Fall 1998

When Legislators Become Administrators: The Problem of Plural Office-Holding

Richard A. Hogarty
University of Massachusetts

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation
Available at: http://docs.rwu.edu/rwu_LR/vol4/iss1/6
When Legislators Become Administrators: The Problem of Plural Office-Holding

Richard A. Hogarty*

INTRODUCTION: FRAMING THE ISSUE

An invitation every academic welcomes is the rare opportunity to grapple effectively with the new realities of modern life in America. When the invitation includes the application of both theory and practice and the sorting out of power relationships, the academic not only welcomes the opportunity, but relishes it. Properly conceived, the basic task of public policy analysis is to deal in a timely and practical fashion with pressing public issues of the day. The focus typically is on "hot" political problems and topics that are "ripe" for public debate and scrutiny. Clearly the central theme of this symposium falls into such a category. But the reader must remember that my conclusions are those of a political scientist, not a constitutional lawyer. To the legal mind, the problem of plural office-holding and lopsided legislative power may be seen in a different light.

For purposes of this exploration, I will focus my analysis on the dynamics of state politics in general, and the intrastate distributions of political power in particular. More specifically, I will examine the propriety of Rhode Island state legislators and their designated appointees serving on various public boards and commissions and performing what are essentially executive functions. For the legislators involved this means holding dual positions. Sooner or later, they will have to vote on appropriations for their own agency. This institutional arrangement is at best a messy sit-

* Professor of Political Science and Senior Fellow, McCormack Institute of Public Affairs, University of Massachusetts, Boston. An earlier version of this article was prepared for delivery at the Roger Williams Law School symposium, Separation of Powers in State Constitutional Law on April 25, 1998.
uation, and at worst a glaring conflict of interest. At a time when public distrust of government runs high, this dubious practice has aroused considerable media attention and controversy in Rhode Island. No issue is more contentious or more contradictory. It has fueled a political fire that would burn with increasing intensity.

Naturally there are conflicting views on the subject. Some observers see the controversy strictly as a power struggle between the executive and the legislature.1 Others view it as a political question, not a constitutional one.2 Still others see it more broadly as a legal confrontation between “good-government” reformers and patronage-bent legislators.3 The former represent an alliance of civic activists protesting the worst abuses of patronage and corruption, while the latter appear to be a cadre of opportunistic politicians seeking to use their political influence to enhance their power and personal gain. In political parlance, the practice of simultaneously holding legislative office and serving on administrative boards is derisively known as “double-dipping.”4 Whatever the variance in opinions and perceptions, understanding the ways in which they complement and counteract one another makes the problem of plural office-holding more comprehensible.

Unquestionably, the intent of the civic-minded reformers is to force the lawmakers off the numerous administrative boards on which they serve. The forces of reform have heretofore engaged in institutional reform litigation to achieve their twin goals of cleaning up government and improving the efficiency of public services. At rock bottom, the conflict has pitted the legislative and executive branches of state government against each other, and for obvious reasons. This is because the stakes are so high; they have a great deal at stake to defend. Each of the three co-ordinate branches,

1. Telephone interview with Elmer E. Cornwell, Professor of Political Science (Feb. 18, 1998); telephone interview with Maureen Moakley, Professor of Political Science (Feb. 11, 1998). These scholars have co-authored a forthcoming book on Rhode Island state government. It should be noted that Elmer Cornwell, a professor at Brown University, formerly served as the House parliamentarian in the Rhode Island Legislature.


4. The term “double dipping” generally refers to a state employee who holds two salaried jobs and is compensated for both of them.
which includes the judiciary, claims that its own sphere of power is constitutionally protected. Each seeks to defend itself in battles over turf and jurisdictional boundary lines. The account that follows is based almost entirely on the historical record.

THE ORIGINS OF THE CURRENT SEPARATION OF POWERS DEBATE

For openers, I take as given the constitutional legitimacy of the separation of powers doctrine. I leave to other symposium participants the legal debate over the "true intentions" of those who originally drafted and subsequently amended the Rhode Island constitution. The dispute over whether it is proper for the legislature to appoint its own members to public boards that exercise executive powers is very much a modern debate. The reason is that since the early 1970s, this relatively recent phenomenon grew dramatically with the birth of the quasi-public state agency.

