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The Battle for Separation of Powers in Rhode Island

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THE BATTLE FOR SEPARATION OF POWERS IN RHODE ISLAND

CARL T. BOGUS*

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The reader should be forewarned: I make no claim to being a disinterested observer in the battle for separation of powers in Rhode Island. I was an activist in that struggle, and served as Chair of the Separation of Powers Task Force for Common Cause of Rhode Island and Vice President of the Rhode Island Separation of Powers Committee.

Portions of this article are adapted from CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS AND THE COMMON LAW* (2001); Carl T. Bogus, *A Radical Decision by the R.I. Supreme Court*, R.I. BAR J., Nov. 1999, at 13; and Carl T. Bogus, *Speaker's Clout Enfeebles Members*, PROVIDENCE J., May 22, 2002, at B6.

INTRODUCTION

“It is one of the happy incidents of the federal system,” Louis Brandeis famously said, “that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹ As his quotation makes clear, Brandeis was talking about social and economic experiments, not political ones, and about experiments sanctioned by the people. Yet, since joining the Republic in 1790, Rhode Island has been conducting something of a political experiment—and an extreme one at that.

Notwithstanding comments by James Madison about how Rhode Island’s experiment placed it outside the central ideology of the American founders, Rhode Island continued for more than two centuries to reject one of the most fundamental principles of American government, namely the doctrine of separation of powers. That rejection, at times ambiguous and later explicit, was never sanctioned by the people. Quite the contrary, it took two revolutions to bring separation of powers into Rhode Island government: the Dorr Rebellion of 1840 to 1842 and a powerful citizens’ movement beginning in 1994, and barring the unforeseen, culminating in a constitutional amendment providing for separation of powers to be ratified by the voters in the fall of 2004.²

The central theme of this article is that separation of powers is at the core of American ideology. It is not an optional feature in American government. Rather, separation of powers is part of the essence of American government, as fundamental as the vote or representative government. One of the greatest lessons of the Rhode Island experience is that separation of powers is the people’s creed. The state supreme court handed down opinions attempting to honor Rhode Island’s exceptionalism. For unique historical circumstances, the court argued, Rhode Island never adopted separation of powers for state government. Some scholars found

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. See Liz Anderson, *General Assembly Unanimously Approves Separation of Powers*, PROVIDENCE J., July 1, 2003, at A-01 (including the text of the constitutional amendment). For descriptions of the issues leading up to final passage, see also Liz Anderson, *Unity Sought in Separation*, PROVIDENCE J., Apr. 10, 2003, at B-01; Liz Anderson, *House in Accord on ‘Powers’ Plan*, PROVIDENCE J., May 16, 2003, at A-01; Liz Anderson, *‘Separation’ Bill Draws Skepticism*, PROVIDENCE J., May 20, 2003, at B-01; Liz Anderson, *House OKs Separation of Powers, 71 to 1*, PROVIDENCE J., May 22, 2003, at A-01; Edward Fitzpatrick, *Senate OKs Power Separation*, PROVIDENCE J., May 31, 2002, at B-01; Liz Anderson, *Language Delays Powers Bill*, PROVIDENCE J., June 12, 2003, at B-01. Among the many op-ed articles of interest regarding the language of the amendment are: Robert P. Nicholas Gorham, *Article 6, Section 10: A Provision Madison Would Strike*, PROVIDENCE J., Mar. 11, 2003, at B-05; Carl T. Bogus, *Separation-of-Powers End Game: House Must Enact Real Reform*, PROVIDENCE J., Apr. 4, 2003, at B-07; Editorial, *Brink of Reform*, PROVIDENCE J., May 16, 2003, at B-04.

this reasonable.³ The people were inflamed.

The Rhode Island experience shows that the people see separation of powers at the doctrinal center of the American political system; for them, it is an essential idea reflecting the social needs and aspirations of America.⁴ The people see it as part of their American heritage, adopted by the Founders in Philadelphia in 1788, handed down through the generations, and guaranteed to the people of every state.

I shall support this proposition historically, theoretically, and anecdotally. The people of Rhode Island undertook a modern revolution not principally because they found separation of powers appealing in theory, but because they thought it would make a critical difference in practice. This article deals with specific episodes in recent Rhode Island history and how the people perceived them to be relevant to separation of powers.

One of my goals is to stimulate the interest of researchers in studying the battle for separation of powers in Rhode Island, a history worthy of study for a couple of reasons. Rhode Island represents the most extreme rejection of the principle of separation of powers in the history of the Republic. Separation of powers is, of course, a relative concept. As James Madison himself made plain, as a practical matter there neither can nor should be

3. Patrick T. Conley, a professor emeritus of history and constitutional law at Providence College, defends the status quo in PATRICK T. CONLEY, *NEITHER SEPARATE NOR EQUAL: LEGISLATURE AND EXECUTIVE IN RHODE ISLAND CONSTITUTIONAL HISTORY* (1999). Professors Elmer E. Cornwell, Jr. and Jay S. Goodman, of the political science departments of Brown University and Wheaton College respectively, endorse Conley's views in their Foreword to his book. Cornwell has been on the Rhode Island legislative payroll, receiving a salary of \$46,811.96 in 2002. Katherine Gregg, *Taxpayers: The Cost of Your Part-Time Legislature Has Doubled in 10 Years*, PROVIDENCE J., Jan. 12, 2003, at A-01. In addition to being an academic, Goodman also works as a lobbyist, representing unions before the Rhode Island General Assembly.

Testifying before the House committee considering separation of powers on Apr. 2, 2003, Professor Alan Rosenthal of the political science department at Rutgers University-New Brunswick, who characterized himself as "nearly" a legislative supremacist, questioned the desirability of adopting separation of powers in state government.

At a symposium on separation of powers at the Roger Williams University School of Law, Professor Grant D. Reeher, a political scientist at Syracuse University and a co-author of the Kersh article cited below, said he was not troubled by legislative appointees sitting on boards that control executive agencies. Doane Hulick, *Separation-of-Powers Debate Leaves Legal Scholars Divided; The Question of Whether Lawmakers Should Serve on Executive Agencies Has Been Put to the Rhode Island Supreme Court*, PROVIDENCE J., Apr. 26, 1998, at E-01.

For a variety of scholarly views, see Symposium, *Separation of Powers in State Constitutional Law*, 4 ROGER WILLIAMS U. L. REV. 1 (1998) (containing articles by Rogan Kersh et al., Michael C. Dorf, Robert A. Shapiro, James A. Gardener, Richard A. Hogarty, and Robert F. Williams). One common theme running through the articles by Kersh, Dorf, Shapiro, and Gardener is the view that it is undesirable for all of the states to adopt wholesale either federal doctrine or any other uniform formulation of separation of powers.

4. I follow the definition of "ideology" found in THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 422 (4th ed. 2001).

absolute separation of powers among the branches of government.⁵ An intermingling of powers is both necessary and desirable. For example, the President and most governors participate in legislative activity through their veto power and influence the judiciary by virtue of their role in selecting judges. As scholars put it, separation of powers should be conceived in functional rather than formal terms.⁶

Many have noted that separation of powers is not a single idea, but a cluster of concepts, including theories of sovereignty, division of authority, balanced government, and checks between the branches.⁷ Nevertheless, separation of powers is mainly about two principles. The first springs from the belief that power has a pernicious effect on human nature. In Lord Acton's famous axiom: "Power tends to corrupt and absolute power corrupts absolutely."⁸ Thus, too much power should not reside in one place. The second principle is rooted in the belief that any person or group possesses limited wisdom and even the majority's collective wisdom can be overcome by passions of the moment. Thus, there need to be checks and balances to guard not only against corruption but improvident or impetuous decisions as well.

There is no single way to meet these objectives, and the fifty state governments differ considerably in how they attempt to do so. They differ as well as to what extent they seek equipoise among the branches. There are, for example, states with relatively strong or weak governors. Rhode Island, however, has been beyond the far end of the spectrum. No other state legislature has claimed to be "omnipotent,"⁹ or told the state's highest court that the government consisted of only two coequal branches of government—the legislative and judicial branches, and a "diminutive"

5. *E.g.*, THE FEDERALIST NO. 47 (James Madison) (J.B. Lippincott & Co. ed., 1866) ("On the slightest view of the British Constitution [which Montesquieu praised], we must perceive that the legislative, executive, and judicial departments are by no means totally separate and distinct from each other."); THE FEDERALIST NO. 48 (James Madison) (J.B. Lippincott & Co. ed., 1866) ("It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other."); *id.* (Madison goes on to write that the object is to prevent one department from "directly and completely" administering powers properly belonging to another department or to possess "an overruling influence over the others in the administration of their respective powers.").

6. *See, e.g.*, Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988) (examining the debate between the two approaches to resolving separation of powers issues).

7. Garry Wills does a particularly fine job of demonstrating this. *See* GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 97-175 (1981).

8. Letter to Mandell Creighton, Apr. 5, 1887, *quoted in* THE INTERNATIONAL THESAURUS OF QUOTATIONS 493 (Rhoda Thomas Tripp, ed. 1970). I do not take the concept of corruption to be limited to conscious self-aggrandizement but to also embrace the problems of hubris and conflicts of interest.

9. *See* *City of Providence v. Moulton*, 160 A. 75, 77 (R.I. 1932) (tracing phrase that "the legislature was omnipotent" to a 1844 House of Representatives report).

Governor.¹⁰ Nor have the courts of any other state held that its government was a “quintessential parliamentary supremacy.”¹¹ In addition, no other state has had a dissenting justice on the state’s highest court write that his colleagues were reducing the Governor to “the functional equivalent of a show captain, propped up on the ship of the state’s maindeck in full-dress regalia for all the passengers to ogle, while the real legislative bosses steered the ship, barked orders, and hired, fired, and supervised the crew and all those who toiled away in the boiler rooms below.”¹² Rhode Island did not merely move to the end of the spectrum; it sought to adopt a different paradigm.

This is a topic with wider ramifications. In many states, there are increasing legislative encroachments into executive and judicial spheres, a new gathering of power into the impetuous legislative vortex.¹³ In Massachusetts and New Hampshire, for example, there have been serious questions about whether the legislature might reduce the pay of judges, end lifetime appointment of judges, or perhaps even impeach judges in retaliation for judicial decisions regarding legislative apportionment or campaign finance.¹⁴ The greatest trend is increasing legislative control over executive agencies. In Pennsylvania, legislative appointments to executive agencies are growing, with what one knowledgeable commentator calls “pernicious results.”¹⁵ In Illinois, North Carolina, Ohio, Pennsylvania, Wisconsin, and other states, there is a trend toward aggressive “rules review,”¹⁶ where legislatures do not merely exercise

10. See *Almond v. R.I. Lottery Comm’n*, 756 A.2d 186, 204 (R.I. 2000) (Flanders, J., dissenting) (quoting brief by House of Representatives).

11. See *infra* note 24 and accompanying text.

12. *In re Advisory Opinion to the Governor* (R.I. Ethics Comm’n—Separation of Powers), 732 A.2d 55, 100 (R.I. 1999) (Flanders, J., dissenting).

13. In referring to the impetuous legislative vortex, I am paraphrasing Madison. See *infra* note 87 and accompanying text.

14. See John DiStaso, *Tangled Issues Abound in Judges’ Suit for Fees: High Court Urges Legislators Not to Curb Court’s Authority*, UNION LEADER (Manchester, N.H.), Mar. 14, 2001, at B3; Nancy Meersman, *Judiciary vs. Legislature*, UNION LEADER (Manchester, N.H.), Nov. 2, 2002, at A1; Frank Phillips, *Judges Ask SJC to Restore Appointment Power: Say Lawmakers’ Move Saps Judicial Role*, BOSTON GLOBE, Mar. 5, 2002, at B1, B8; Christine MacDonald, *New Hampshire Conducts Trial to Impeach High Court Justice*, CHI. TRIB., Sept. 20, 2000, at § 1-5; Steve Marantz, *Finneran Considers Reining in Judiciary Over Clean Elections*, BOSTON HERALD, Feb. 8, 2002, at 14; Editorial, *Finneran in Contempt*, BOSTON GLOBE, Feb. 10, 2002, at C12; Aviam Soifer, Editorial, *Legislators Seek to Undermine State’s Separation of Powers*, BOSTON HERALD, Oct. 13, 2002, at 30 (discussing the debate over separation of powers issues in Massachusetts and New Hampshire).

15. John C. Pittenger, Editorial, *Pernicious Legislative Role in Pennsylvania*, PROVIDENCE J., July 24, 2002, at B-05. Pittenger has at various times served as a member of the Pennsylvania legislature, the state’s secretary of education, and member of the state board of education. He is also formerly a professor of law and dean at the Rutgers University School of Law—Camden.

16. See JAMES R. BOWERS, *REGULATING THE REGULATORS: AN INTRODUCTION TO THE LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING* 24-25 (1990) (identifying

general oversight of the promulgation of rules and regulations by executive agencies, but also reserve to a committee or other entity, controlled by legislators, the authority to suspend or veto regulations, a practice that the United States Supreme Court has held to be unconstitutional within the federal government.¹⁷

Aggressive rules review often yields political results with legislators weakening regulations to curry favor with constituents and contributors.¹⁸ Moreover, the more legislatures acquire control over regulatory agencies, the more they weaken executive power and inflate their own. When legislative oversight of agencies drifts into supervision, legislative control becomes dominant, for the agency must look to the legislature not only for funding but also for continuing and specific approval of its work product. In practice, this means the legislature will dictate the agencies' work product.¹⁹ The Rhode Island experience has lessons for other states. It illuminates both the peril of permitting greater concentration of legislative power and the ability to rally the people against it.

Although the campaign for separation of powers can be traced back more than 160 years, when a young lawyer named Thomas Wilson Dorr sought to overturn the existing Rhode Island government, the modern effort began in 1994 when Common Cause of Rhode Island made separation of powers its most important political priority.

The genesis was alarm about the legislature's expanding practice of reserving to itself the power to appoint the controlling officials of executive agencies. When the *Roger Williams University Law Review* published its inaugural issue in the spring of 1996, the lead article by then U.S. Attorney

Wisconsin, Pennsylvania, Illinois, and eleven other states that allow legislative suspension of administrative regulations); see also Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1213-14 (1999) (discussing North Carolina, Ohio, Pennsylvania, and other states).

17. Even a veto by one chamber of Congress alone, or by both chambers without presentment to the President for signature or veto, is prohibited. See *INS v. Chadha*, 462 U.S. 919, 946 (1983).

18. See BOWERS, *supra* note 16, at 50-55 (elaborating on the effect of aggressive rules review). An official at one Illinois agency told a researcher: "The more politically motivated [an objection by a legislative committee] appears to be, the greater the likelihood that this agency will comply with it. We don't want to antagonize legislators who may retaliate against us elsewhere in the legislative process." *Id.* at 72. See also Marcus E. Ethridge, III, *Legislative-Administrative Interaction as "Intrusive Access": An Empirical Analysis*, 43 J. OF POLITICS 473, 480 (1981) (quoting Harold Bruff and Ernest Gellhorn, who stated that a congressional veto over administrative regulations alters the powers balance between Congress and the President).

19. Agencies cannot afford to expend time and resources promulgating regulations only to have the legislature veto them at the end of a long process. See generally BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA, *supra* note *, at 145-59 (describing how agencies cannot afford to invest years and resources to develop rules that ultimately never go into effect or are overturned). This will force agencies to include powerful legislators or their surrogates in the drafting process, where they will be the most influential participants.

Sheldon Whitehouse was titled "Appointments by the Legislature Under the Rhode Island Separation of Powers Doctrine: The Hazards of the Road Less Traveled."²⁰ Mr. Whitehouse was concerned about the General Assembly's exercising "virtually unchecked appointment powers" over executive agencies in many substantive areas, from the commission regulating gambling to the agency charged with protecting the coastal environments of the state.²¹ Two cases challenging the practice as violating the doctrine of separation of powers had reached the state supreme court; in both instances the court avoided reaching a decision on the merits.²² No one could say if the issue would finally be resolved by the courts, but it was the place to begin.

As it turned out, the Rhode Island Supreme Court subsequently handed down two opinions, in 1999 and 2000, that are surely among the most radical ever rendered by the highest court of an American state.²³ The court proclaimed that Rhode Island does not have the same fundamental system of government found in the federal system and the other forty-nine states. Rather, Rhode Island government is "that of a quintessential system of parliamentary supremacy."²⁴ The court concluded that Rhode Island does not have three co-equal branches of government and that the General Assembly is supreme. In Rhode Island, the General Assembly's power is not limited to the authority granted to it by the state constitution; the General Assembly possesses "all of the powers inhering in sovereignty" except for authority expressly granted to other branches of government.²⁵

20. 1 ROGER WILLIAMS U. L. REV. 1 (1996).

21. *Id.* at 2.

22. *See id.* (highlighting two major separation of powers cases in Rhode Island).

23. *Almond v. R.I. Lottery Comm'n*, 756 A.2d 186 (2000); *In re Advisory Opinion to the Governor*, 732 A.2d 55 (R.I. 1999).

24. *In re Advisory Opinion to the Governor*, 732 A.2d at 64.

25. *Id.* at 62-63. As the Tenth Amendment emphasizes, the federal government is a government of limited powers, possessing only those powers expressly or implicitly granted to it in the United States Constitution, while all other powers are "reserved to the States, respectively, or to the people." U.S. CONST. amend. X. Writing for the Supreme Court, Benjamin Cardozo said that, "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937).

As a matter of abstract political theory, it is interesting to ask what happens to any residual powers that are not doled out in the state constitution to the executive, legislative, or judicial branches of government. Where do they reside? This, however, may only be an academic question because as a practical matter it is difficult to imagine governmental power that cannot be classified as legislative, executive, judicial, or some combination thereof.

Not everyone concedes that residual power belongs to the government. Philip Bobbitt wrote that it is a fundamental ethos of our constitutional system that "all residual authority remains in the private sphere." Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1284 (1989). But one pretty much gets to the same place by conceding that the legislature may enact a law of any kind or stripe, subject only to constitutional limitations, which among other things require that laws be rationally related to a valid public purpose. This is sometimes called "plenary power," meaning the legislature's law-making authority is

The campaign then turned into a political effort to amend the state constitution, seemingly a fool's errand. As a practical matter, the state constitution could not be amended without the consent of the General Assembly itself.²⁶ How, without enormous political pressure, would a legislature be made to give up such power? Such pressure could only come from the public, from voters making it clear that legislators would have to amend the constitution or be voted out of office. But was it possible to arouse the public over an arcane issue of political theory?

In 1999, I embarked on a project to publish a full page advertisement in the *Providence Journal-Bulletin* in which forty teachers of law, history, and politics in the state's colleges and universities would proclaim the importance of separation of powers. Philip H. West, Jr., the executive director of Common Cause and one of the key leaders of the movement, found a benefactor willing to pay most of the cost of the ad.²⁷ My job was to get at least forty signatories, and I expected it to be easy. I anticipated difficulty in the state's three public colleges²⁸ which are funded by the General Assembly and controlled by boards with legislative appointees. Nevertheless, the state's seven private colleges²⁹ provided a more than ample pool to recruit the required amount of supporters—or so I thought.

I got off to a fine start when sixteen of my colleagues at the Roger Williams University School of Law agreed to sign the ad. But, to my amazement, I could not get even close to the necessary twenty-four additional signatures from all of the state's other institutions of higher learning. It was not for want of trying. I worked the phones diligently, calling nearly everyone I could reach in the departments of history and

not delimited by a list of subject matter but extends to any valid public purpose.

