (1994) ("Essentially, in Rhode Island, a delegation is valid if the statute provides for either standards or procedures to confine and guide the agency's discretion." (citing *Bourque v. Detore*, 589 A.2d 815, 818 (R.I. 1991)). See generally Arthur Earl Bonfield & Michael Asimov, *State and Federal Administrative Law* 451-61 (1989) (describing the state nondelegation doctrine).

55. 589 A.2d 815 (R.I. 1991).

deal with these problems, it frequently relies on administrative experts to decide upon the details of such legislation. Consequently, many courts have allowed delegations of broad power to administrative agencies with minimal direction from the legislature.<sup>56</sup>

The nondelegation doctrine is based on separation of powers concerns, underlying which are desires to shield citizens from arbitrary government. In a state like Rhode Island, therefore, which arguably has a relatively loose view of the dangers of broad delegations of legislative power to the executive, there is *even more* reason for concern when the legislature goes on to administer statutes, including appropriations, through its own members or their appointees. Arbitrary government is bound to result from broad delegations of *authority*,<sup>57</sup> joined with reverse delegations of *personnel*. This is a bad combination.

*Bourque v. Dettore* is certainly not the only delegation doctrine case in Rhode Island, but a full investigation of this doctrine is beyond the scope of this article. *Bourque*, even though it might be categorized as "soft" on delegation, expresses the separation of powers concerns surrounding delegation: "The purpose of the nondelegation doctrine is twofold: to ensure that basic policy choices will be made by duly authorized and politically responsible officials and to protect citizens against arbitrary and discriminatory action by public officials."<sup>58</sup>

The court noted that the nondelegation doctrine "stems" from the character of the Rhode Island Constitution as the supreme law of the state and as assigning the *legislative* power to the *legislative* branch.<sup>59</sup> Interestingly, therefore, the nondelegation doctrine is another example of an implied limit on plenary legislative power, inherent in the concept of legislative power. A doctrine prohibiting reverse delegation can also be seen as inherent in the concept of legislative power.

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56. Greco, *supra* note 54, at 588.

57. "Category II states shift more power to administrative agencies to determine policy." *Id.*

58. *Bourque*, 589 A.2d at 817 (citing *Davis v. Wood*, 427 A.2d 332, 335 (R.I. 1981)).

59. *Id.*



## IV. CONCLUSION

There are many occasions on which state courts look to the concept of legislative (and executive) power to derive implied limits on plenary state legislative authority. The issue of legislative membership on, and appointment to, executive branch boards calls for a similar approach. The Rhode Island Supreme Court should seriously consider a bright-line, administrable rule prohibiting legislators and their appointees from serving on executive boards, thereby ending the practice of reverse delegation. Looked at either formally (concept of legislative power) or functionally (encroachment), this is a case for judicial intervention. It is time to get the legislative "fox" out of the executive "hen-house."<sup>60</sup>

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60. *Cf.* Advisory Opinion to the Governor (Ethics Comm'n), 612 A.2d 1, 11 (R.I. 1992) (analyzing the reach of the Ethics Commission's powers, and noting the concern that if ethics were left to the legislature "the sharp teeth in any code of ethics could be removed by those who feared being bitten" (quoting the proponents of the commission)). Here, one might say that if execution of the law is left to legislators and their appointees, the sharp teeth of legislative oversight can be removed by those who fear being bitten.