The controversy originated with the passage of the so-called Brayton Act in 1901, when the legislature first encroached upon the governor's patronage power to appoint administrative officials. At the time, the Republican-controlled General Assembly feared that the Democrats might capture the governorship. The Senate, in a blatant use of power, seized certain appointments for itself. This allowed the Senate, through its control of over 80 boards and commissions, to formulate and implement Rhode Island's governmental programs and, in effect, run the state.

From the time the Republicans took over the reins of government from a faltering old aristocracy in 1856, they maintained political control of the state up until 1932. The Democrats controlled the executive branch only eight of the seventy-six years be-

6. See R.I. Const. art. V. Furthermore, the people of Rhode Island adopted a "Bill of Rights" in 1790 which guaranteed a separation of powers in state government. See Kevin D. Leitao, Rhode Island's Forgotten Bill of Rights, 1 Roger Williams U. L. Rev. 31, 45 (1996).
7. See Brief of Governor Lincoln C. Almond at 6, In re Advisory Opinion to the Governor (Separation of Powers) (No. 97-572-M.P.).
8. See Conley, supra note 5, at 10.
9. See id.; see also Brief of Governor Lincoln C. Almond at 51, In re Advisory Opinion (No. 97-572-M.P.) (explaining the powers of the Rhode Island General Assembly).
10. See Conley, supra note 5, at 10.
Duane Lockard, a distinguished student of New England state politics, has traced the origins of the plural office-holding dispute. It was clearly present at the turn of this century. In 1901, Charles Brayton was the undisputed Republican party leader, who ran things in Rhode Island in the oligarchic manner of the classic party boss. As Lockard explains:

Often boss-ridden and corrupt, the Republican party was the representative of business interests and rural Yankees. The career of Rhode Island's most famous boss, General Charles Brayton, is a gaudy illustration of the kind of power the party had and how it was used. Brayton, who had been a general in the Civil War, had been a minor figure in the party with minor patronage appointments prior to his emergence as party mogul late in the nineteenth century. Blind during the latter years of his rule, he nevertheless operated the government of the state with a sure hand. He had an alliance with powerful Senator Nelson Aldrich, but in matters of internal politics he was by and large on his own. Since Brayton occasionally had trouble with "his" governors, he had a law passed in 1901—commonly called the Brayton Law—by which the Senate, if it did not approve of a governor's nomination to any post, could substitute its own choice for the job. The governor also lacked the veto power then. Prime authority rested with the legislature—that is to say, with Brayton.

Brayton's control over the party and the government was reinforced in two ways. He had the support of the big money in the state and he had a faithful organization with which to discipline the recalcitrant. According to Lincoln Steffens, Brayton controlled legislators by advancing them "to judge-ships and other political jobs, threw them law business and, if they were not lawyers, contracts and other business. He had pull enough to get men jobs with his client corporations." If his orders were disobeyed, the "word" would be passed down and only rarely would the offender be able to withstand the disciplinary action. As "counsel" to such corporations as the New Haven and Hartford Railroad, the Rhode Island Company (street railways), the Providence Telephone Company, and other such large corporations wanting favors from the state, Brayton had ample money with which to work. Cash

12. See id.
13. See id.
14. See id.
was put to work in a most undignified manner in elections. It bought votes.\textsuperscript{15}

But that was only the start of a pattern of behavior that would become all too familiar in the coming years. The Republicans continued to use the Brayton Law to keep their own supporters in administrative positions.\textsuperscript{16} Hence, they were able to frustrate the efforts of Democratic Governor Theodore F. Green, who came to power in 1932 at the height of the Great Depression.\textsuperscript{17} Lockard noted that allowing the governor's nominations to lay idle for three days enabled the Senate to override the governor's suggestions and appoint whomever it pleased to any position.\textsuperscript{18} The result was that administrative and judicial positions went mostly to Republicans.\textsuperscript{19}