The concepts of residual power or plenary power, however, cannot be properly used to justify the legislature appropriating to itself (or delegating to an entity that it controls or influences)—not some untraditional or unclassifiable power—but *executive* powers, including implied or unenumerated executive powers.

26. There are two ways to get around the state constitution: (1) by a majority vote in each chamber of the Grand Assembly, together with ratification by a majority of voters at the next general election; or (2) a constitutional convention, convened in one of two ways. R.I. CONST. art. XIV, §§ 1, 2. Reform forces would have faced insurmountable odds by taking the constitutional convention route, which in theory might have been called without the consent of the General Assembly. First, members of the General Assembly, politicians with name recognition and support of party regulars, would have had enormous advantages in standing for election to be delegates. Second, the reform coalition would have been driven asunder by wedge issues such as abortion, gun control, and tort reform.

27. I asked each signatory for a contribution of only \$35.00, which would cover only a small fraction of the cost. In my judgment, the ad needed to be signed by at least forty professors to carry the desired weight; and I promised the signers that we would not run the ad without at least forty names.

28. Community College of Rhode Island, Rhode Island College, and the University of Rhode Island.

29. Brown University, Bryant College, Johnson & Wales University, Providence College, Rhode Island School of Design, Roger Williams University, and Salve Regina College.

political science. I spoke to one professor who told me she did not want to sign because her specialty was international relations and she had never studied separation of powers. “It’s complicated and I don’t know enough about it,” she said.³⁰ If this was too complicated for a political scientist, no matter what her specialty, how was it going to be simple enough for the public at large?

Many knowledgeable people—not only scholars, but successful politicians and public relations experts—concluded that it would be impossible to generate sufficient public interest in separation of powers to mount a credible campaign to amend the state constitution.³¹ The issue was too arcane, abstract, and complicated to explain to the voters. People would focus instead on issues of obvious bread and butter significance, such as taxes and schools.

The stunning surprise is that separation of powers became the biggest issue in the state. When the candidates campaigned, it was typically the topic that voters asked about first and most often. Newspapers and radio talk shows became filled with discussions about separation of powers. The *Providence Journal* published nearly 800 news articles, editorials, commentary pieces, or letters-to-the-editor about separation of powers.³² Community groups held forums about separation of powers.³³ Members of the General Assembly lost seats over the issue.³⁴

Separation of powers turned out to be an issue that the public grasped intuitively and cared about passionately—an issue that is paradoxically too complicated for professors of history and political science and starkly clear to the average person. Separation of powers is about consolidated power, and that is something the public understands.

Part II of this Article describes the theoretical and historical basis for my argument that separation of powers is a central feature of American

30. Or words to that effect.

31. I state this from first-hand knowledge, but because the conversations were private I will not identify individuals.

32. A Lexis search conducted on June 5, 2003 produced 791 documents that included the term “separation of powers” published in the *Providence Journal-Bulletin* from January 1, 2003 forward.

33. Here is a small sample of such events (ones in which I happened to participate) during the last eighteen months of the campaign: Panel Discussion: “State of the State” (cable television broadcast, filmed May 8, 2003); Debate, Rotary Club of Providence, R.I., (Mar. 31, 2003); Forum, Common Cause of R.I., (Mar. 19, 2003); Debate, St. Michael’s Episcopal Church, Bristol, R.I. (Mar. 13, 2003); Luncheon Talk, Roger Williams University School of Law (Mar. 11, 2003); Evening Talk, College Republicans at Roger Williams University (Feb. 12, 2003); Luncheon Talk, Rotary Club of Bristol, R.I. (Feb. 26, 2003); Forum, Newport Chamber of Commerce, Newport, R.I. (Jan. 27, 2003); Forum, Operation Clean Government, Rhodes on the Pawtuxet, R.I. (Jan. 20, 2003); “Focus Rhode Island,” WRNI, Providence, R.I., (Oct. 18, 2002); Luncheon Talk, Netopian Club of Providence, (Apr. 24, 2002); Talk, First Baptist Church in America, Providence, R.I., (Apr. 14, 2002).

34. See *infra* note 251 and accompanying text.

ideology. Part III describes the relevant Rhode Island history, including, in broad terms, how and why Rhode Island came to reject separation of powers and perhaps most importantly the problems that resulted from that rejection. This section deals in some length with regulatory agencies because they have experienced the greatest ramifications. From 1842 until the Rhode Island Supreme Court decisions in 1999 and 2000, there was uncertainty about whether the Rhode Island constitution incorporated the principle of separation of powers. Growing legislative control over administrative agencies caused then-Governor Lincoln Almond to ask the court to resolve the question; and it was the court's decisions—and fear that with the issue resolved in the General Assembly's favor, the legislature would assert even greater control over agencies—that ignited the campaign to amend the state constitution. That effort successfully culminated in July 2003.³⁵ Part IV of this Article describes the culmination of the battle.

This is by no means a complete recounting of the battle for separation of powers. Although I allude to the decisions of the state supreme court to make a variety of points, I do not analyze them comprehensively. I do not deal with the full body of Rhode Island case law about separation of powers. I do not describe in detail the chronology of the political struggle for a constitutional amendment, and I do not discuss the process of drafting, fighting, and negotiating over the language of the amendment or present any exegesis of the language itself. These are all important subjects, but they must await another day.

This story is about why the battle for separation of powers was fought.

I. SEPARATION OF POWERS AND AMERICAN IDEOLOGY

A. *Ideological Origins*

One of the first modern political philosophers to recognize the importance of separation of powers was Niccolo Machiavelli.³⁶ Machiavelli argued that the government of Sparta had been so enormously successful because its great lawgiver, Lycurgus, created a constitution that divided and balanced power among three separate organs of government,

35. This is the date on which the General Assembly passed a proposed constitutional amendment. The amendment will not become effective unless it is ratified by the voters at the general election in November 2004.

36. In his grand survey of western philosophy Bertrand Russell mentions Machiavelli first on this topic. See BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 508 (1945). However, every thinker stands on the shoulders of predecessors, and Machiavelli was strongly influenced by Polybius, who in turn was influenced by Aristotle. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 80-81 (1985) (highlighting the influence of Aristotle and Polybius, among others); see also WILLS, *supra* note 7, at 98-101 (offering an excellent summary of Polybius's thinking).

controlled respectively by the kings, the aristocrats, and the people.³⁷ Sparta had two concurrent kings, with limited powers, who performed religious ceremonies of ritualistic importance to the state, were in charge of the judiciary, and commanded the army during times of war.³⁸ Sparta's Senate was composed of twenty-eight aristocrats, who were elected from those eligible by the Assembly.³⁹ The sovereignty of the state was formally in the Assembly, comprised of all males over the age of thirty, which had the authority to enact laws. Sometime after Lycurgus, the Spartan constitution was amended so that the Senate could veto laws that, in its view, had been "crookedly" decided by the Assembly.⁴⁰

Machiavelli credited the wisdom of Lycurgus for creating a government that lasted for more than 800 years.⁴¹ By comparison, he argued, Athens' lawgiver, Solon, failed to create a governmental structure that provided a check on either "the insolence of the upper class" or "the abuse of freedom on the part of the populace," each of which ran rampant at different times.⁴² As a result, said Machiavelli, "Athens endured a very brief time in comparison to Sparta."⁴³

In the seventeenth century, English political philosophers, struggling with nascent concepts of democracy, began thinking about separating and balancing powers between King and Parliament. Thomas Hobbes opposed this concept.⁴⁴ He preferred an outright monarchy, and could abide a supreme Parliament instead but believed a government of divided power between King and Parliament was intolerable.⁴⁵ John Locke disagreed. In 1698, he wrote:

[B]ecause it may be too great a temptation to human frailty apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the

37. See NICCOLO MACHIAVELLI, DISCOURSES ON LIVY 20 (Harvey C. Mansfield and Nathan Tarcov trans., Univ. of Chicago Press 1996) (1512) (discussing the structure of government in ancient Sparta).

38. See WILL DURANT, THE LIFE OF GREECE 79 (1939) (describing the structure of and power distribution in the Spartan government).

39. See *id.* at 79-80.

40. See *id.* at 80.

41. See MACHIAVELLI, *supra* note 37, at 26-27 (providing an analysis of the historical establishment of laws and government and distinguishing between those governments which allocated power responsibly and those that did not).

42. *Id.*

43. *Id.*

44. See THOMAS HOBBS, LEVIATHAN, pt. 2, ch. 29, § 16 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651) (proclaiming a government with separate powers to be a "disease in the natural body of man").

45. "[W]hat is it to divide the power of a commonwealth, but to dissolve it? for [sic] powers divided mutually destroy each other." *Id.* ch. 29. See also RUSSELL, *supra* note 36, at 551 (noting that Hobbes preferred governments ruled by a single power rather than separate entities).

law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government⁴⁶

Many give Locke the lion's share of the credit for originating the doctrine of separation of powers.⁴⁷ Although Locke was quite clear about the malady—the perniciousness of consolidated power—and prescribed a division between the legislative and executive authorities in a general sense, he was far from clear about how this was to be accomplished. He believed that the legislative authority (which might vest in a body or a single individual) was at the same time both the supreme power and subject to constraints. Namely, he believed that the legislative authority cannot enact arbitrary laws or issue arbitrary decrees, and its power “is limited to the public good of the society.”⁴⁸ But whether there should be any enforcing mechanism Locke fails to say. Although Locke does not envision a separate judicial branch of government,⁴⁹ he does at least in part recognize the importance of the rule of law. The legislative authority “is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges,”⁵⁰ he wrote. But again, he prescribes no formal check on legislative power. His comments seem purely hortatory; he argues that it is wise to entrust decisions to authorized judges because those “who through passion or interest” have violated the unwritten natural law “cannot so easily be convinced of their mistake where there is no established judge,” and leaves it at that.⁵¹

Two events undoubtedly stimulated Locke's thinking. The first event was the English Civil War, which in 1649 resulted in the trial and execution of Charles I and the abolition of both the monarchy and the House of Lords. After the King's assassination and the consolidation of power in the House of Commons, the dangers of legislative supremacy became apparent.⁵² Eleven years of rule by the House of Commons alone

46. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, bk. II, ch. 2, § 143 (Mark Goldie ed., Everyman 2000) (1698).

47. *E.g.*, M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 63 (2d ed. 1998) (recognizing the scholarly debate over who developed the separation of powers theory and crediting Locke); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 247 (1996); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 151 (1969).

48. LOCKE, *supra* note 46 § 135, at 183-84.

49. *See, e.g.*, James E. Pfander, *Sovereign Immunity and the Right to Petition*, 91 NW. U. L. REV. 899, 921 n.82 (1997) (noting that Locke did not include the judiciary as an independent branch of government); Jonathan M. Hoffman, *By the Course of the Law*, 74 OR. L. REV. 1279, 1315 (1995) (explaining that Locke did not endorse the judiciary as a separate branch of government).

50. LOCKE, *supra* note 46, at 184 § 136.

51. *Id.*

52. Despite restoration of the monarchy in 1660, the problems of parliamentary

was enough to convince England that consolidating all power in one set of hands, even a body of the people's elected representatives, was a recipe for disaster; as a result, resurrection of both the monarch and the House of Lords ensued.⁵³ From this point on, British thinkers began to argue that Parliament should be limited to enacting general laws and that the operation of government should be the province of the executive, subject to legislative review.⁵⁴

The second event that stimulated Locke's thinking was the Glorious Revolution of 1689. James II failed to recognize parliamentary prerogatives, and in a bloodless revolution, Parliament replaced him with a new monarch, William of Orange.⁵⁵ As a condition of gaining the crown, William recognized the principle that Parliament was the sole source of law. Thus, the primitive thinking about separation of powers gained some degree of acceptance by the government itself.

However, two post-Medieval theories continued to influence thinking about separation of powers.⁵⁶ The first theory (evident in Machiavelli's writing about Sparta) was that the nation consisted of three separate interests or estates—the monarch, the aristocracy, and the people—which were entitled to participate in government, but did so as a combined, single governmental institution, namely Parliament.⁵⁷ The second theory involved the concept of sovereignty.⁵⁸ As traditional conceptions held, the personification or embodiment of the nation itself must rest somewhere, in a single person or institution. As Edmund S. Morgan brilliantly illustrated, this idea undoubtedly derived from the divine right of kings, the idea that God appointed the King—"that kings were visible gods and God an invisible king,"⁵⁹ as the Speaker intoned when opening every session of the House of Commons—to lead a people and constitute a nation.⁶⁰ It was

supremacy were evident, but the solution of separated powers had not yet been fully worked out. See RAKOVE, *supra* note 47, at 245-46 (describing the development of the separation of powers in England and America). The Glorious Revolution of 1689 was a landmark in the creation of British democracy; it was not until the end of the eighteenth century that the transfer of executive authority from monarch to prime minister and cabinet began.

53. See *id.* at 246 (summarizing the evolution of England's government of separate spheres).

54. See *id.* (explaining the political theories developed regarding England's separation of powers).

55. See Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 383 (1998) [hereinafter, *Hidden History*] (describing how Parliament's power increased along with William of Orange's ascension to the throne).

56. See *infra* notes 57-63 and accompanying text.

57. See RAKOVE, *supra* note 47, at 245 (describing "the English theory of mixed government").

58. The second theory focused on the separate roles of the executive, legislative, and judicial branches of government. *Id.* at 245-46.

59. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 19 (1998).

60. See *generally id.* at 17-29 (theorizing about the development of the ideology that the

only natural, therefore, that when monarchy slowly began to give way to democracy, Englishmen perceived this as a shift of sovereignty and supreme authority from King to Parliament. Thus, in 1765 Blackstone wrote that Parliament was "coequal with the kingdom itself"⁶¹ and that its power was "transcendent and absolute."⁶² Or as another commentator put it, since England's civil war "the only ultimate source of law is the King in Parliament."⁶³

Nevertheless, from the Glorious Revolution onward, there gradually developed, through fits and starts and with much confusion, a practical division between executive authority residing in the King and legislative authority residing in Parliament, and with checks and balances between them.⁶⁴ Only the monarch could convene or dissolve Parliament; only Parliament could make law; and the bicameral nature of Parliament prevented the enactment of any law without the consent of both the aristocracy in the House of Lords and the elected representatives of the people in the House of Commons.⁶⁵

It was the Baron de Montesquieu who, in his brilliant work, *The Spirit of Laws*,⁶⁶ published in 1751, first pierced the post-Medieval fog and clearly enunciated the modern concept of separation of powers.⁶⁷ In a chapter titled "Of the Constitution of England," Montesquieu wrote:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the

King is a divine source of power, which the Commons ultimately utilized as a method of restricting the King's power by limiting his authority to his own actions).

61. WILLIAM BLACKSTONE, *BLACKSTONE'S COMMENTARIES ABRIDGED* 36 (William C. Sprague ed., 9th ed. 1915) (1892).

62. *Id.* at 38.

63. EDWARD JENKS, *A SHORT HISTORY OF ENGLISH LAW: FROM THE EARLIEST TIMES TO THE END OF THE YEAR 1911*, at 185 (1912).

64. "For centuries [prior to the American Revolution] Englishmen had bragged about their mixed government, in which executive, legislative, and judiciary powers were allegedly balanced against each other." MORGAN, *supra* note 59, at 261. Whether clarity about the concept of separation of powers, or even any term or label for it, extends back as far as Morgan suggests I do not know, but he is certainly correct when he writes that by "the 1780s belief in the separation of powers was widespread." *Id.*

65. Along with William's rise to power came a recognition of Parliament's authority, independent of the executive. *Hidden History*, *supra* note 55, at 382-83.

66. BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. XI, ch. 6 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1751).

67. Scholars have noted that Montesquieu was influenced by Bolingbroke. See, e.g., McDONALD, *supra* note 36, at 80 (recognizing the sources of Montesquieu's theories and how his theories influenced Americans' political theories).

judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.⁶⁸

Montesquieu's thinking was far richer and more developed than Locke's. He devoted an entire chapter to separation of powers, working the principles out in considerable detail. He argued that most European kingdoms "enjoy a moderate government"⁶⁹ because they separated and balanced power in one fashion or another. He compared how Turkey, Italy, and Holland accomplished this by observing the important ways their governmental structures emulated those of ancient Rome. He intriguingly suggested that by reading the Roman historian Tacitus one would discover that the Romans in turn derived the principle of separation of powers from the German Huns; "[t]his beautiful system was invented first in the woods,"⁷⁰ he observed. Montesquieu also was the first, as far as I know, to expressly combine within the principle of separation of powers not only the concept of divided authority but also of checks and balances among the governmental departments.

Montesquieu wrote that the government of England had the best system of separation of powers, at least in theory.⁷¹ However, he predicted that it would not last; "[a]s all human things have an end, [England] will lose its liberty, will perish. Have not Rome, Sparta, and Carthage perished? It will perish when the legislative power shall be more corrupt than the executive."⁷²

Montesquieu especially influenced the American Founders on the concept of separation of powers.⁷³ Madison himself sounded much like Montesquieu when he famously explained that American government needed to incorporate the principle of separation of powers: "[t]he 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

68. MONTESQUIEU, *supra* note 37, bk XI, ch. 6 at 151-52.

69. *Id.* at 152.

70. *Id.* at 161.

71. "It is not my business to examine whether the English actually enjoy this liberty or not. Sufficient it is for my purpose to observe that it is established by their laws; and I inquire no further." *Id.* at 162.

72. MONTESQUIEU, *supra* note 66, Book XI, Ch. 6 at 161-62.

73. "The oracle who is always consulted and cited on this subject is the celebrated Montesquieu," said James Madison. THE FEDERALIST NO. 47, at 374 (James Madison) (J.B. Lippincott & Co. ed., 1866). See also McDONALD, *supra* note 36, at 81 ("American republican ideologues could recite the central points of Montesquieu's doctrine as if it had been a catechism.").

tyranny.”⁷⁴

And, as we are about to see, the American Founders were especially worried about Montesquieu’s warning that democracies perish because of the corruption of legislative power.⁷⁵

B. *Separation of Powers and the American Founders*

Virginia’s original constitution, adopted in 1776, was the first to expressly adopt the concept of separation of powers.⁷⁶ Nevertheless, separation of powers was not a widely accepted concept immediately after the Revolution.⁷⁷ In their original constitutions, adopted at the outset of the Revolution, only four states established governments with expressly separate legislative, executive, and judicial departments.⁷⁸ Moreover, according to William Wiecek, seven of the state constitutions adopted in 1776 exalted legislative power.⁷⁹ Pennsylvania did not even have the office of Governor, and other states gave the office little power.⁸⁰ The judiciary was either elected by or answerable to the General Assembly.

The Articles of Confederation, adopted in 1777, did not create a judicial department at all. One could argue that there was no reason for the drafters

74. THE FEDERALIST NO. 47, at 373-74 (James Madison) (J.B. Lippincott & Co. ed., 1866).

75. See *infra* notes 83-88 and accompanying text.

76. Its first substantive sentence reads: “The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time; except that the Justices of the County Courts shall be eligible to either House of Assembly.” VA. CONST. OF 1776, in 10 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 52 (William F. Swindler ed. and annotator 1979). Although Madison was a delegate to this convention, he was only twenty-five years old at the time; George Mason is generally given credit as the principal draftsman. See, e.g., RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 68-71 (1971) (noting that “Mason was . . . widely acknowledged as having the most profound understanding of republican government of any man in Virginia,” and that Madison deferred to him).

77. See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 216-17 (1989) (observing the states’ criticism of separation of powers and their varied policies for implementing separate forms of government); Cf. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 607 (1994) (arguing that many original state constitutions incorporated the separation of powers concept).

78. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 150-51 (1969) (naming Virginia, Maryland, North Carolina, and Georgia as the four states that incorporated separate legislative, executive, and judicial branches of government into their state constitutions).

79. See WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 21 (1972) (discussing the “merger of the doctrines of separation of powers and mixed government”); see also McDONALD, *supra* note 36, at 86 (noting that “no state endowed its governor with real power”).

80. See McDONALD, *supra* note 36, at 86 (summarizing the lack of gubernatorial powers granted in initial state constitutions); WIECEK, *supra* note 79, at 21 (noting the limited executive powers within state governments created in the state constitutions developed in 1776).

to even contemplate doing so since the Articles did not so much create a government as a confederation among thirteen sovereign state governments. Nevertheless, the Articles contained provisions for adjudicating certain disputes (disputes between states and questions about the structure of the confederation itself), and it entrusted this authority to Congress.

The drafters of the Articles were most afraid of executive tyranny. They considered King George III and his manipulative advisors to be villains. But why had the Americans demonized the King and not Parliament? The revolutionaries argued that much as he corrupted colonial judges by making them dependent on him for the amount and payment of their salaries, the King corrupted Parliament through patronage and other nefarious techniques.⁸¹ Parliament might be supreme in theory, but the monarchy's bribing of members of Parliament reestablished its practical control.

There is irony here. To move his programs through an often resistant Parliament, King George III employed a member of the House of Lords, Lord North, as his "prime minister." North was one of England's first prime ministers, and the original vision of the job may be thought of, in modern terms, as the King's lobbyist. English Whigs and the Americans found this position part of the corruption of Parliament. History has shown that their concern that the King's employment of a member of Parliament might undermine the balance of power was correct, but they were right for the wrong reason. Beginning with the appointment of William Pitt the Younger—who accepted the post of Prime Minister in 1783 on the condition that he, rather than the King, select the other ministers—power flowed not from Parliament to the King but from the King to Parliament. From the Glorious Revolution to the appointment of William Pitt, the idea of separation of powers flickered in England, then disappeared.⁸²

While immediately after the revolution, excessive executive power served as a primary concern for Americans. Their experience under the Articles of Confederation changed that view. The state legislatures' exercise of unchecked power created terrifying results: there was little regard to the rule of law. Assemblies enacted *ex post facto* legislation when it pleased the electorate. Many small farmers, merchants and

81. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION 174-75* (1992) (highlighting the various methods the King used to corrupt American government); MCDONALD, *supra* note 36, at 82-83 (illuminating the King's extensive patronage system and its corruptive effects on Parliament); see also THORNTON ANDERSON, *CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 36-37* (1993) (arguing that there were religious connotations to the corruption theme).

82. See generally VILE, *supra* note 47, at 23-82, 107-30 (articulating the ebb and flow of the separation of powers concept throughout England's history).

tradesmen—whose incomes and enterprises had suffered when they went off to war—had amassed large debts. State legislatures issued paper money and enacted legislation permitting the use of devalued currency to pay off debts. This form of debtor relief was popular but perilous for a new nation with a fragile financial system. As Thornton Anderson put it, “[t]he threat to republican government thus shifted from the man on horseback to legislative tyranny.”⁸³

The Founders were especially alarmed by what they saw as legislative irresponsibility in Rhode Island. Alexander Hamilton decried “the enormities perpetrated by the legislature of Rhode Island.”⁸⁴ James Madison believed that if Rhode Island were left to its own devices, without its alliances with other states tempering its policies, selfish and self-interested majority will, exercised through the legislature, would become so tyrannical that the people would wind up revolting against themselves:

It can little be doubted, that if the state of Rhode Island was separated from the confederacy, and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities, that some power altogether independent of the people, would soon be called for by the voice of the very factions whose misrule had proved the necessity of it.⁸⁵

It was the unchecked power of the American state legislatures that was the primary impetus for abandoning the Articles of Confederation and writing the U.S. Constitution.⁸⁶ “The legislative department is everywhere extending the sphere of its activity and drawing power into its impetuous vortex,”⁸⁷ complained Madison. When, in the summer of 1787, delegates convened at the Constitutional Convention in Philadelphia under the guise of revising the Articles of Confederation, there was general agreement that they needed to go beyond their mandate and create a new government. Moreover, from the beginning of their deliberations there was consensus

83. ANDERSON, *supra* note 81, at 168. See also WOOD, *supra* note 78, at 406-07 (explaining the corruptive effects of debtor relief legislation); RAKOVE, *supra* note 47, at 291 (suggesting that the new government oppressed the people).

84. THE FEDERALIST NO. 7, at 89 (Alexander Hamilton) (J.B. Lippincott & Co. ed., 1866).

85. THE FEDERALIST NO. 51, at 402 (James Madison) (J.B. Lippincott & Co. ed., 1866).

86. See, e.g., ANDERSON, *supra* note 81, at 49 (describing the nationalist movement for a convention to overrule the Articles of Confederation); WOOD, *supra* note 78, at 471-75 (stating the belief that the American federal government was too weak under the Articles of Confederation to have a necessary effect on state governments as needed to establish a unified nation).

87. THE FEDERALIST NO. 48, at 383 (James Madison) (J.B. Lippincott & Co. ed., 1866). Madison also noted that because the legislature’s powers are “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.” *Id.* at 384.

that governmental power should be separated and balanced among the three branches of government recommended by Montesquieu.⁸⁸

C. The Guarantee Clause

When I addressed audiences in Rhode Island about separation of powers, I generally started with the question, "If someone asked you what the most fundamental aspects of American democracy⁸⁹ were, what would you say?" After a pause, I suggested that American democracy rests on two pillars. The first pillar is the principle that the people, through the vote, choose their representatives in the political branch of government. I suggested the second is the principle that all power is not placed in one pair of hands but is divided among separate branches of government, with checks and balances among them. I would then add that the second pillar is no less important than the first, for electing a King or a Politburo would be just as repugnant to our philosophy of government as would not holding elections at all. This contention powerfully resonated with audiences.

I make this point because I believe that the principle of separation of powers is at the core of American ideology. Ideology transcends pragmatic considerations. It reaches deeply into beliefs about political philosophy, which flow from underlying beliefs about the nature of humankind.⁹⁰ We do not bother investigating, for example, whether monarchies are more effective or, over the course of history, have proven more successful than democracies.

During the battle for separation of powers in Rhode Island, some argued that Rhode Island's lack of separation of powers resulted in more governmental corruption and a weakened economy. It is important here to draw a distinction between two kinds of corruption. On the one hand, the

88. See ANDERSON, *supra* note 81, at 50-51 (describing how Edmond Randolph proposed the three branch system at the beginning of the convention).

89. See WIECEK, *supra* note 79, at 18 (maintaining the Founders wanted to create a republican form of government that was neither monarchical nor democratic by stating "Monarchy represented one extreme in the form of government; its opposite was 'democracy,' which was considered equally undesirable . . . Republican government was thought to be an alternative to these extremes, a middle course between the Scylla of tyranny and the Charybdis of anarchy.") Nonetheless, I use the term "American democracy" to refer to our system of government, including its non-democratic elements. I believe that in common usage the term "American democracy" is both synonymous with "republican form of government" and better understood. My understanding is that within popular usage, only the extremist John Birch Society, whose motto at least used to be "This is a Republic, Not a Democracy; Let's Keep it That Way," draws a distinction between the two.

90. See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 127 (3d ed. 2000) (explaining the separation of powers doctrine "has evolved over the last two hundred years" and is "a product less of political philosophy than of practical experience"). I agree that separation of powers *doctrine*, as a collection of rules, is constructed from practical experience, but the principle of separation of powers flows from a deeper-seated belief in political philosophy.

term may refer to criminal conduct such as the embezzlement or theft of public funds (i.e., criminal corruption). On the other, it may be used more broadly to mean the distortion of public decision-making caused by conflicts of interest (i.e., legal corruption).

Rhode Island has suffered a stunning amount of criminal corruption. In recent years, two justices of the state's supreme court, a judge of the superior court, a speaker of the House, a governor, and the mayor of the state's largest city left were sent to prison for graft. In another case, a public leader was, forced from office but not charged criminally.⁹¹ Though dramatic, these incidents by themselves cannot prove Rhode Island is more criminally corrupt than other states, and I do not know whether such a thing has been, or could be, measured.⁹²

I believe that when people argue that the absence of separation of powers result in more governmental corruption, they are essentially referring to the perversion of public decision-making. Without separation of powers, more decisions—lawful as well as unlawful—are influenced by desires to benefit private interests at the expense of the general welfare. Both kinds of corruption result in a waste of public resources. Does Rhode Island suffer more than its share of what may be called legal corruption? The answer appears to be yes. According to researchers at Syracuse University, Rhode Island has one of the least efficient state governments.⁹³ Another

91. See, e.g., Marcella Bombardieri, *Rhode Island Lawmakers Face a Test of Self-Denial*, BOSTON GLOBE, Jan. 26, 2003, at B1; Scott MacKay, *A Gallery of Rogues and Rascals: Rhode Island's Legend of Political Corruption Lives On*, PROVIDENCE J., Sept. 8, 2002, at A-18; Alan Greenblatt, *Rhode Island's Recent Dishonor Roll*, GOVERNING, Nov. 2001, at 88 (listing the officials in Rhode Island's recent history charged with crimes). Officials include House Speaker Joseph A. Bevilacqua, who in 1976, engineered his own election as Chief Justice of the state supreme court; the next Speaker, Matthew J. Smith, who became a judge on the superior court; the next Chief Justice, Thomas F. Fay; Edward D. DiPrete, who served as Governor from 1985 to 1991; Vincent A. (Buddy) Cianci, Jr., who served as Mayor of Providence in the 1980s conducted illegal activity while in office. Bevilacqua resigned when facing impeachment for sex scandals and associating with organized crime members. The others were convicted of felonies in connection with misuse of office.

92. Corruption in state government is widespread. See, e.g., Laura Mansnerus, *Old-Fashioned Graft*, N.Y. TIMES, Oct. 30, 2002, at A-1 (describing the alleged "culture of corruption" in New Jersey); see also *Ex-Arizona Governor Gets 2 ½ Year Jail Term*, CHI. TRIB., Feb. 3, 1998, at 5 (highlighting the corruption in Arizona state government).

93. See GOVERNMENT PERFORMANCE PROJECT: STATE GRADE REPORT 2001, CAMPBELL PUB. AFFAIRS INST. (2001) (assessing Rhode Island's performance in five categories of efficiency and management as a C average, placing it among eleven of the states with the lowest ratings) available at <http://www.maxwell.syr.edu/gpp/grade/state2001/stategrades2001.asp> (last visited Jan. 6, 2004). Rhode Island also received relatively low grades in taxing performance. See generally *Government Performance Project: The Way We Tax: State Grades at a Glance, Rhode Island*, CAMPBELL PUB. AFFAIRS INST. (2003) (last visited Jan. 6, 2004) (contending Rhode Island's taxing methodology needs improvement) available at <http://governing.com/gpp/2003/gp3ri.htm>. See generally *Paths to Performance in State & Local Government: A Final Assessment*, CAMPBELL PUBLIC AFFAIRS INSTITUTE (2002) (last visited Jan. 6, 2004) (describing the method of analysis and surveying tools used to analyze the progress and placement of the several States in various elements of

commentator has persuasively argued that Rhode Island has abnormally bloated public employment rolls, with far too many state workers and exorbitant salaries.⁹⁴ He attributes this to a “diseased political culture” in which public employee unions enjoy enormous political clout.

Whether corruption, legal and illegal, is related to the state’s rejection of separation of powers is a more difficult question. There are reasons to suspect that corruption may be related to an unusual concentration of power in Rhode Island government.⁹⁵ Though the concentration results principally from an absence of separation of powers, other factors exacerbate the situation. While the lack of separation of powers has concentrated power in the legislature, within the legislature itself power has become especially concentrated in the House. A Joint Committee on Legislative Services (JCLS) controls all administrative matters within the General Assembly, including legislative payrolls, budgets, and allocation of office space, equipment, and supplies.⁹⁶ For reasons that seem to remain something of a mystery, three House members, including the Speaker, but only two members of the Senate compose the 1960 statutorily established JCLS.⁹⁷ This gives a small leadership team in the House, led by the Speaker, influence over the Senate. As a practical matter, the Senate cannot hire a staff member nor can a senator obtain a personal computer without the Speaker’s consent.

In addition, the lack of a robust opposition party further enhances the Speaker’s power. Specifically, Republicans control only 14.6 percent of seats in the House and 16 percent in the Senate.⁹⁸

Governmental power is therefore powerfully concentrated in Rhode Island. There are reasons to at least suspect that this concentration leads to an increased ease for special interests such as unions to work their will. It may not be possible to prove this empirically. With a plethora of variables and only fifty states, I doubt whether either legal or illegal corruption correlates statistically with particular features of governance such as separation of powers.

Separation of powers in state governments does not depend on empirical support however. It is, I believe, constitutionally mandated by the

performance) available at <http://www.maxwell.syr.edu/gpp/grade/2002full.pdf>.

94. Edward Achorn, *The Abnormal Ocean State*, PROVIDENCE J., Sept. 20, 2003, at B-05. Achorn is the deputy editorial pages editor of the *Providence Journal-Bulletin*.

95. See *infra* Part II, E-F and Part III.

96. See R.I. GEN. LAWS § 22-11-3 (2002) (prescribing the functions of the Joint Committee on Legislative Services).

97. See R.I. GEN. LAWS § 22-11-1 (2002) (outlining the composition of the Joint Committee on Legislative Services).

98. See Edward Fitzpatrick, *Assembly Outcome Disappoints GOP*, PROVIDENCE J., Nov. 7, 2002, at A-09 (articulating a modest, somewhat insignificant, increase in Republican seats in both the Rhode Island House and Senate).

Guarantee Clause of the United States Constitution, which states, “The United States shall guarantee to every State in this Union a Republican Form of Government . . .”⁹⁹ Asking whether separation of powers is a fundamental feature of republican government for purposes of the Guarantee Clause is, in constitutional terms, much the same thing as asking whether it is a central part of American ideology. I believe the American Founders, and Madison and Hamilton specifically, would agree that it is fundamental.

Earlier thinkers, such as Polybius, Machiavelli, Blackstone, and to a lesser extent Montesquieu, thought about separation of powers in terms of “mixed government.” Specifically, the contention was that government included three classes or estates: monarchy, aristocracy, and the people.¹⁰⁰ Each of these classes had different interests and therefore required separate and distinct representation. The Madisonian revolution adapted this concept for a purely republican form of government. In the United States, representatives of different social classes did not comprise government. All government officials represent the people as a whole.¹⁰¹

The Founders view of human nature required the separation of powers in the American republic. “If angels were to govern men, neither external nor internal controls on government would be necessary,” Madison wrote.¹⁰² “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”¹⁰³

99. U.S. CONST. art. IV, § 4.

100. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 70-71 (enlarged ed. 1992) (referencing the cliché of the eighteenth century, where government was comprised of three elements, royalty, nobility, and the commons); see also WILLS, *supra* note 7, at ch. 11 and especially 104 (asserting that under mixed government theory, the action of kingly or aristocratic principles counter republican diseases).

101. Although the Framers hoped that the Senate, with its six-year terms and smaller size than the House, would become populated by a “better sort” of people who would put the public interest ahead of parochial interests, they did not intend the Senate to be an analog to the House of Lords. Senators, as well as members of the House of Representatives, were expected to represent all of the people and not an aristocracy. See, e.g., MORGAN, *supra* note 59, at 248-49, 291-93 (drawing a distinction between Britain’s hereditary aristocracy and the American conception of an aristocracy based on merit); RAKOVE, *supra* note 47, at 144, 148, 265, 269-70, 272 (discussing how Framers were concerned about designing the Senate’s authority in ways that ensured it not become an aristocratic chamber); see also WOOD, *supra* note 81, at 292-93 (describing how the First congress decided that senators should not receive a higher salary than representatives); cf. ANDERSON, *supra* note 81, at 183-85 (arguing that Framers held “several divergent, even contradictory, conceptions of the role of the Senate,” including the views, among some, that the Senate should be a “somewhat aristocratic body” and that senators should represent “the separate states as political entities, as distinguished from the people of the separate states”).

102. THE FEDERALIST NO. 51, at 354 (James Madison) (J.B. Lippincott & Co. ed., 1866). “[W]hat is government itself but the greatest of all reflections on human nature?” Madison asked. *Id.* at 354.

103. *Id.*

Madison's solution was that "[a]mbition must be made to counteract ambition."¹⁰⁴ For Madison, the structure and nature of republican government were all but inseparable. It is difficult to believe he would not have considered one of the most fundamental features of the structure, aimed at one of the most fundamental concerns, not to be part and parcel of republican government. Madison continues, "In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government."¹⁰⁵ Therefore, if Madison were to have directly addressed whether separation of powers was an essential feature of republican government, I believe he would have said that it was.

Hamilton did answer the question directly. He listed four ingredients of republican government: the "distribution of power into distinct departments," legislative checks and balances, an independent judiciary made possible by life tenure of judges, and the selection of members of the legislature through election by the people.¹⁰⁶

What about the Founders generally? In his superb treatise on the Guarantee Clause, William M. Wiecek of Syracuse University lists five basic principles that he believes the Founders possibly considered the Guarantee Clause should embrace: "popular representation; limited government; the paramountcy of a written constitution and the subordination of ordinary legislation to it; the separation of powers; and functional safeguards against the constitution of power."¹⁰⁷ In its 1999 and 2000 decisions, the Rhode Island Supreme Court argued that for unique historical reasons the state never adopted the principle of separation of powers.¹⁰⁸ However, the court avoided the question of whether the people

104. *Id.* Again, Wills is particularly worth reading on this point. See WILLS, *supra* note 7, at 124 (contending that Madison's statement on ambition pertains to the ambition expressed in office, which is a combination of constitutional motive and personal means).

105. THE FEDERALIST NO. 10, at 70 (James Madison) (J.B. Lippincott & Co. ed., 1866).

106. See THE FEDERALIST NO. 9, at 57 (Alexander Hamilton) (J.B. Lippincott & Co. ed., 1866) (outlining the four essential elements of a republican form of government).

107. WIECEK, *supra* note 79, at 291. Arguably, the Massachusetts Constitution suggests separation of powers is essential to a republican form of government when it states that separation of powers is essential to ensure "a government of laws and not of men." MASS. CONST. art. XXX.

Two state courts have addressed whether separation of powers is an essential component of republican government. One held it is. *Vansickle v. Shanahan*, 511 P.2d 223, 241 (Kan. 1973) (stating that "the doctrine of separation of powers is an inherent and integral element of the republican form of government"). The other held it is not, but at the same time declared: "[T]he separation of powers concept is extremely important, and fundamental to our free system of government. We are unalterably opposed to any attempt by one branch of the government to assume the power of another." *In re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 536 P.2d 308, 316 (Colo. 1975).

108. This was hardly necessary. The stronger argument was that the Rhode Island Constitution embraced the principle of separation of powers when, in 1842, the new state constitution expressly provided: "The powers of the government shall be distributed into

of Rhode Island adopted the principle when they ratified the United States Constitution. Could Rhode Island citizens reasonably have intended to join the Union, accept the U.S. Constitution and all of its requirements, and still have expected to have their state governed, without any theoretical change, by a charter granted by an English king? Surely these citizens expected that in ratifying the Constitution they swept away any aspects of their prior government that were incompatible with fundamental tenets of American republican democracy.¹⁰⁹

Moreover, the state supreme court could have found that the Rhode Island government was required to conform to the principle by the Guarantee Clause regardless of whether the people so intended when they ratified the Constitution. As with all constitutionally guaranteed rights, as long as a single Rhode Island citizen wants a republican system of government, she is entitled to have it.

Even if the Guarantee Clause is not justiciable in the federal courts,¹¹⁰ the Rhode Island courts could hold that the Clause is enforceable in the state's courts. Indeed, in a 1992 advisory opinion, all five justices of the Rhode Island Supreme Court expressed exactly that view.¹¹¹ Moreover, the Rhode Island Constitution requires the justices to support both the state and federal constitutions.¹¹² Therefore, the Rhode Island Supreme Court not only might have, but arguably was obliged to, interpret the Guarantee Clause and strike down any aspect of state government inconsistent with a republican form of government. This would not have required reconfiguring state government. The three traditional branches have

three departments: the legislative, executive, and judicial." R.I. CONST. art. V. For an expanded argument, see Carl T. Bogus, *Rhode Island Faces a Political Crisis*, PROVIDENCE J., Aug. 15, 2000, at B-04 (maintaining there is little check on legislative power in Rhode Island). See generally Carl T. Bogus, *A Radical Decision by the R.I. Supreme Court*, R.I. BAR J., Nov. 1999, at 13 (arguing the Rhode Island Supreme Court used an incorrect method of analysis in its interpretation of separation of powers within the state).

109. In 1842, political reformer William Goodell made exactly this argument. See, e.g., WIECEK, *supra* note 79, at 90 (highlighting William Goodell's opinion in 1842 that adoption of the guarantee clause negated the effect prior charters).

110. This is a question I do not take up here, other than to note that I do not consider the answer to be clear. Ever since *Luther v. Borden*, the conventional wisdom has been that the Clause is not justiciable in the federal courts. However, the Court was then contemplating a case in which armed conflict had been a real prospect, and in such circumstances only the political branches can act quickly enough. But in different circumstances there may be strong reasons why the courts should decide whether a particular practice violates the Guarantee Clause. See generally Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 59-67 (1998) (clarifying the justiciability of the Guaranty Clause in state courts).

111. See *In re Advisory Opinion to the Governor*, 612 A.2d 1, 15-17 (R.I. 1992) (holding that the Guaranty Clause applies to the state and analyzing a constitutional amendment for potential violation of the federal Guaranty Clause and reasoning it did not).

112. See R.I. CONST. art. III, § 4 (binding all political and judicial officers to both the state and the U.S. Constitutions).

always comprised the Rhode Island government,¹¹³ and the Rhode Island Supreme Court should have had no trouble finding separation of powers implied in the state constitution's Distribution of Powers clause. After all, the United States Supreme Court found the doctrine implied in the United States Constitution even though that document lacks a Distribution of Powers Clause.¹¹⁴

D. Is Separation of Powers a Conservative Issue?

Some believe liberals and conservatives see separation of powers differently. Conservatives, many argue, accept the darker portrait of human nature painted by Thomas Hobbes and Edmund Burke, one that emphasizes an inherent selfishness.¹¹⁵ Conservatives favor separation of powers because they see a need to check self-interest in government officials; as Madison put it, the need for ambition to check ambition. Like Lord Acton, they are worried about the poisoning of power itself. Both George H. Nash, author of one of the definitive intellectual histories of conservatism, and Thomas Sowell, author of the one definitive exegesis of the underlying visions of conservative and liberal thought, stress the importance of separation of powers to conservatives.¹¹⁶ Liberals, however, lean toward John Locke and Jean-Jacques Rousseau's more sunny view of human nature. They believe that unless perverted by cruelty or injustice, human nature is innately good. Therefore, the argument runs, liberals are less concerned with separation of powers. In fact, some even consider it an unnecessary obstacle stymieing dynamic government.¹¹⁷

These are not views I share. Liberal and conservative views on human nature are too varied, rich, and complex to be captured in any single,

113. At least insofar as Rhode Island had a governor, legislature, and courts. See PATRICK T. CONLEY, *DEMOCRACY IN DECLINE: RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT 1176-1841*, at 40-41 (1977) (noting Rhode Island had governor, general assembly, and courts in the seventeenth century).

114. See *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590-91 (1949) (reasoning "the doctrine of separation of powers is fundamental to our system. It arises, however, not from Art. III nor any other single provision of the Constitution, but because 'behind the words of the constitutional provisions are postulates which limit and control.'" (quoting *Monaco v. Mississippi*, 292 U.S. 313, 323 (1934))).

115. See generally THOMAS SOWELL, *A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES* (1987) (elaborating upon the description of the theory that liberal and conservative beliefs are rooted in different visions of human nature). See also STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 287-95 (2002) (summarizing Sowell's position on the connection of political beliefs to human nature).

116. GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945*, at 168, 191, 202-03, 208, 233, 293 (1976); SOWELL, *supra* note 115, at 25.

117. See generally GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* 15-22, 83-90 (1999) (finding that over time, liberals have often taken issue with the concept of a divided system of government which utilizes a separation of powers).

simple theory.¹¹⁸ No thoughtful person sees the human being in cartoon terms. Liberals may have greater faith in the capacity of loving parents, nurturing teachers, and caring communities to produce psychologically whole and healthy adults. Yet liberals are especially aware that most people are not raised under ideal conditions. Liberals are more ready than conservatives to acknowledge the terrible secrets of child abuse and sexual molestation. Liberals are the first to defend social services and educational programs for underprivileged children, such as Head Start, and warn of the dire social consequences of abandoning them. And liberals are at least as concerned about the pernicious effects of the materialistic culture on child development. While liberals may, therefore, have a greater faith in people growing straight and whole in nurturing environments, they see a wide gap between present reality and the ideal.¹¹⁹ Liberals may be particularly concerned that people who choose a career in elective politics do so because of unhealthy psychological flaws. For liberals and conservatives alike, government officials in the real world are not philosopher-kings.

Conservatives are great believers in economic laissez-faire but liberals believe passionately in the marketplace of public discussion. Liberals believe in a sort of Gresham's Law of ideas—when there is open and vigorous debate, good ideas will, over time, prevail over bad ideas.¹²⁰ Thus, liberals see separation of powers as a mechanism for forcing government officials in one branch to persuade officials in the other branches, through reasoned articulation, of the wisdom of policies. Legislators, for example, must persuade the governor that laws are sensible to avoid vetoes. Political branches must persuade the courts that policies are not arbitrary or capricious. Therefore, while conservatives may see separation of powers as a safeguard against selfishness and liberals may see it as a check on improvident decisions, both believe it is important.

And in fact, liberals and conservatives do not line up neatly with respect to their views on either human nature or separation of powers. We are told that conservatives support separation of powers because they share Hobbes' pessimistic view of human nature. However, Hobbes himself was

118. Although Sowell has persuaded me that his theory has merit, I do not believe it is a complete or perfect account of the liberal-conservative dichotomy. I wonder if Sowell's contention that liberal and conservative visions have remained consistent over centuries has diminishing power, because those visions are now undergoing change. I find at least as compelling George Lakoff's theory that the liberal-conservative divide is defined by different visions of the family, with conservatives and liberals attempting, respectively, to model government after a family dominated by either a strong father or a nurturing mother. See generally GEORGE LAKOFF, *MORAL POLITICS: WHAT CONSERVATIVES KNOW THAT LIBERALS DON'T* (1996).

119. Liberals believe there is a large gap between the actual and potential capabilities of ordinary people, See SOWELL, *supra* note 115, at 148, 153 (agreeing that liberals believe there is a large gap between the actual and potential capabilities of ordinary people).

120. See *generally id.* at 35-65 (arguing that liberals have a greater faith in rationality).

not a believer in separation of powers.¹²¹ Neither was Willmoore Kendall, one of the leaders of the modern conservative intellectual movement.¹²² Lord Acton was a liberal.¹²³ Furthermore, both liberals and conservatives claim James Madison as one of their own.¹²⁴ And there is an emerging Darwinian Left that recognizes that self-interest is an evolved part of the human personality.¹²⁵

Finally, the Rhode Island experience does not bear out a liberal-conservative divide over separation of powers. Sheldon Whitehouse, a former Democratic attorney general and gubernatorial candidate, was the original proponent of the issue. Republican Governor Lincoln Almond crusaded for separation of powers by pursuing the issue before the state supreme court. Unsuccessful there, he placed two non-binding referenda on the ballot, asking voters whether they wanted the state constitution amended to provide for separation of power. Rhode Island voters answered in the affirmative both times, with 66 percent voting yes in 2000, and 76 percent voting yes in 2002.¹²⁶ The issue received overwhelming majorities in every election district. All five of the 2002 gubernatorial candidates, two Republicans and three Democrats, supported separation of powers. The newly elected Republican Governor, Donald Carcieri, made it the flagship proposal in his Inaugural Address. And in my own experience in the state, I observed no significant difference between those supporting separation of powers based either on party affiliation or ideology. Across the spectrum, people overwhelmingly accepted separation of powers as a fundamental part of the American form of government.

II. SEPARATION OF POWERS AND RHODE ISLAND HISTORY

A. *The Charter of 1663*

Unlike her sister states, Rhode Island did not adopt a constitution during or immediately after the Revolutionary War but continued to operate under a charter granted by King Charles II of England in 1663. This charter

121. See HOBBS, *supra* note 44 and accompanying text (arguing the separation of powers can have disastrous consequences).

122. See NASH, *supra* note 116, at 224 (expressing Willmoore Kendall's thoughts on separation of powers).

123. See *id.* at 250 (contending that even liberal Lord Acton's views effected conservative opinion in matters dealing with political power).

124. See, e.g., WILLS, *supra* note 117 (lamenting the misappropriation of Madison's silhouette by the conservative Federalist Society, which uses it as its symbol).

125. See generally PETER SINGER, *A DARWINIAN LEFT: POLITICS, EVOLUTION AND COOPERATION* (1999) (arguing that self-interest is an inherent and ever-evolving trait).

126. See Liz Anderson, *Why the Struggle for Separation of Powers*, PROVIDENCE J., Jan. 26, 2003, at D-01 (claiming that most voters supported referendums on separation of powers).

established what was then considered the most liberal of democracies.¹²⁷ However, it was granted thirty-five years before Locke's *Two Treatises of Government* and eighty-eight years before Montesquieu's *The Spirit of the Laws*, and placed all power, including the legislative, executive, and judicial, in the colonial legislature. When in the *Federalist Papers* Madison reviewed how the states had incorporated the principle of separation of powers into their constitutions, he passed over Rhode Island because it was "formed prior to the Revolution and even before the principle [of separation of powers] had become an object of political attention."¹²⁸ But Madison probably harbored no illusions about Rhode Island soon reforming its government. Madison had long been exasperated by Rhode Island's intransigence.¹²⁹ Although twelve of the thirteen states agreed that Articles of Confederation needed to be revised, "the petty state of Rhode Island,"¹³⁰ as Madison described it, "has obstructed every attempt to reform the government" and "repeatedly disobeyed and counteracted general authority."¹³¹

B. *The Dorr Rebellion*

In fact, Rhode Island did not reform its government.¹³² The landowners, who controlled the General Assembly because only they and their first-born sons were allowed to vote, preferred not to yield power. Owning land had always been a qualification for voting, but whether this was a liberal or restrictive qualification changed from time to time and place to place. In the seventeenth century, Roger Williams' settlement in Providence tried to distribute land equally among all settlers while the Portsmouth settlement allocated land in proportion to one's wealth and social standing, allowing only a minority to vote.¹³³ From 1723, the value of real estate that one had to own in order to qualify to vote was set by statute and was uniform across the state.¹³⁴ At first, this was considered a liberal reform, as voting rights

127. See WILLIAM G. MCLOUGHLIN, *RHODE ISLAND: A BICENTENNIAL HISTORY* 38-39 (1978) (describing Rhode Island's uniquely liberal and progressive charter).

128. *THE FEDERALIST* No. 47, at 334 (James Madison) (J.B. Lippincott & Co. ed., 1866).

129. See JAMES MADISON, *Speech in the Virginia Ratifying Convention in Defense of the Constitution*, in MADISON, *WRITINGS* 354, 356-57 (Jack N. Rakove ed., 1999) (making disparaging remarks about Rhode Island).

130. *Id.* at 357.

131. *Id.* at 356.

132. Nor did Rhode Island send delegates to the constitutional convention in Philadelphia or ratify the United States Constitution and join the Union until May 1790, after the other twelve states had joined and Providence and Newport threatened to secede from the state and join the Union on their own. See MCLOUGHLIN, *supra* note 127, at 104; RAKOVE, *supra* note 47, at 246 (1996).

133. See MCLOUGHLIN, *supra* note 127, at 21.

134. See CONLEY, *supra* note 113, at 48-49 (detailing how a freeman's land value, in order to vote, was originally set at 100 pounds, but fluctuated as a result of inflation and deflation trends).

were conferred broadly. Historians estimate that in 1723, 75 percent of the adult, white, male population owned enough land to qualify to vote.¹³⁵ But as time marched on and the cities grew, an ever smaller portion of the population was qualified to vote. By 1840, the situation had become patently undemocratic.¹³⁶ Putting aside the issue that neither blacks nor women could vote, fully two-thirds of the adult, white, male population were disqualified from voting. Moreover, apportionment of seats in the General Assembly had been fixed 177 years earlier, and there was no mechanism for change.¹³⁷ Providence, with a population of 23,000, held only four seats in the General Assembly while Newport, with only 9,000 people, held six seats.¹³⁸ In fact, a number of small towns enjoyed greater representation than the large cities. And that was just how the General Assembly—and the landowners who controlled it—wanted to keep it.¹³⁹

Under the leadership of a lawyer named Thomas Wilson Dorr, a group of reformers organized a constitutional convention.¹⁴⁰ They permitted every adult, white male in the state to vote in an election for delegates.¹⁴¹ The convention ultimately met and produced the “People’s Constitution.”¹⁴²

The People’s Constitution clearly provided for separation of powers. “No person or persons connected with one of [the three branches of government] shall exercise any of the powers belonging to either of the

The right to vote was compromised by property qualifications and apportionment problems for far too long in Rhode Island. As means of retaining Yankee control despite the influx of immigrants, naturalized citizens were required to own land to qualify to vote until this was abolished by the Bourn Amendment in 1888. See MCLOUGHLIN, *supra* note 127, at 160-61. There continued to be landowning requirements to vote in municipal elections until 1928, when Democrats finally achieved sufficient strength to abolish this practice by constitutional amendment. Until 1973, only persons who paid some form of taxes, whether on real estate or personal property, could vote. *Id.* at 193.

The Dorr Rebellion failed to end severe apportionment inequities. Rural counties continued to have disproportionately greater representation in the General Assembly. For example, in 1905, although 40 percent of the state’s population lived in Providence, that 40 percent could elect only 16.75 percent of the members of the General Assembly. *Id.* at 163. The apportionment problems continued until the United States Supreme Court famous voting rights cases in the mid-1960’s. *Id.* at 215.

135. See CONLEY, *supra* note 113, at 49; see also MARVIN E. GETTLEMAN, *THE DORR REBELLION, A STUDY IN AMERICAN RADICALISM: 1833-1849* 6-7 (1973) (quoting David Lovejoy and other historians who had similar estimates) (footnote omitted).

136. For the history of the Dorr Rebellion, I rely on CONLEY, *supra* note 113, at 309-79; GETTLEMAN, *supra* note 135; and MCLOUGHLIN, *supra* note 127, at 126-37.

137. See GETTLEMAN, *supra* note 135, at 4 (describing the Charter of 1663 and how the Charter declared the number of representatives for each town).

138. See *id.*

139. See *id.* at 4, 6 (clarifying how the political power of the General Assembly was chosen by freemen, defined in terms of property ownership).

140. See *id.* at 43 (confirming that Dorr was invited to stand for election for the People’s Constitutional Convention).

141. See *id.* at 43, 45 (footnote omitted) (verifying that male adult citizens residing in the state for at least one year could vote in the election).

142. See GETTLEMAN, *supra* note 135, at 44-45 (footnote omitted) (establishing when the People’s Constitution first appeared in draft form).

others, except in cases herein . . . permitted," one section read.¹⁴³ Another section gave the governor the power to appoint all government officers, except those otherwise provided for.¹⁴⁴

The reformers held another election—a gain, open to all male, white citizens—in which the People's Constitution was approved by a vote of 13,947 to 52.¹⁴⁵ The small number of people voting in opposition is not significant since the landowners, not wanting to lend legitimacy to the election, stayed away from the polls. However, Dorr and his followers argued that 13,947 constituted a majority of all eligible voters in the state, declared the constitution ratified, and held elections to fill positions in the new government.

The established power structure used every means at its disposal to crush this new government. The state supreme court (controlled by the legislature) ruled that the People's Constitution was invalid.¹⁴⁶ The General Assembly declared martial law and enacted legislation making acts against the established government treason. The Governor issued a warrant for Dorr's arrest.¹⁴⁷ Some of Dorr's followers were arrested, brutalized, and terrorized (one was even subjected to the grisly ordeal of being put through a mock execution).¹⁴⁸

At the same time, the landowners sought to placate the populace by offering to replace King Charles's charter with a new constitution that contained minimal reforms. The landowners' first effort was defeated at the polls, but a second document, often called the Algerine Constitution, was approved by a vote of 7,024 to 51. Again, the number in opposition is misleading; this time Dorr's supporters did not vote. What is significant is that only 25 percent of the electorate—half the number of people who had voted for the People's Constitution—voted for the Algerine Constitution.¹⁴⁹ Nevertheless, the landowners declared their constitution had been ratified.

Dorr's supporters asked the United States Supreme Court to declare theirs to be the lawful government of Rhode Island, but in the famous case

143. PEOPLE'S CONST. art. III, § 2, in GETTLEMAN, *supra* note 135, at app. A.

144. *See id.* art. VIII, § 5, in GETTLEMAN, *supra* note 135.

145. *See* GETTLEMAN, *supra* note 135, at 54 (distinguishing the errors in the amount of votes for endorsing the People's Constitution (footnote omitted)). *See also* CONLEY, *supra* note 113, at 315 (showing 13,944 votes for the People's Constitution).

146. *See* CONLEY, *supra* note 113, at 317-18 (asserting how attempting to carry the People's Constitution into effect would be treason).

147. *See id.* at 334-35, 337, 341 (characterizing how Governor King and Sheriff Potter tried several times to arrest Dorr with a warrant).

148. *See id.* at 349-50 (suggesting those seized were subjected to harsh treatments and denial of civil rights).

149. *See* GETTLEMAN, *supra* note 135, at 147 (examining the voter turnout for the Algerine Constitution). A strong but unnerving argument can be made that the Rhode Island Constitution was never legitimately ratified. *See* *Gorham v. Robinson*, 186 A. 832, 840 (R.I. 1936) (claiming that the Convention of 1834 dissolved without proposing a Constitution).

of *Luther v. Borden*¹⁵⁰ the Court held this was a question entrusted to the President and Congress rather than the federal courts, and it declined to intervene. Faced with the choice of accepting the Algerine Constitution or resorting to armed warfare, Dorr and his supporters decided against bloodshed.

It is the Algerine Constitution that, in the main, survives to this very day. That document was—probably deliberately—vague on the question of separation of powers. The landowners wanted to make the document attractive enough to be accepted while preserving as much legislative power as possible. They started a devilish precedent of drafting a document that appeared to contain the demanded reform, but seeding it with an ambiguity that might later be read as withholding all or part of that very reform.

Thus, on the one hand, the Rhode Island Constitution includes a provision stating, “The powers of the government shall be distributed into three departments: the legislative, executive, and judicial,”¹⁵¹ as well as a provision vesting the “chief executive power of this state” in the governor.¹⁵² On the other hand, it has a clause providing, “The general assembly shall continue to exercise the powers it has heretofore exercised, unless prohibited by this Constitution.”¹⁵³ It is that phrase, as we shall see, that the General Assembly continued to use to trace its powers back to those granted to it by King Charles II in 1663 and to claim that it is a transcendent branch of government.

C. Early Twentieth Century

In 1901, the General Assembly passed the Brayton Act, which effectively gave the legislature the power of appointment over not only judicial appointments but executive appointments as well, thereby reducing the governor to the mere figurehead of the executive branch.¹⁵⁴ Historians generally emphasize the political context in which this occurred; the legislation was a mechanism by which the Republican-controlled General Assembly sought to weaken Democratic Governors.¹⁵⁵ However, it was a flagrant violation of separation of powers, and it lasted for thirty-four years.

When, in 1935, Governor Theodore Francis Green and the Democrats in Rhode Island rode to power on Franklin D. Roosevelt’s coattails as loyal

150. 48 U.S. 1 (1849).

151. R.I. CONST. art. V.

152. *Id.* art. IX, § 1.

153. *Id.* art. VI, § 10.

154. See MCLOUGHLIN, *supra* note 127, at 162.

155. See *id.*; see also CONLEY, *supra* note 113, at 376 (indicating the General Assembly not only had a “legislative veto[,] but . . . over state appointments and the state budget” as well).

supporters of the New Deal—controlling, for the first time since the election of Abraham Lincoln, the executive branch and both houses of the General Assembly—they repealed the infamous Brayton Act. But they too sacrificed separation of powers to the politics of the moment. On New Year's Day 1935, the first official day of the new legislative session, the newly elected General Assembly declared each of the five seats on the Rhode Island Supreme Court to be vacant—thus purporting to fire all of the sitting members of the court—and elected replacements.¹⁵⁶ The objective was to clear the court of Republican appointees who might find New Deal programs to be unconstitutional.¹⁵⁷ To soften public outrage, Green persuaded his Democratic cohorts in the General Assembly to allow him to appoint two Republicans to the court, and proceeded to cleverly provide ethnic diversity by appointing two Yankees, two Irish-Americans, and an Italian-American.¹⁵⁸

The legislature relied on a section of the state constitution that provided that members of the supreme court “shall hold office until that judge’s place be declared vacant by a resolution of the general assembly” but also specified that “[s]uch resolution shall not be entertained at any other time than the annual session for the election of public officers.”¹⁵⁹ In another case fifty-one years later, the Rhode Island Supreme Court would, in effect, declare that the removal of the justices had been unconstitutional.¹⁶⁰ However, in 1935 the justices agreed not to challenge their termination in return for the General Assembly’s granting them life pensions.¹⁶¹

Around the same time, the General Assembly also replaced lower court judges. Four of these judges challenged the legislature’s authority to remove them without cause.¹⁶² In 1936, their case was heard by the newly appointed justices of the Rhode Island Supreme Court. In a 3-2 decision, the court upheld the power of the General Assembly to remove judges at its

156. See *In re* Advisory Opinion No. 85-471-M.P., 507 A.2d 1316, 1323, 1331 (majority and dissenting opinions, respectively) (1986) (stating that the General Assembly used its power to remove justices of the Rhode Island Supreme Court).

157. See MCLOUGHLIN, *supra* note 127, at 202.

158. See *id.* Members of the state supreme court were then called “judges” but their title has since been changed to “justices.” I use the modern term for the sake of clarity.

159. See *id.* at 201-02.

160. The court reviewed the historical reasons for the “annual session for the election of public officers,” and found that the 1893 amendments to the state constitution rendered obsolete the annual session for the election of officers and the General Assembly’s ability to declare supreme court vacancies on that day alone had been “consigned to history.” *In re* Advisory Opinion, *supra* note 156, at 1322.

161. See *id.* at 1323 (conceding that the court never had to address when the Legislature tried to resurrect the power to vacate justices before because those justices agreed not to challenge the termination if they received life pensions).

162. See *Gorham v. Robinson*, 186 A. 832, 836 (R.I. 1936) (claiming that the General Assembly’s act was invalid because they are powerless under the Rhode Island Constitution to remove the justices (and clerks) unless by impeachment).

pleasure.¹⁶³ Writing for the majority, Justice Moss said:

We have examined the materials which the petitioners have furnished to us as supporting their contention, and have found nothing in these which tends to bring into question the power of the General Assembly, before our Constitution went into effect, to remove any judge from office at any time at its pleasure. This court has repeatedly recognized the fact that under the charter, which constituted the fundamental law of the this state prior to 1843, the General Assembly was virtually supreme in the government, except so far as limited under the Constitution of the United States.¹⁶⁴

The court found “a long and unbroken record of the exercise by the General Assembly of every kind of governmental power, legislative, executive, and judicial.”¹⁶⁵ The court made much of the fact that the General Assembly retained “all the powers it had formerly exercised.”¹⁶⁶ “[A]s to the principles of the separation of powers,” the court could simply not find that “they were given much recognition.”¹⁶⁷ The court went on, with comical inconsistency, to puff up the constitutional language stating that “the legislative power is vested in the General Assembly” while deflating the parallel language that “[t]he chief executive power of the state shall be vested in a governor,” draining it of virtually any meaning.¹⁶⁸ The constitution simply gives the governor “expressly very little executive power,” it declared.¹⁶⁹

In dissent, Justice Capotosto wrote:

Counsel for the respondents [formally, the newly appointed judges], as well as the Attorney General, in their briefs and arguments, stress the “omnipotency” of the General Assembly. The use of this word, in its broad sense and without qualification, to mean that the legislative department has unlimited power, is unwarranted and in direct conflict with the very fundamentals of American constitutional government. If the General Assembly has any such power, then the Constitution is a mere pretense, and the Legislature might well say, as did Louis XIV of France: “I am the State.”¹⁷⁰

Justice Capotosto stressed the importance of the Guarantee Clause of the United States Constitution, which, he suggested, required that “the powers of the government [be] distributed among three departments that are

163. *See id.* at 860 (finding that the General Assembly has, since 1853, asserted control over the terms of office of the justices of the courts).

164. *Id.* at 839 (citation omitted).

165. *Id.* (citation omitted).

166. *Id.* at 841.

167. *Id.*

168. *Gorham*, 186 A. at 841-42.

169. *Id.* at 841.

170. *Id.* at 864.

intended to be independent within their respective spheres.”¹⁷¹ “It is too late to try to read into [the state constitution] now, almost 100 years after its adoption, an inference that the people of this state intended to give the General Assembly practically unlimited control over a co-ordinate branch of the government which they created for the protection of person and property.”¹⁷²

There can, of course, be no genuine judicial independence or any assurance of a rule of law when the political branches of government can replace judges at their will.¹⁷³ Nevertheless, the General Assembly retained the ability to do so until either 1986, when, in an advisory opinion, the court held that the General Assembly lacked that authority, or 1994, when at the same time the constitution was amended to provide for merit selection of judges the General Assembly’s authority to declare supreme court seats vacant was eliminated, and another section was added providing that justices would “hold office during good behavior.”¹⁷⁴

D. Executive Power

In the main, the head of an executive branch in American government—whether the President or a Governor—has three, and in some states up to five, potential sources of power. First, all chief executives have the bully pulpit.¹⁷⁵ Generally, by virtue of their position alone, they can command press attention and thereby reach the public-at-large.¹⁷⁶ The magnitude of the pulpit power, of course, depends on the personality, savvy, and communication skills of the individual. For a “great communicator” the bully pulpit is more powerful than for others; and even for a single individual, pulpit power fluctuates with the vicissitudes of his or her popularity at the moment. Nevertheless, all executives have a bully pulpit.

The second source of executive power is the veto. Not only does this

171. *Id.*

172. *Id.*

173. At least since 1856, the state supreme court has recognized and sought to safeguard judicial independence. In that year, a party who believed itself to be erroneously subject to a garnishment order issued by the court of common pleas of Providence county sought relief not from the court but from the General Assembly, which set aside the court’s order. Relying on seven provisions in the state constitution, including the distribution of powers clause, as well as what I call fundamental American ideology, with citations to Montesquieu and Madison’s writings, the Rhode Island Supreme Court had little difficulty finding that the state constitution incorporated the principles of separation of powers and an independent judiciary, and holding that notwithstanding whatever it had done historically, the General Assembly was constitutionally prohibited from interfering with court orders. *G. & D. Taylor & Co. v. R. G. Place*, 4 R.I. 324, 360 (1856).

174. R.I. CONST. art. X, § 5.

175. See ALAN ROSENTHAL, *THE DECLINE OF REPRESENTATIVE DEMOCRACY* 301 (1998) (implying that governors are automatically offered a “bully pulpit” from the media).

176. See *id.* at 300 (contending that the individual governor can capitalize on the media better than a group of legislators).

give a President or Governor power to block legislation with which he or she disagrees unless the legislature can muster a supermajority, but strategic use of (or even the threat of) the veto gives him or her the ability to negotiate changes in legislation. This allows the executive to become an influential player in shaping legislation. The strength of an executive's veto may vary with two key factors. Governors with a line-item veto have an especially potent tool because they can eliminate specific initiatives, either by vetoing the enabling legislation or by vetoing their appropriations. In states without a line-item veto, the legislature can often maneuver the Governor into accepting measures he or she opposes by including them in bills that he or she cannot afford to veto in total. The strength of veto power also varies with the strength of the Governor's political party. It is a relatively weak tool in the hands of a Governor whose party does not control enough seats in the legislature to override vetoes.

Third, some chief executives have a role in selecting judges. The President, for example, selects judges for all three levels of the federal courts.¹⁷⁷ The power is not absolute; his nomination must be confirmed by the Senate.¹⁷⁸ Nevertheless, the power to nominate judges is enormously influential, especially in systems where judges have life tenure.

Fourth, some chief executives have the authority to appoint the government's chief law enforcement official, generally the attorney general. While political interference with an attorney general's performance would be considered illegitimate, chief executives who select, and have the power to remove, the government's chief law enforcement official nonetheless influence how the laws will be enforced.

Fifth, and arguably most important of all, is the ability to appoint officials in the executive branch, especially of the regulatory agencies. This gives the chief executives discretion in terms of deciding how the laws will be implemented, including which laws will be enforced aggressively and which less so. A chief executive who, for example, favors strong environmental protection can appoint an administrator who will vigorously enforce the environmental laws; by contrast, one who gives a higher priority to business development can appoint an administrator who will focus on business initiatives.

For Rhode Island governors, the veto is a relatively weak tool. First, Rhode Island is one of only seven states that does not give the Governor the power to veto individual items in appropriation bills.¹⁷⁹ Second, Rhode Island is effectively a one-party state, at least in the General Assembly.

177. See U.S. CONST. art. II, § 2, cl. 2.

178. See *id.*

179. See ROSENTHAL, *supra* note 175, at 296 (explaining that forty-three states have the power to veto individual items in appropriation bills, Rhode Island not being one of them).

The Democratic Party controls approximately 85 percent of the seats in both chambers, and legislative leaders have little trouble mustering supermajorities on legislation to which they give high priority.¹⁸⁰

Rhode Island governors have a relatively weak role in selecting judges (more about that later),¹⁸¹ and the state's attorney general is independently elected. To make matters worse, Rhode Island has a divided executive. While the Governor is the chief executive officer of the state, three other executive officers—the Lieutenant Governor, Secretary of State, and Attorney General—are independently elected. Moreover, the Governor and Lieutenant Governor do not run as a team, and so the two are not necessarily political allies.¹⁸²

In modern American government, both at the federal and state level, one of the chief executive's most important sources of power is her ability to control the governmental departments and agencies by appointing the controlling officers who serve at the Governor's pleasure. In Rhode Island, however, this power is especially critical—for without it, the Governor's quiver is nearly empty. It is to this topic we turn next.

E. The Administrative State in Rhode Island

1. Background

The origins of regulatory agencies are generally traced to 1887, the year that both Congress established the Interstate Commerce Commission (ICC), which is generally considered the first modern agency, and a young professor at Bryn Mawr College named Woodrow Wilson published an essay titled "The Study of Administration."¹⁸³ At first, the administrative state grew slowly. The second independent agency, the Federal Trade Commission (FTC), was not formed until 1914.¹⁸⁴ The New Deal provided the first burst of agency creation, with the establishment of the Securities and Exchange Commission (SEC) and the National Labor Relations Board (NLRB), among others; and an even greater expansion came during the

180. See, e.g., *id.* at 318 (analyzing how in Rhode Island in 1996, the legislature passed its own budget because of the governor's refusal to negotiate); see also Katherine Gregg & Liz Anderson, *State Budget Veto Falls*, PROVIDENCE J., July 16, 2003, at A-01 (describing the ease with which the Rhode Island General Assembly overrode vetoes of their budgets by the last two Governors).

181. See *infra* notes 231-34 and accompanying text.

182. The Rhode Island Lieutenant Governor has no significant responsibilities or authority. In the 2002 election, the candidate of the Cool Moose Party promised to serve without pay, terminate the staff, and recommend that the office be abolished. His campaign slogan was: "Martin Healy: He's Good for Nothing." See *Rossano: No Longer a Moose, But Still Cool*, PROVIDENCE J., Aug. 20, 2002, at C-01.

183. JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 4 (3d ed. 1992).

184. See *id.* at 5-6.

1960s and 1970s.

Today, of course, much of modern government is operated by regulatory agencies. One directory lists what it designates as twelve “major” regulatory agencies, most of which are instantly recognizable by initials, such as EPA, FCC, FTC, FDA, NLRB, OSHA, and SEC; sixteen “other” agencies, including the Nuclear Regulatory Commission (NRC); and seventy-six “departmental agencies” located within cabinet level departments, including for example the Federal Aviation Administration (FAA) and National Highway Transportation and Safety Administration (NHTSA), both of which are within the Department of Transportation.¹⁸⁵ This particular directory is devoted only to agencies that regulate the private sector and omits agencies such as the Tennessee Valley Authority (TVA) that provide services themselves but do not regulate others. Of course, some governmental agencies, such as the Coast Guard and IRS, both perform functions themselves and regulate particular spheres of activity. It is on the basis of their regulatory functions that this directory classifies agencies as “major” or “other;” thus, it is not by virtue of its size that it fails to list the U.S. Postal Service as a “major” agency.¹⁸⁶ Although separation of powers questions relate to both kinds of agencies, regulatory agencies present special problems because they involve mixtures of executive, legislative, and judicial functions.

During the course of the twentieth century, the administrative state developed in the states as well, including Rhode Island. But in Rhode Island, agencies did not merely develop, they metastasized. According to one study, Rhode Island has 429 agencies, boards, and commissions, seventy-three of which are performing executive functions.¹⁸⁷ Depending on how one counts, this may mean that Rhode Island has more administrative agencies than does the federal government.¹⁸⁸

The Rhode Island administrative state has undergone unusual and, I believe, unhealthy growth as a direct result of the state’s rejection of the principle of separation of powers. One of the most significant modern developments in the evolution of American government has been the process of fitting the growth of the administrative state into the structure of separation of powers envisioned by the Founders. In the main, the United

185. FEDERAL REGULATORY DIRECTORY v-vii (10th ed., 2001).

186. *See id.* (indicating that the U.S. Postal Service is under “other regulatory agencies” even though it is such a large agency).

187. COMMON CAUSE OF R.I., SEPARATION OF POWERS REFERENCE MANUAL (June 23, 2003) (on file with author).

188. I use the term “agency” to refer to all independent bodies not within a governmental department, including entities called boards and commissions. Rhode Island’s seventy-three agencies appear to exceed the twenty-eight independent federal agencies counted by CQ Press.

States Supreme Court has accomplished this by giving each branch a significant role and providing checks and balances among the branches vis-à-vis administrative agencies. Administrative law is a complex web of divided authority among the branches of government over the agencies. In grossly simplified terms, the division is as follows. The legislature creates an agency, defines its mission and the scope of its authority, establishes its funding, and conducts oversight to see whether the agency is accomplishing its purpose and is operating in a fair and non-partisan fashion.¹⁸⁹ The executive branch effectively operates the agency, through the chief executive's authority to appoint, with the advice and consent of the Senate, the officials in charge of the agency¹⁹⁰ and, at least as important, to unilaterally remove those officials. Most significantly, it is the power to fire that gives one control over an employee.¹⁹¹ The courts have the power of judicial review to ensure that the agency is acting within its legislatively-delegated authority, following legislatively-prescribed procedures, and not acting arbitrarily or capriciously or denying citizens due process or other constitutionally guaranteed rights.¹⁹²

Rhode Island did not follow the federal example. Some Rhode Island agencies are structured traditionally, with the Governor appointing the executive director. The legislature, however, has increasingly used a variety of mechanisms to gain operating control over agencies. Typically, it accomplishes this by delegating governing duties to a board of directors, which has the power to appoint and remove the agency's executive director. Presently, the legislature appoints a total of 234 members on the governing boards of these seventy-three agencies, in some instances by filling these seats with members of the General Assembly themselves.¹⁹³

189. One essential strand in the web of relations among the departments was denying to Congress the ability to reserve to itself the authority to approve regulations. See *INS v. Chadha*, 462 U.S. 919, 951-58 (1983) (rejecting provisions of an INS Act granting one House of Congress authority to veto Attorney General decisions to keep an alien in the country as a separation of powers violation).

190. See *Buckley v. Valeo*, 424 U.S. 1, 124-36 (1976) (extending the Appointments Clause of the Constitution to administrative agencies by defining "officers of the United States" as officials who exercise policy-making authority).

191. See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) ("For it is quite evident that one who holds his office only during the pleasure of another cannot be depended on to maintain an attitude of independence against the latter's will."); *Mistretta v. United States*, 488 U.S. 361, 410-11 (1989) (noting that limiting the President's power to remove judges serving on Sentencing Guidelines Commission for good cause helps "prevent the President from exercising 'coercive influence' over independent agencies" and does not affect the tenure of judges serving lifetime appointments on the bench); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto.")

192. See generally ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 338-536 (2d ed. 2001).

193. One-hundred and fifty-six seats are designated for legislators, sixty-six for public members appointed by either the Speaker of the House or the President of the Senate, and

The legislature has appointed a majority of governing board members to some of the state's most powerful agencies, including the Coastal Resources Management Council, Lottery Commission,¹⁹⁴ Unclassified Pay Plan Board,¹⁹⁵ and Ethics Commission.¹⁹⁶ But even where the legislature appoints a minority of members, the influence of their appointees is disproportionately great because they sit at the table representing the General Assembly—the institution that decides, among other things, how much money the agency will receive each year.¹⁹⁷

Issues of legislative control exacerbated the proliferation of Rhode Island agencies. When Congress establishes a new agency, there is a high level of confidence that it is doing so for reasons of public policy because the agency provides Congress with no patronage or other increased powers. But when a state legislature creates, funds, staffs, and operates a regulatory agency, there is great capacity for mischief. Among other things, the legislature gets patronage and the ability to dispense valuable favors by choosing not to rigorously enforce the law against favored parties.¹⁹⁸ When legislators themselves serve on the governing boards of regulatory agencies, their prestige and perceived influence in that industry is enhanced, as is their ability to make money in the private sector.¹⁹⁹ These

five for legislative staff. COMMON CAUSE OF R.I., SEPARATION OF POWERS REFERENCE MANUAL, Tab 3 (June 23, 2003) (on file with author).

194. Six of the nine members of the Lottery Commission are, by law, members of the General Assembly. R.I. GEN. LAWS § 42-61-1 (2002) (providing the Lottery Commission shall include three members of the Senate and three members of the House of Representatives).

195. Four of the seven Unclassified Pay Plan Board's members are, by law, members of the General Assembly. R.I. GEN. LAWS § 36-4-16 (2002). The board establishes the salaries for all unclassified employees in the state, which includes the heads of departments and judges for all of the courts, making it a powerful political instrument. R.I. GEN. LAWS §§ 36-4-2 (2002), 36-4-16.2.

196. See R.I. GEN. LAWS § 36-14-8 (2002) (providing for selection of five members of the nine-member Ethics Commission from lists of names submitted by legislative leaders); see also R.I. CONST. art. III, § 8 (conferring constitutional status to Ethics Commission by establishing and authorizing Ethics Commission to administer code of ethics applicable to all appointed officials and government employees, and allocating power to investigate and punish those who violate ethics regulations).

197. See BOWERS, *supra* note 16, at 71-72 (explaining power of legislative committees to encourage agency compliance through the use of appropriations).

198. A Governor's power of selective enforcement is, to some degree, checked by the legislative oversight authority.

199. Partly as a result of problems inherent in a part-time, citizen legislature, as well as a culture that has long tolerated conflicts of interest, Rhode Island has continuing problems with legislators profiting from their legislative roles in the private sector. See, e.g., Edward Achron, *Opening Fire of R.I. Citizens*, PROVIDENCE J., Dec. 9, 2003, at B-05; Katherine Gregg, *CVS Confirms Paying Key Senator as a Consultant*, PROVIDENCE J., Dec. 5, 2003, at A-01 (reporting that state Senator John A. Celona, while serving as chair of the Senate committee that regulates the health care industry and blocked a so-called "freedom to choose your pharmacy" bill that was opposed by CVS and supported by competing pharmacies and received as a "consultant" a monthly retainer from pharmacy chain CVS, without disclosing it on his ethics filings); Bruce Landis, *Ethics Panel Agrees to Investigate Fox*, PROVIDENCE J., Oct. 29, 2003, at B-01; M. Charles Bakst, *The Fox Saga: Perceptions*

factors provide incentives for a proliferation of agencies. The situation is further complicated when, as has been the case from the birth of the administrative state in the early twentieth century until the state supreme court decisions in 1999 and 2000, there is confusion about how far the legislature may go in controlling executive agencies.

During the 1990s, administrative regulation in Rhode Island failed in multiple ways, ranging from disturbing to catastrophic. Observers linked these breakdowns to the increasing legislative control of regulatory functions. These are complicated stories involving many agencies, and I cannot here relate them all or even one of them in detail.²⁰⁰ I shall try, however, to provide a glimpse of the tip of a very large iceberg.

2. *Environmental Protection*

Rhode Island has many agencies with various responsibilities for environmental protection. The largest is the Department of Environmental Management (DEM), which has general jurisdiction over environmental protection in the state.²⁰¹ DEM is administered by a director who is appointed by the Governor with the advice and consent of the Senate. One wonders whether it makes sense for the geographically smallest state to have other environmental agencies. Nevertheless, in 1971, the General Assembly created the Coastal Resources Management Council (CRMC).²⁰² A sixteen-member council governs CRMC, eight of whom are appointed by the legislature. In 1980, the legislature created yet another agency, the Narragansett Bay Commission, to protect the bay from the discharge of pollutants. By law, the twenty-three members of that commission include two members of the House and two members of the Senate.²⁰³

The bloating of bureaucracies is one problem stemming from a lack of separation of powers, but the politicization of agencies is an even greater

Can be Lethal, PROVIDENCE J., Oct. 2, 2003, at B-01 (reporting that while House Majority Leader Gordon D. Fox was influential in passing legislation that gave the company GTECH an exclusive, twenty-year contract to operate the state lottery, while Fox's law firm and Fox himself were doing legal work for GTECH); Stephanie Rivera, *Making a Legislative Lackey—How Ethics Commission Got Mugged*, PROVIDENCE J., Mar. 20, 2001, at B-04 (describing how Ethics Commissioner Thomas D. Goldberg voted to weaken a gift ban rule and thereby help legislative lobbyists notwithstanding the fact that his own brother and law partner was one of the state's biggest lobbyists).

200. See generally COMMON CAUSE OF R.I., DEMOCRACY BETRAYED: CONFLICTS OF INTEREST AND FAILURES OF OVERSIGHT IN RHODE ISLAND GOVERNMENT (2000) [hereinafter COMMON CAUSE OF R.I.] (summarizing issues involving seven different agencies, with helpful citations to other relevant sources).

201. See R.I. GEN. LAWS §§ 42-17.1-1 to 42-17.1-3 (2002) (assigning power over state environmental issues to the director of DEM).

202. R.I. GEN. LAWS § 46-23-2 (2002).

203. See R.I. GEN. LAWS § 46-25-6 (2002) (delegating appointment of two House members to the Speaker of the House and appointment of two Senate members to the Senate President to serve on the commission).

concern. Agencies may become improperly politicized under executive control, of course, but legislative oversight provides some check when that occurs. When the legislature both operates and oversees agency operation, however, that safeguard is gone. CRMC has been criticized for operating in secret, too readily allowing developers to undertake environmentally detrimental projects, and suffering from politicization and conflicts of interest.²⁰⁴ It is not a disaster, and the DEM is far from perfect; nevertheless, with respect to matters involving secrecy, insider influence, self-dealing, and unequal enforcement of the law, the performance of the environmental agencies controlled in whole or in part by the legislature appears worse than that of DEM. And in these kinds of matters, the public never knows how much lay concealed under the surface.

Individually and collectively, environmental advocacy groups in Rhode Island have political clout. Forty-two groups belong to the Environmental Council of Rhode Island (ECRI), including state chapters of national organizations such as the Sierra Club, Audubon Society, Clean Water Action, National Wildlife Federation, Nature Conservancy, and American Lung Association; Providence College and environmental units at Brown University and the University of Rhode Island; and Save the Bay, which is not only the state's largest environmental group but also, with 20,000 members and supporters, one of the largest membership organizations of any kind in Rhode Island.²⁰⁵

Environmental groups have long supported separation of powers. They have a special understanding of how separation of powers affects environmental regulation in the state. They know the relative performance of DEM and CRMC. But they are also concerned about preserving their relationship with legislators so that they may lobby effectively, and in some cases preserve their ability to obtain grants and other legislatively dispensed benefits. Thus they preferred to take a back seat role on the issue.²⁰⁶ From 1996 to 1998, several events radicalized the environmental community on the politics of separation of powers, however, persuading them to step forward in the battle for separation of powers.

The engine of radicalization was a special committee of the House of Representatives, formally the "Commission to Study the Department of Environmental Management and All Matters Relating Thereto, and to

204. See COMMON CAUSE OF R.I., *supra* note 200, at 32-36.

205. Telephone Interview with Kendra Beaver, Staff Attorney, Save the Bay (June 26, 2003) (providing Save the Bay membership figure).

206. Environmental groups also generally defer to what they view as Common Cause's greater expertise on matters of general governmental structure. Save the Bay and Common Cause enjoy especially close relations. Topher Hamblett, Save the Bay's Director of Advocacy, served for many years on the governing board of Common Cause, and Common Cause sublets office space from Save the Bay.

Make Recommendations Thereto,” but generally called the “Kennedy Commission” after its chairman, Representative Brian P. Kennedy. The commission held a series of televised, McCarthy-esque hearings that, in the guise of legislative oversight, seemed principally designed to disparage the DEM.²⁰⁷ The environmental community was shocked by often personally vicious and demeaning treatment of DEM employees. Many believed the legislators’ strategy was to diminish DEM’s public reputation, thereby laying the groundwork for legislation that would either transfer much of DEM’s authority to CRMC or merge both agencies into a new entity controlled by the General Assembly.

At the end of the day, the Kennedy Commission produced the reverse of its intended result. It was not DEM that was diminished in the eyes of the public, but the legislature itself. The environmental community saw in the Kennedy Commission a brazen scheme by the legislature to take control of all of the state’s environmental regulatory apparatus. There was less reason for environmental groups to preserve a close relationship with so voracious a legislature. What was the point if environmental regulation would be destroyed anyway? The ECRI groups ultimately decided to fight prominently alongside the good government groups, filing an amicus curiae brief in support of the separation of powers in the state supreme court in March of 1998.²⁰⁸

3. RISDIC

On December 31, 1990, the Rhode Island Share and Deposit Indemnity Corporation (RISDIC) declared itself unable to insure deposits of insolvent

207. See, e.g., Peter Lord, *Subpoena Powers, Perjury Penalties Await Passage, House Panel Sets Rules for Probe of DEM*, PROVIDENCE J., Feb. 13, 1997, at B-01; Peter Lord, *Ex-DEM Officials Criticize Probe, Ask to Testify Before Committee: All Five Former Directors Want to Express Their Belief in Strong Environmental Protection*, PROVIDENCE J., Feb. 13, 1997, at B-05 (noting hearing commissioner’s refusal to allow former DEM directors to testify about positive aspects of DEM); Scott MacKay, *House Approves Subpoena Use by Committees; Governor Almond Pledges to Veto the Bill He Characterizes as “Reckless,”* PROVIDENCE J., Feb. 27, 1997, at A-01 (“[T]his bill . . . was designed to intimidate and harass employees of DEM. This has the potential for a witch hunt.”) (quoting Governor Almond); Peter Lord, *DEM Official Quits, Cites Pressure from Legislative Panel*, PROVIDENCE J., May 1, 1997, at A-01 (highlighting top agency official’s resignation after she was targeted by commission but was refused the opportunity to provide the desired information in private); Peter Lord, *Environmentalists Decry Tank Bill; In a Year When the Assembly has Turned a Deaf Ear to Environmental Bills, A Half Million Dollar Request from a Powerful Legislator Gets Quick Approval*, PROVIDENCE J., June 21, 1997, at A-01; C.J. Chivers, *Despite Budget Surplus, DEM Blasted for Cash Handling*, PROVIDENCE J., Aug. 1, 1997, at B-01 (noting commission critiqued DEM’s spending and economic practices while ignoring the fact that DEM spent less overall than its allocated budget in 1996); Peter Lord, *“Secret” Meetings on DEM Attacked*, PROVIDENCE J., Apr. 22, 1998, at B-01 (addressing local environmental groups concerns that commission was holding “secret meetings” to restructure DEM).

208. See *In re Advisory Opinion to the Governor*, *supra* note 12 (filing of a brief of Amicus Curiae by the Environmental Council of Rhode Island, Inc.).

credit unions and other financial institutions in the state.²⁰⁹ RISDIC was a private company, regulated by the state, which was established to insure customer accounts at credit unions in the state. Depositors were stunned. Through television ads that depicted a hammer and chisel carving the RISDIC emblem into a piece of granite, depositors had been led to believe that RISDIC protected their accounts at state credit unions in the same way that the Federal Deposit Insurance Corporation (FDIC) and the Federal Savings and Loan Insurance Corporation (FSLIC) protected accounts at federally regulated institutions. On the following day, the newly-elected Governor closed the forty-five financial institutions supposedly insured by RISDIC. Fifteen never reopened. The state and private parties ultimately raised nearly \$1 billion dollars to repay depositors at insolvent institutions.

Investigations, including one conducted by an independent panel of experts chaired by the President of Brown University,²¹⁰ and another conducted by a select commission created by the General Assembly,²¹¹ revealed that both the Governor and leaders in the General Assembly had long known that RISDIC was incapable of covering losses if even a single credit union became insolvent. They knew as well that the risks of insolvency were escalating as the legislature, at the behest of industry lobbying, was markedly relaxing regulation. In 1985 alone, the Governor received three separate reports warning of dangers in the RISDIC system—one from one of the Governor's own advisors, another from the state's Director of Business Relations (DBR), and a third from the attorney general's office that Attorney General Arlene Violet considered so important that she personally handed it to the Governor. However, the Governor, who had received more than \$100,000 in campaign contributions from seven large borrowers from RISDIC institutions, whose loans were made possible by the loosened regulations, took no action.

209. See generally Bruce Sandlun, *Cleaning Up the Credit-Union Crisis*, PROVIDENCE J., Nov. 18, 2001, at E-10 (providing retrospective of crisis by former Governor who learned on December 31, 1990, the day before his inauguration, that RISDIC had declared insolvency). See also Gregory Smith, *The Bailout—Taxpayers: Your Bill is Ready, Five Years After the RISDIC Crisis, the Costs are Tallied and Rhode Islanders will Pay Until the Year 2022*, PROVIDENCE J., Mar. 3, 1996, at A-01; Annetta Miller with Debra Rosenberg, *Mad as Hell in Rhode Island*, NEWSWEEK, Oct. 7, 1991, at 46; Scott Minerbrook, *The Man Who Picked Rhode Island Clean*, U.S. NEWS & WORLD REPORT, June 10, 1991, at 36; Fox Butterfield, *Vanished: A Man, \$13 million and Faith in State's Banks*, N.Y. TIMES, Jan. 14, 1991, at A-1; Brian Mooney et al., *R.I. Officials, Cozy with Bankers, Did Little to Prevent Crisis*, BOSTON GLOBE, Jan. 6, 1991, at 1 (providing summaries of the RISDIC crisis).

210. See ARTAN GREGORIAN, *CARVED IN SAND: A REPORT ON THE COLLAPSE OF THE RHODE ISLAND SHARE AND INDEMNITY CORPORATION (1991)* (discussing the causes and the leaders responsible for the RISDIC's collapse).

211. See REPORT OF THE SELECT COMMISSION TO INVESTIGATE THE FAILURE OF RISDIC-INSURED INSTITUTIONS LENDING PRACTICES OF THE RISDIC-INSURED FINANCIAL INSTITUTIONS (1992) (investigating those individuals and entities whose negligence and/or misconduct directly or indirectly contributed to the financial loss sustained by the state and its citizens).

Both of the investigations blamed the RISDIC crisis, in significant part, on conflicts of interest by legislators. For example, one state senator was simultaneously the director of a credit union with a soaring deficit and a member of a Senate committee that killed legislation that would have required credit unions to obtain federal deposit insurance.²¹² A state representative was both chair of the House Corporations Committee and a member of the Board of Bank Incorporation. According to one of the reports, this legislator “played a prominent role in the shaping of bank legislation”²¹³ at the same time he was receiving such significant favors from RISDIC and one of its insured institutions—including a large loan that was often in default, and junkets at RISDIC’s expense—as to be “a captive of the RISDIC lobby.”²¹⁴

The most extreme example may have been state Representative Robert V. Bianchini. Bianchini was vice chair of the House Finance Committee, and, according to reports, the House leadership gave him final say over all legislation relating to the regulation of credit unions. During the same time, Bianchini²¹⁵ served as president of the Rhode Island Credit Union League, the trade association that lobbied the legislature on behalf of the industry. If ever there was a classic example of a conflict of interest, the principle that no person shall be a judge in his own cause, this was it. Yet, this was not all. Bianchini also served on the State Investment Commission, the agency that approved the investment of millions of dollars in state funds in credit unions.²¹⁶ Additionally, he attended meetings of the Unclassified Pay Plan Board, the agency that controlled the salaries of the director of the Department of Business Regulation and the General Treasurer, the officials with regulatory authority over the credit unions and RISDIC.²¹⁷ How free are regulators to blow a whistle that will offend someone who helps set their salaries?

4. *The Unclassified Pay Plan Board*

The Unclassified Pay Plan Board (Board) provides a striking example of how abandoning the principle of separation of powers allows the consolidation and misuse of power, particularly legislative power. Since 1978, when the Board was reconstituted to give the legislature a controlling number of seats, it has become a powerful mechanism for the legislature to

212. See COMMON CAUSE OF R.I., *supra* note 200, at 4-5 (implicating Senator John Correia).

213. See *id.* at 4 (quoting the Report of the Select Committee) (implicating Representative Joseph Casinelli as a legislature who played a role in shaping the bank legislation).

214. See *id.* (quoting the report of the Senate committee).

215. See *id.* at 3-4.

216. See *id.*

217. COMMON CAUSE OF R.I., *supra* note 200, at 3-4.

influence executive officials, and perhaps judicial officials as well.

There are two employment systems in Rhode Island government. Approximately 85 percent of state workers are in the “classified” or competitive system in which jobs must be advertised, candidates tested, and jobs filled on the basis of specified criteria. The “unclassified” system comprises about 2,500 political appointees. These include the heads of governmental departments and agencies as well as all employees within the judicial branch, from judges to law clerks and secretaries.

One notorious incident illustrates how the legislature can use the Board to assert its will in the other branches of government. During the 1980s and 1990s, the chairman of the state’s Public Utility Commission (PUC), James Malachowski, took a number of positions that annoyed powerful legislators. For example, under his leadership, the PUC disapproved a number of rate increases requested by the Narragansett Bay Commission, a state agency that was chaired by state Representative Vincent Mesoellella. Mesoellella introduced legislation to exempt the Narragansett Bay Commission from PUC oversight authority, but Malachowski opposed that legislation, and it was ultimately defeated. In 1994, Malachowski frustrated efforts by the Narragansett Bay Commission by awarding a sludge incinerator contract to a single bidder whose employees routinely made political contributions to Mesoellella. In 1996, Malachowski opposed legislation that would both deregulate the state’s electrical industries and split the PUC into two entities that would be controlled by the legislature rather than the Governor. In what Common Cause of Rhode Island stated “was widely understood to be retribution against him for the PUC’s vigilant and independent regulatory stance,” in February 1997, the Unclassified Pay Plan Board cut Malachowski’s salary by \$12,000, from some \$94,000 to \$81,293.²¹⁸

The legislature, of course, has the authority to set the salaries of officials in the executive branch, from the Governor on down. However, there is an enormous political difference between having salaries set by a small group, such as the Unclassified Pay Plan Board, and requiring the legislature to do so by enacting legislation. The legislative process not only requires majority votes in two chambers and supermajorities to overcome gubernatorial vetoes; it also requires that at least the number of legislators necessary to constitute a quorum cast public votes, and thus be politically accountable for their decisions. Delegating this power to an entity such as the Unclassified Pay Plan Board permits legislative leaders to stack the Board with loyal members from politically safe seats and work their will

218. See *id.* at 53 (stating that Unclassified Pay Plan Board reasoned that the split of the PUC into two divisions caused a reduction in Malachowski’s responsibilities and thus necessitated the pay cut).

with diminished public accountability. While Malachowski was an extraordinary public servant who was not intimidated by the legislative leaders' control over his salary, this incident sent a loud and clear message to those who were not as brave.²¹⁹

F. Reform Efforts Sour

The battle for separation of powers was not the only attempt to amend the state constitution to curb legislative power. Reform groups²²⁰ fought hard for, and won, what they expected to be two significant amendments. In the late 1980s, they successfully won an amendment to the state constitution requiring the General Assembly to "establish an independent non-partisan ethics commission which shall adopt a code of ethics including, but not limited to, provisions on conflict of interest."²²¹ The commission was to be empowered to investigate and impose penalties for ethics violations. The objective was to outlaw conflicts of interest that so plagued Rhode Island government, especially conflicts of interest involving

219. See *infra* notes 260-273 and accompanying text (discussing how officials in executive branch tried to help House Speaker John Harwood escape from the Wendy Collins scandal).

220. The state's major governmental reform groups were:

1. *Common Cause of Rhode Island*. Common Cause of Rhode Island was established in 1970, the same year as the national organization. From the start, that group benefited from strong volunteer leadership, and it became even more effective after hiring an indefatigable executive director, H. Philip West, Jr., in 1988. But it has been since 1994, when it made separation of powers its highest priority, that Common Cause achieved its greatest support. Today, Common Cause of Rhode Island has 2,400 members, making it one of the largest chapters in the nation proportionate to state size. Even more telling is that since becoming the state's leading champion of separation of powers, Common Cause of Rhode Island raised more money than any other Common Cause chapter in the nation, including chapters in California or New York State. Telephone Interview with H. Philip West, Jr., Executive Director, Common Cause of Rhode Island (June 26, 2003).

2. *Right Now!* Following the RISD/C calamity, a number of new citizen groups were formed. One, known as the *Right Now!*, was a temporary coalition of citizen organizations formed to advocate a package of reform measures. It included Common Cause, the Urban League, local chambers of commerce, and many religious groups. Rhode Islanders still talk about the day church bells rang in unison throughout the state, sounding a clarion call for reform. Telephone Interviews with Beverley M. Clay, First Vice Chair, Operation Clean Government (March 2003) and Bruce Lang, Co-Founder, Operation Clean Government (June 27, 2003).

3. *Operation Clean Government*. In 1993, several groups that had formed in reaction to the RISD/C crisis merged to create the state's second permanent governmental reform organization, Operation Clean Government, which currently has about 2,200 members. Operation Clean Government played a dynamic role in the battle for separation of powers. For example, in March 2003, it distributed 80,000 special newsletters as a four-page insert to local newspapers in legislatively targeted districts. Telephone Interviews with Beverley M. Clay, First Vice Chair, Operation Clean Government (March 2003) and Bruce Lang, Co-Founder, Operation Clean Government (June 27, 2003).

221. R.I. CONST. art. III, § 8.

legislators. In 1994, after two consecutive chief justices of the state supreme court were forced from office as a result of misconduct,²²² the constitution was amended to replace the prior system of judicial selection, under which the General Assembly had selected the justices for the state supreme court, with a merit selection system.²²³ To their proponents' horror, however, both reforms seemed to turn to dust.

I shall not relate all of the complaints about the Ethics Commission. Probably the most devastating episode occurred on May 23, 2000, when, notwithstanding a loud public outcry,²²⁴ the Commission voted to allow public officials, including members of the General Assembly, to receive gifts totaling up to \$450 per year from parties "interested" in legislation.²²⁵ Previously, public officials had been barred from accepting gifts of any kind or in any amount. The new rule allowed them to receive unlimited income from interested persons, provided only that no one gift exceeded \$150, that gifts from a single person not exceed \$450 annually, and (perhaps) that gifts not be in cash. A professional lobbyist who represented 100 clients could legally bestow a legislator with a bouquet of 100 gifts, each one with an individual value of up to \$150 from each client. The rule passed 5-4 on the strength of votes from the members of the Commission appointed by the General Assembly.

The deciding vote was cast by Thomas H. Goldberg, whose brother, Robert, was the state's sixth highest paid lobbyist.²²⁶ Moreover, Thomas and Robert were law partners, and Thomas presumably shared in that income and would benefit from his brother's enhanced value as a lobbyist.²²⁷ Good government groups asked Commissioner Goldberg to

222. See *supra* note 91 and accompanying text.

223. R.I. CONST. art. X, § 4.

224. See Christopher Rowland, *Ethics Panel Under Attack*, PROVIDENCE J., May 2, 2000, at A-01 (reporting the change was met by an "outcry" from citizen groups and that no one testified in favor of the new rule); see also Editorial, *Too Generous to Solons*, PROVIDENCE J., May 10, 2000, at B-06 (stating "public interest groups and average citizens have risen up to protest the commission's plan").

225. See R.I. CODE R. 36-14-5009 (2000) (overturning prior ban on all gifts to legislators by interested parties, including lobbyists).

226. See Bruce Landis, *Member Sues Ethics Commission to Clarify Possible Conflict*, PROVIDENCE J., Oct. 7, 1999, at B-04 (noting the Ethics Commission member, whose brother was a prominent lobbyist in Rhode Island, who sought to have a local court clarify whether he was able to participate in legislative votes concerning lobbyists without violating Rhode Island's code of ethics); see also Common Cause of R.I., *Top Ten Commercial Lobbyists*, 1999 COMMON CAUSE OF R.I. REPORT, at 8 (reporting that Robert Goldberg's annual lobbying income exceeded \$120,000, giving him the sixth highest lobbying revenue in Rhode Island).

227. See Katherine Gregg, *New Furor Arising over Ethics Dispute*, PROVIDENCE J., Mar. 8, 2001, at A-01 (discussing the Goldberg brother's resistance of subpoenas for this info, though the courts never decided whether the subpoenas were to be enforced because the litigation was deflected by the issue of whether the attorney representing the Ethics Commission had improperly failed to seek admission pro hac vice); see also *id.* at A-01 (highlighting attempts by Ethics Commission member Goldberg to remove an out-of-state

recuse himself because of his conflict of interest, but he refused.²²⁸ They later filed an ethics complaint against him for having voted despite a conflict of interest, but the commission's investigation of this complaint stalled, preventing a final decision from being reached within the required statutory time.²²⁹

In retrospect, reformers recognized the reform was doomed when they settled for a constitutional amendment that permitted the General Assembly to organize the Ethics Commission as it saw fit, which allowed the legislature to reserve to itself the authority to appoint a majority of the commissioners.

The judicial merit selection system had the same flaw. The new system created a judicial nominating commission, but effectively gave the General Assembly the ability to select five of the nine members of that commission.²³⁰ As the Governor was required to select supreme court justices from lists provided by the judicial nominating commission, this gave the General Assembly the ability to all but select nominees. If this were not enough, the Senate and the House were each given the power of advice and consent, and thus the ability to veto nominations to the court.

The chickens came home to roost in January 1997 when Governor Almond nominated Margaret E. Curran to the state supreme court. Curran had fine credentials, a high reputation for professional skill and integrity, and sterling recommendations from distinguished lawyers and jurists.²³¹

lawyer investigating ethics complaints against him and generally engaging in stall tactics to avoid an adverse decision on his conflict of interest concerning voting for lobbyist legislation); see Karen Lee Ziner, *Court Rejects Effort by Ethics Commission to Subpoena Member*, PROVIDENCE J., Jan. 31, 2001, at B-03 (noting a successful ruling in favor of Ethics Commission member Goldberg who sought to avoid answering a subpoena issued by the lawyer investigating ethics complaints against him).

228. See Rowland, *supra* note 224 (noting Commission members Francis Flanagan and Richard Kirby defended Goldberg while criticizing H. Philip West, Jr., Executive Director of Common Cause of Rhode Island, for questioning the potential conflict of interest of a Commission member voting on legislation affecting his brother and law partner).

229. See Jonathan D. Rockoff, *Ethics Panel Fires its Director*, PROVIDENCE J., Apr. 4, 2001, at A-01 (explaining how Common Cause's ethics complaint against an Ethics Commission member was dismissed due to failure to meet the required deadline); see also Carl T. Bogus, *Exactly Why Judicial Silence is Golden*, PROVIDENCE J., Apr. 12, 2001, at B-06 (arguing that Rhode Island Supreme Court justices who denied an out-of-state lawyer permission to continue investigating ethics violations of Commission members, thus causing delay that led to dismissal of certain complaints, should have explained the reasoning that led to the decision in their judicial opinions, not in the media).

230. See R.I. CONST. art. X, §§ 4-5 (requiring advice and consent of each individual House of the state legislature to appoint Rhode Island Supreme Court justices). See also Barton P. Jenks, III, *Rhode Island's New Judicial Merit Selection Law*, 1 ROGER WILLIAMS U. L. REV. 63, 71 (1996) (arguing that the new system had many flaws, one of the most serious was "the degree to which it provides for the involvement of legislators in the judicial selection process").

231. See M. Charles Bakst, *Margaret Curran: First Impressions*, PROVIDENCE J., Jan. 5, 1997, at D-01 (quoting U.S. District Judge Bruce Selya, with whom she clerked, who said of Curran at the time of her nomination, "[a]mong my colleagues on the Court of Appeals, she

Nevertheless, the House rejected her nomination. It claimed that at forty-four years of age, she was “too young” and that, because most of her work had been in the federal courts, she lacked state courtroom experience, notwithstanding that having argued 152 cases before the U.S. Court of Appeals for the First Circuit, Curran’s appellate experience may have been unmatched in the state.²³² Many believed the proffered reasons were mere pretext and that the real reason was that Curran was too independent, especially on the looming issue of separation of powers.²³³ The woman ultimately confirmed for that seat was the wife of Robert Goldberg, a former member of the General Assembly.²³⁴

Prior to the reform in judicial selection, when the General Assembly appointed members of the bench itself, the legislature often appointed its own members to the state supreme court.²³⁵ The catalyst for reform was the General Assembly’s failure to appoint justices with integrity. The last two chief justices appointed under the prior system were Joseph A. Bevilacqua, Speaker of the House, and Thomas F. Fay, chair of the House Judiciary Committee. Both resigned from the court in disgrace as a result of improper conduct, with Fay receiving a criminal conviction for graft.²³⁶

The 1997 reforms were not devoid of benefit. So far at least, they appear to have elevated appointments in terms of integrity and competence.²³⁷ Yet

is regarded as one of the two or three best attorneys who regularly appear before us, because of the quality of her briefs and her skill and advocacy”); *see also* John E. Mulligan, *Curran Confirmed as U.S. Attorney by Senate*, PROVIDENCE J., Oct. 22, 1998, at B-01 (noting the unusual swiftness of Curran’s nomination by President Bill Clinton and confirmation as a U.S. Attorney for Rhode Island); Karen Lee Ziner, *Curran to Remain U.S. Attorney*, PROVIDENCE J., Mar. 19, 2001, at B-08 (highlighting a recommendation from a state Republican senator to President Bush helped Democrat Curran keep her job as a Rhode Island U.S. Attorney making her one of only a dozen of the previously appointed ninety-three U.S. Attorneys retained by President George W Bush).

232. *See* Scott MacKay, *House Leaders Flex Muscles; The Defeat of Supreme Court Nominee Margaret E. Curran Shows that the Democratic Leadership Can Do as It Pleases*, PROVIDENCE J., Jan. 30, 1997, at A-01 (addressing the superior position which the House democratic leaders held when they rejected Curran’s nomination); *see also* Jonathan D. Rockoff, et al., *House Panel Rejects Curran Nomination; The Judiciary Committee, After Criticizing Margaret E. Curran’s Youth and Lack of Rhode Island Courtroom Experience Votes 11 to 6 Against Her*, PROVIDENCE J., Jan. 23, 1997, at A-01 (noting opposition to Curran’s nomination centered on her federal, not state, court experience and young age).

233. *See* Russell Garland & Scott MacKay, *House Rejects Curran; Critics Cite Court Candidate’s Lack of Experience*, PROVIDENCE J., Jan. 29, 1997, at A-01 (quoting House Judiciary Committee member Timothy Williamson on the political tint to Curran’s rejection, “Was she a sacrificial lamb? Yes, she was. But that’s politics.”).

234. For more about Goldberg, *see supra* notes 226-229, *infra* note 238, and accompanying text.

235. *See* Leslie Alan Horvitz, *Corruption Big in Poor, Little Rhode Island*, WASH. TIMES, Dec. 28, 1993, at A-7 (observing that as “Rhode Island is one of only three states . . . where the selection of judges is entirely the prerogative of the legislature [i]t should come as little surprise that all five current members [of the state supreme court] are former members of the General Assembly.”).

236. *See supra* note 91 and accompanying text.

237. *See* Michael J. Yelnosky, *Rhode Island’s Judicial Nominating Commission: Can*

a majority of supreme court justices appointed since 1997 have either themselves been former members of the General Assembly, married to former members, or siblings of current members.²³⁸ The close connection between the courts and the legislature is disturbing no matter how capable and conscientious the justices may be. Consider the federal model. Because the United States Supreme Court must frequently resolve disputes between the legislative and executive branches, would it be considered acceptable if the majority of the justices were former members of Congress? The situation in Rhode Island was even worse because of the special importance of separation of powers in cases that have come, and are likely to come, before the court, and, in this respect at least, the 1997 reform failed.²³⁹

The failures of these reforms—with respect to both the Ethics Commission and judicial merit selection—poured gasoline on the fires already burning for separation of powers.

III. THE FINAL BATTLE

The battle for separation of powers reached its crescendo with two events in 2002. After years of vigorous public education and lobbying by public advocacy groups, a proposed constitutional amendment to incorporate separation of powers into the state constitution reached the floor of the Rhode Island House of Representatives on April 11, 2002. Sponsors had been led to believe the measure would be debated and voted

"Reform" Become Reality?, 1 ROGER WILLIAMS U. L. REV. 87, 99-100, 117-30 (1996) (arguing reforms in judicial selection process improved with the creation of the judicial nominating commission that engaged in a more rigorous screening process, conducting open candidate interviews, public meetings for comment on potential nominees, and public votes).

238. See generally Russell Garland, *Almond, Legislators Square Off in Court Case*, PROVIDENCE J., Dec. 28, 1997, at A-01 (listing the biographical information of Joseph R. Weisberger who was an associate justice from 1978-1993, a chief justice from 1993-2001 and a former minority leader in state Senate; of Justice Victoria Lederberg (1993-2002) who was a former member of the state House of Representatives; and of Justice Maureen McKenna Goldberg (1997-present) who is married to Robert Goldberg, and was also a former minority leader in the state Senate). See Katherine Gregg, *House Bill Zips Through Hearing Minus Testimony*, PROVIDENCE J., May 28, 2003, at B-01 (stating Justice Francis X. Flaherty (2003-present) as the brother of Robert Flaherty, who is chairman of the House Judiciary Committee); Liz Anderson, *Senate Confirms Suttell to Supreme Court*, PROVIDENCE J., June 20, 2003, at B-01 (noting that Justice Paul A. Suttell (2003-present) was a former state legislator and worked for three years as legal counsel for the House minority leader).

239. See Barbara Dickinson et al., *Carriers Should Appoint Women Judges*, PROVIDENCE J., June 30, 2003, at A-07 (raising questions about the lack of racial and gender diversity among state judges and characterizing current paucity of diversity as "scandalous"); see also Bruce Landis, *Suttell Endorsed by House Panel Amid Complaints*, PROVIDENCE J., June 11, 2003, at A-01 (expressing widespread disappointment of minority leaders over House Judiciary Committee's failure to submit an esteemed African-American female judge as a nominee for the state Supreme Court).

upon, but House leadership surprised them with a sudden parliamentary maneuver that killed the measure without either a debate or a vote.²⁴⁰ “If we are playing a clever game, congratulations, you have just scammed the people of the state of Rhode Island,” the House minority leader said in frustration.²⁴¹

The episode ignited a public firestorm. Legislators were lambasted in newspaper editorials,²⁴² op-ed articles,²⁴³ and letters to the editor.²⁴⁴ Local talk radio programs were consumed with the issue for days on end, with callers and hosts alike vowing to turn out of office legislators who opposed the amendment.²⁴⁵ So many angry citizens logged on to the secretary of state’s website to get their representatives’ telephone numbers and e-mail addresses that the system crashed.²⁴⁶ Eager to avoid becoming targets themselves, state senators brought a parallel measure to the floor of that chamber and passed it by a vote of forty to six.²⁴⁷

The forty-nine representatives who opposed separation of powers found themselves alone at the center of a political bull’s eye. Under normal conditions some may have felt confident at surviving even this storm; in a typical election about half of all of the seats in the Rhode Island are uncontested in either the primary or the general election.²⁴⁸ But this

240. See Edward Fitzpatrick, *House Leaders Block “Powers” Bill*, PROVIDENCE J., Apr. 11, 2002, at B-01 (explaining that had both legislative chambers passed the bill, it would have placed the proposed constitutional amendment on the ballot at the next general election for ratification by the voters. House leaders orchestrated a vote, which passed 49-38, to recommit the bill to the House Judiciary Committee, which had previously rejected the amendment).

241. *Id.*

242. “Last week, citizens bombarded lawmakers with phone calls, demanding a binding vote on a constitutional amendment to balance powers in Rhode Island, the way it is done in [forty-nine] states and the federal government Yet, in spite of that uprising, those who run the legislature chose to keep treating the citizens with contempt.” Editorial, *Ignoring the Voters*, PROVIDENCE J., Apr. 17, 2002, at B-06. The editorial went on to urge citizens to call legislators and published the telephone numbers of the speaker of the House and the Senate majority leader, and listed (for the second time) all forty-nine members of the House who had voted to kill the amendment. *Id.*

243. E.g., Rod Driver, *R.I. Separation of Powers—The Good Guys Ambushed Again*, PROVIDENCE J., Apr. 26, 2002, at B-05 (describing House members’ tactic of moving to return a bill to committee to thwart debates on the bill as trickery).

244. See Thomas K. DiPaola, Letter to the Editor, *Dump the Democrats*, PROVIDENCE J., Apr. 23, 2002, at B-05 (arguing that the Democratic party controls every aspect of government in Rhode Island and is responsible for steering the state into moral and fiscal bankruptcy).

245. This is based on listening to the radio myself. From the portions I heard, it appeared that at least four of the most popular local talk shows, the Steve Kass and Dan Yorke shows on WPRO-AM and the John DePetro and Arlene Violet shows on WHJJ, were devoted nearly exclusively to the issue for days.

246. See *Ignoring the Voters*, *supra* note 242 (noting that citizens’ outrage did not prevent House Speaker John Harwood from “bouncing” the balance-of-powers bill back to the House Judiciary Committee earlier in the month, essentially killing the bill).

247. See Edward Fitzpatrick, *Senate OKs Power Separation*, PROVIDENCE J., May 31, 2002, at B-01.

248. See Scott MacKay, *It’s No Contest: Democracy is Withering in Rhode Island*,

particular year the state legislature was being downsized—the Senate was shrinking from fifty to thirty-eight and the House from 100 to seventy-five members—and a number of incumbents were being forced to run against other incumbents. Less than a third of the seats were uncontested.²⁴⁹

In the late spring of 2002, a new group called the Rhode Island Separation of Powers Committee (RISOP) was formed with the principal mission of running newspaper advertisements during the fall campaign to again publicize how the candidates stood on separation of powers. RISOP leaders debated internally whether to stick legislators with their prior votes or to give them a chance to switch sides. RISOP decided to ask all candidates, incumbents and challengers alike, regardless of prior positions, to sign a pledge promising to support separation of powers in the future.²⁵⁰ Like rats jumping off a sinking ship, many opponents seized the opportunity to become supporters of separation of powers. Nearly all of the forty-nine opponents in the House either switched sides or were defeated in the fall.²⁵¹

This alone would probably have been sufficient to bring the long battle for separation of powers in Rhode Island to a successful conclusion. But like a perfect storm,²⁵² another event added still more momentum. In the late summer and early fall of 2002, a scandal broke involving the powerful Speaker of the House, John B. Harwood.

This is a long and messy story that unfolded piece by piece, but it can be sketched as follows.²⁵³ In the spring of 1999, Harwood, fifty, met a

PROVIDENCE J., July 9, 2000, at A-01.

249. See Edward Fitzpatrick, *Downsized Assembly Prompts More Vigorous Races*, PROVIDENCE J., Sept. 8, 2002, at D-01.

250. The pledge read: "If I am elected to public office in Rhode Island this year, I will support a constitutional amendment to incorporate the principle of Separation of Powers among the three branches of government, and if I am elected to the General Assembly, I will vote for a Separation of Powers amendment and support procedural measures designed to bring it to the floor for a vote."

251. I favored rewarding or punishing incumbents for their actual votes. In retrospect, offering legislators a chance to switch was the savvy strategy; my approach may have solidified opposition.

252. Borrowing the title for Sebastian Junger's popular book, H. Philip West, Jr. adopted the term "perfect storm" to refer to the confluence of three events that swept separation of powers to ultimate success: the House using what was considered unfair political maneuver to kill separation of powers in 2002 session; legislative downsizing; and the Harwood-Collins scandal.

253. For the most comprehensive, single description of the Harwood-Collins story, see Edward Fitzpatrick, *Harwood v. Collins—'I Did Nothing Wrong'*, PROVIDENCE J., Oct. 13, 2002, at A-01.

For discussion of the political ramifications of the incident, see M. Charles Bakst, *The Settlement: Can Harwood Survive Furor?*, PROVIDENCE J., Aug. 29, 2002, at B-01; Edward Fitzpatrick, *Party Support Crumbling for Harwood*, PROVIDENCE J., Sept. 18, 2002, at A-01; Edward Fitzpatrick, *Events Reaching Critical Mass for Harwood—Jurors Hear Collins Coworker*, PROVIDENCE J., Oct. 4, 2002, at A-01; Edward Achorn, *The Roar that R.I. Leaders Heard*, PROVIDENCE J., May 20, 2003, at B-05. See also Katherine Gregg, *Pires Questions Settlement Payments*, PROVIDENCE J., Aug. 16, 2002, at A-01; Katherine

twenty-eight year old woman named Wendy L. Collins while both were waiting for an elevator. Harwood was married and an attorney. Collins was a single mother and a high school graduate who was then unemployed but had previously worked as a secretary, bookkeeper, laborer, and bartender in a strip club.²⁵⁴ Although one suspects it would have been unusual for the Speaker to personally interview and hire low level employees, and Collins's work history did not seem to qualify her for a such a position, Harwood nonetheless asked Collins to call on him at the State House and hired her as a legislative researcher.²⁵⁵ "He told me to bring a book because it was going to be kind of boring," Collins told a reporter.²⁵⁶

But perhaps not boring enough. Collins said she was required to perform oral sex for Harwood. When, approximately two years later, she insisted on discontinuing the practice, she was harassed by co-workers, became emotionally distraught, took sick leave, and was subsequently fired for "excessive absenteeism."²⁵⁷ Collins engaged counsel and filed a workers compensation claim. Her complaint stated that she was unable to work as a result of, among other things, "sexual harassment and retaliation."²⁵⁸ When the story became public, Harwood denied any sexual relationship with Collins, and Collins never produced a blue dress²⁵⁹ definitively corroborating her own allegations.

It is the next aspect of this story—palpably improper actions that state officials took to protect Harwood from Collins's allegations—that are instructive regarding the concentration of power in Rhode Island and pertinent to the battle for separation of powers.

Collins's compensation claim did not immediately come to the attention

Gregg, *Harwood Asks Police Probe of 'Demands' by Ex-Worker*, PROVIDENCE J., Aug. 28, 2002, at A-01; Katherine Gregg, *The Collins Case—Report of Alleged 'Sexual Favors' for Harwood Factored into State's Deal with Collins*, PROVIDENCE J., Sept. 20, 2002, at A-01; Edward Fitzpatrick, *RIC Job Both Puzzling and Welcome*, PROVIDENCE J., Sept. 24, 2002, at A-13; M. Charles Bakst, *Harwood Chaos: From Strange to Surreal*, PROVIDENCE J., Sept. 28, 2002, at A-03; Katherine Gregg, *Harwood Resolute As Calls for His Resignation Grow*, PROVIDENCE J., Oct. 3, 2002, at A-01; W. Zachary Malinowski, *Grand Jury Rules Out Indictments in Collins Case*, PROVIDENCE J., Oct. 26, 2002, at A-01.

254. See Fitzpatrick, *Harwood v. Collins*, *supra* note 253.

255. Harwood originally told Collins that she would be hired as a proofreader. When Collins reported for work on the first day, Kearns and another staffer told her that instead she would be a legislative researcher. See *id.*

256. *Id.*

257. See Katherine Gregg, *Carl Seen Playing Key Role in Collins Settlement*, PROVIDENCE J., Sept. 25, 2002, at A-01; Katherine Gregg, *Harwood 'Rather Angry'—House Speaker Denies Any Relationship with Former Worker*, PROVIDENCE J., Aug. 23, 2002, at A-01.

258. See Katherine Gregg, *Harwood Says He Knew of Collins's Allegations Earlier*, PROVIDENCE J., Sept. 28, 2002, at A-01.

259. I am alluding to the infamous blue dress in the Monica Lewinsky-Bill Clinton episode.

of the press. To head off that revelation, the parties cut a secret deal. Collins's attorney blacked out the phrase "sexual harassment and retaliation" on the complaint in the court file, and Collins promised to forever remain silent about those allegations. In return, Collins received \$75,000 in worker's compensation payments and a new job. A new permanent position—"property coordinator," with an annual salary of \$28,009—was created at Rhode Island College (a public university) specifically for Collins. An internal memorandum confirming the arrangement read, "[A]n agreement has been reached between the director of administration, the commissioner of higher education and the President of Rhode Island College to transfer funding sufficient to cover the salary and benefits as well as providing one (full-time equivalent) to the college's annual budget. The employee's name is Wendy Collins."²⁶⁰ This was the first time in twenty-five years that a new full-time position of any kind—administration, faculty, or staff—had been created for Rhode Island College.²⁶¹

A number of people were involved in making this arrangement on behalf of the state. Harwood was, of course, involved, as were two attorneys representing him personally: Richard P. Kearns, the speaker's chief legal counsel at the State House,²⁶² and the ubiquitous lawyer and lobbyist Robert Goldberg,²⁶³ whom Harwood apparently engaged as private counsel. Two lawyers—Samuel L. DiSano, a deputy in the state workers compensation office, and Eric B. Sweet, a staff attorney in that office—ostensibly represented the state. However, when DiSano presented the proposed settlement to his superior, Frank P. Knight, the state's workers compensation administrator, Knight ultimately refused to approve it.²⁶⁴ Moreover, Knight instructed DiSano to write a memorandum outlining the details of the case.²⁶⁵

260. Gregg, *Carl Seen Playing Key Role in Collins Settlement*, *supra* note 257 (explaining the memorandum was sent from the college's human resources director to Robert L. Carl, Jr., the state's director of administration).

261. *See id.* (adding that during those twenty-five years, positions were added to certain departments only when a corresponding position was eliminated).

262. *See* Katherine Gregg and Tracy Brenton, *Collins' Lawyer: Harwood's Story 'Fiction'*, PROVIDENCE J., Oct. 19, 2002, at A-01 (relating settlement events, according to Collins' lawyer, in which Kearns played a key role, particularly in his efforts to ensure that all evidence implicating the speaker were destroyed).

263. *See supra* notes 226-229 and accompanying text; *see also* Bruce Landis, *Harwood's Hiring of Lawyer to be Probed*, PROVIDENCE J., Jan. 24, 2003, at B-03 (reporting that Operation Clean Government filed a complaint with the state's ethics commission contending that Harwood violated conflict of interest rules in hiring a lobbyist to represent him in the Collins case).

264. *See* Katherine Gregg et al., *2d Worker Alleges Threat in Collins Case*, PROVIDENCE J., Oct. 2, 2002, at A-01 (noting Knight initially agreed to approve the deal but changed his mind).

265. *See* Katherine Gregg, *Carcieri: Investigate Lawyer's 'Threat'*, PROVIDENCE J., Oct. 1, 2002, at A-08 (adding that Knight stated that DiSano refused his direct order to write an

DiSano refused to write that memorandum. Instead, he threatened Knight, who was seventy-five years old and close to retirement, with the loss of his pension should he disclose anything about the matter.²⁶⁶ Because Knight refused to sign the necessary paperwork, Robert L. Carl, Jr. approved the deal. Carl, a powerful figure in his own right within Rhode Island government, was the director of the department of administration and a member of the Governor's Cabinet. Involving someone as high ranking as Carl in the settlement of an individual workers compensation claim would have been unusual if not unprecedented. But Carl did not merely sign the papers; he also called the commissioner of higher education to arrange for Collins's job at Rhode Island College.²⁶⁷

Carl maintained that he personally approved this particular workers compensation settlement over the objection of the administrator of the workers compensation bureau and helped create a new position at Rhode Island College specifically for Collins without ever knowing about Collins' allegations that Harwood had sexually harassed her. Carl's claim was so preposterous that it "didn't pass the laugh test," as then gubernatorial candidate Donald L. Carcieri put it.²⁶⁸ Carcieri was subsequently elected Governor and did not reappoint Carl.²⁶⁹

Carl made another claim that people unfamiliar with Rhode Island might think equally implausible. He said he never informed his boss, Governor Lincoln Almond, about the Collins case. Almond said that had he known, he would not have permitted the case to be settled.²⁷⁰ Although bizarre,

outline of the case).

266. See Gregg, *2d Worker Alleges Threat*, *supra* note 264 (asserting that although DiSano denied threatening Knight, Knight's deputy confirmed hearing DiSano tell Knight more than once that "anyone who talked [about the Collins' case] would lose their state job and pension").

267. See Gregg, *Carl Seen Playing Key Role in Collins Settlement*, *supra* note 257.

268. Fitzpatrick, *Harwood v. Collins—'I Did Nothing Wrong'*, *supra* note 253.

269. See Mark Arsenault, *Carcieri Filling Key Posts With Business Leaders*, PROVIDENCE J., Dec. 20, 2002, at A-01.

As for other players, see also Katherine Gregg, *Harwood Won't Run As Speaker - Murphy, of W. Warwick, Will Succeed the Embattled Pawtucket Democrat*, PROVIDENCE J., Nov. 8, 2002, at A-01 (affirming John B. Harwood lost the speakership); John Castellucci, *Bayuk Concedes; Harwood Keeps Seat*, PROVIDENCE J., Nov. 23, 2002, at A-01 (asserting Harwood barely won reelection in his district after a political unknown launched a last minute write-in campaign against him). See also Katherine Gregg, *Kearns Removed from Assembly's Spending Panel*, PROVIDENCE J., Feb. 1, 2003, at A-01 (explaining Richard P. Kearns lost an important position as head of the group that determines hiring and spending at the State House, but kept his \$131,000 position as State House legal counsel after William Murphy replaced Harwood as Speaker); see also Malinowski, *supra* note 253 (discussing the grand jury investigation of the Collins case and the fact the grand jury did not hand up any indictments).

270. See Katherine Gregg, *Officials on Defensive—Almond, Aides Say They Didn't Know of Harassment Allegations*, PROVIDENCE J., Sept. 27, 2002, at A-01 (quoting Governor Almond who stated, "If there was a sexual-harassment allegation against a high official, the speaker or anyone else, it should have gone to trial." "You just don't let these things [hang] out there.").

this is not incredible. Carl was appointed by the Governor and served at his pleasure. Nevertheless, Carl had ambitions,²⁷¹ and he understood that the real power resided in the Speaker's office.

One might expect legislative employees such as Richard Kearns to try to protect their boss, but what is so illuminating about the case is that officials within the *executive branch* did so as well. They took significant personal risks to serve, not their formal superiors, but the Speaker of the House. DiSano refused an order from his immediate boss and then boldly threatened him, even doing so in the presence of others. How did he explain this insubordination? DiSano told Knight that Carl had personally chosen DiSano to be "the point man" on Harwood's sexual harassment case.²⁷² Knight took no part in what he considered an improper arrangement, but apparently he was sufficiently cowed by DiSano's threat to silently accept the insult and to refrain from telling Governor Almond about the case.²⁷³ Carl, a member of the Governor's own Cabinet, went to extreme lengths to protect the speaker while concealing from the Governor something of titanic political importance.

This event was emblematic of something the public already understood—the dynamics of concentrated, unchecked power. The sociology of power and the physics of gravity appear to have something in common. Astrophysicists tell us that deep in space there are black holes with so much concentrated mass that anything close becomes captured by the hole's enormous gravitational force.²⁷⁴ Not even light escapes. In Rhode Island, so much power became concentrated in the General Assembly—and more, in the office of the Speaker of the House—that influence radiated outward, extending deep into the executive branch.²⁷⁵ The Collins case shows that Madison's concern about concentrated legislative power "extending the sphere of its activity and drawing power into its impetuous vortex" remains relevant.

271. See Katherine Gregg, *Carl Contender for Dean's Job at URI*, PROVIDENCE J., Feb. 7, 2002, at B-01 (reporting that Carl, who holds a doctorate in philosophy and likes to be addressed as "Dr. Carl," sought to become dean of the College of Human Sciences and Services at the University of Rhode Island).

272. See Gregg, *supra* note 264.

273. See Fitzpatrick, *Harwood v. Collins—'I Did Nothing Wrong,' supra* note 253.

274. See, e.g., BRIAN GREENE, *THE ELEGANT UNIVERSE* 78-83, 320-44 (1999).

275. One might argue that Lincoln Almond was especially weak because he was a lame-duck Governor. This is hardly reassuring about gubernatorial power as every reelected governor is a lame duck during half of his total time in office, and those who are not reelected are not, almost by definition, politically powerful figures.

One might also ask why the Collins episode came to public attention. Someone unknown tipped off a radio talk show host, who interviewed a reluctant and ambivalent Collins at her home. That individual remains unknown. But one wonders whether the matter would have leaked if Harwood were not already in a considerably weakened political condition, in large part because of the battle over separation of powers.

CONCLUSION

On July 30, 2003, both the Rhode Island Senate and House unanimously approved a constitutional amendment incorporating the doctrine of separation of powers.²⁷⁶ I have little doubt that if the votes had been taken by secret ballot, the amendment would have been defeated. But democracy worked. Although it took many years—a concerted campaign of nine years in the modern effort, and 162 years since ratification of the People’s Constitution during the Dorr Rebellion—the people finally got what they wanted.

This was not a victory of elites. It was truly a victory of the people as a whole, who made themselves heard in community meetings, calls on talk radio, letters to the editors, discussions with candidates on the campaign stump, letters and calls to legislators, and perhaps most importantly of all, their votes. The campaign was never backed by large sums of money or promoted with television commercials. To be sure, a cadre of well-educated and generally prosperous people in Common Cause and elsewhere stimulated the effort. Still, the campaign succeeded because it resonated with people from all walks of life and across ethnic, sociological, and economical spectrums. People may never have heard of Lord Acton or Montesquieu or read *The Federalist Papers*, and some may have needed a reminder about the concept of separation of powers, but they intuitively grasped the dangers of consolidated power and understood why the American Founders divided governmental power into three branches.

Rhode Island’s adoption of separation of powers will not, by itself, result in three perfectly balanced branches of government. First, legislative supremacists have not disappeared. They remain alive and well and have already begun attempting to pursue their agenda in other ways.²⁷⁷ Second,

276. The House approved the resolution by a vote of sixty-six to zero with eight members absent, including former Speaker John B. Harwood. With two members absent, the Senate vote was thirty-six to zero.

The measure amends the Rhode Island Constitution in four ways: (1) it prohibits members of the legislature from being “appointed to any state office, board, commission or other state or quasi-public entity exercising executive power;” (2) it declares that the three branches of government are “separate and distinct;” (3) it deletes a provision that provided that the “general assembly shall continue to exercise the powers it has exercised heretofore,” which had been interpreted as preserving all of the powers the legislature exercised in 1663 except those expressly granted to other branches; and (4) it adopts a provision closely tracking the appointments clause of the U.S. Constitution, giving the Governor the authority to appoint, with the advice and consent of the Senate, all officials in the executive branch who have policy making discretion, while permitting inferior officers to be appointed within their departments by the general officers, the judiciary, or the heads of the departments. See H.J. Res. 5081 (R.I. 2003); see also Anderson, *General Assembly Unanimously Approves Separation of Powers*, *supra* note 2 (reporting the votes and including text of joint resolution).

277. See, e.g., Carl T. Bogus, *Don’t Pollute Bay with 12 Lobbied Pols*, PROVIDENCE J., May 15, 2003, at B-04 (discussing “legislative supremacists” attempt to give the General Assembly veto power over administrative regulations).

though the constitutional amendment adopts the federal system of appointments within the executive branch, the amendment does not adopt the federal model in all respects and there will undoubtedly be many struggles over how the state will implement the doctrine. Tugs of war between the branches are, of course, a perennial and perhaps healthy feature of American government. Power between the branches is never in perfect equipoise and is constantly in flux. For Rhode Island, however, the victory of separation of powers means that at least that a tug of war can take place. As disputes arise, the courts will be constitutionally mandated to keep the branches within their respective realms and to strive for an appropriate balance of power, as difficult and imperfect as this necessarily will be.

For other states, the Rhode Island experience may serve as an admonition to re-evaluate their own doctrines of separation of powers and the status of the balances of power. As previously noted,²⁷⁸ legislative power appears to be expanding in a number of states. Some have suggested that encroachments by one branch into another's realm of responsibility are less problematic if they are not hostile, that is, if one branch abdicates or cedes authority to another branch.²⁷⁹ Yet accretion of power by any branch, whether or not challenged at the time, presents difficulties, for power once lost is difficult to retrieve. As one branch acquires more and more power, it becomes increasingly difficult for other branches to assert themselves, even within their own domains.²⁸⁰ Yet, there is good news from Rhode Island. Its battle teaches that separation of powers is not merely some arcane theory of political science but rather a robust part of American ideology. It is an issue that people understand, care about, and, when necessary, will rally behind. James Madison and the American Founders would be pleased.

278. See *supra* note 15 and accompanying text.

279. See, e.g., *Communication Workers of Am. v. Florio*, 617 A.2d 223, 232 (R.I. 1992); Robert F. Williams, *Rhode Island's Distribution of Powers Question of the Century: Reverse Delegation and Implied Limits on Legislative Powers*, 4 ROGER WILLIAMS U. L. REV. 159, 172 (1998); Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 588-91 (1994).

280. From Rhode Island's experience, consider for example how officials in the executive branch worked to protect the Speaker of the House without even reporting to the Governor what they were doing or the potentially significant political event that precipitated their actions, and how the Chief Justice of the state supreme court became a patronage dispenser for the Speaker. See *supra* notes 262-270 (regarding the Harwood-Collins episode) and 231-234 (regarding the Chief Justice's appointment of the Speaker's wife to a life-time judicial position) and accompanying text.