Once the Democrats gained power, they quickly retaliated. In the election of 1934, they not only returned Governor Green to office, but they also captured both houses of the legislature.\textsuperscript{20} With a clean sweep, the Democrats staged what became known as the "Bloodless Revolution."\textsuperscript{21} They repealed the Brayton Law, abolished several boards and commissions, and enacted a statute that gave the governor budgetary power.\textsuperscript{22} As Lockard elaborates:

With a clear majority thus assured, the Senate then concurred with the House in the removal of all members of the Supreme Court, all of them Republicans. (No Democrat had served on that bench for sixty three years!) A new court was promptly appointed consisting of three Democrats and two Republicans. Then within minutes many state boards and commissions were abolished, and some eighty governmental units were reorganized into eleven departments under control of the governor. There being no Civil Service Law Protection, the consequences for officeholding Republicans were what one might expect. Few survived the house-cleaning operation.\textsuperscript{23}

\textsuperscript{15} Id. at 175-76 (citation omitted).
\textsuperscript{16} See id. at 191.
\textsuperscript{17} See id.
\textsuperscript{18} See id.
\textsuperscript{19} See id.
\textsuperscript{20} See id. at 192.
\textsuperscript{21} Conley, supra note 5, at 10.
\textsuperscript{22} See id.
\textsuperscript{23} Lockard, supra note 11, at 192 (citation omitted).
The Republicans recaptured the governorship in 1938. Though defeated in the General Assembly, Republican Governor William H. Vanderbilt, of the famous Vanderbilt clan, sought to eliminate dual-job holding by adamantly refusing to appoint legislators to salaried jobs. But as time went on, this practice became increasingly prevalent in the mid-1950s, with the creation of the Retirement Board. Joseph Larisa, Governor Almond's legal counsel, recalled that the Bloodless Revolution of 1935 may have restored some of the Governor's appointment power; however, the General Assembly's "impetuous vortex" began drawing more and more forcefully. The General Assembly's practice of appointing legislators to public boards commenced in 1955, and its membership has increased through the present day.

As the latest figures reveal, the legislature currently makes more than 300 appointments to more than seventy-five public boards. Of these, more than 200 are sitting legislators and their vested interests show. Furthermore, an additional 100 legislative appointees sit on these boards. For whatever reasons, the scope of the problem has not always been accurately documented. Suffice it to say that the inevitable consequences are both intrusive and damaging to the processes of executive decision-making and program execution. No other state in the nation permits such extensive legislative incursion into the executive branch. Of the few states that resort to interbranch appointments, Rhode Island is perhaps the most notorious. As one observer remarked, "[No other state in this nation tolerates legislative intrusion into the executive branch of this nature and to this extent.]" The media, both print and electronic, portrays this situation as a long-standing public problem that heretofore has been considered intracta-

24. See id. at 185.
25. See id. at 186.
26. See Brief of Governor Lincoln C. Almond at 10, In re Advisory Opinion to the Governor (Separation of Powers) (No. 97-572-M.P.).
27. See id. (quoting the Federalist No. 48, at 332 (J. Cooke ed. 1961)).
28. See id.
29. See id. at 6.
30. See id. at 6-7.
31. See Brief of the Amici Curiae Common Cause of Rhode Island et al., at 1, In re Advisory Opinion to the Governor (Separation of Powers) (No. 97-572-M.P.).
32. See id.
33. Id.
With a recurrent pattern of such political behavior, it naturally yields an expectation that things will continue as before. Practice in this case does not square with theory; the excesses raise the specter of corruption.

LEGALISATIVE DOMINANCE VERSUS EXECUTIVE CONTROL

No other branch dominates the operations of Rhode Island state government more than the legislature. It has enormous authority and exercises pervasive influence in state politics. Neither the executive, the courts, nor the bureaucracy possess the kind of concentrated power of the legislature. This august legislative body is perceived by the general public to be the dominant power broker in the state. "Perceived power"—as most political science textbooks indicate—"is real power, even if it is blue smoke and mirrors." To be sure, legislative dominance lies at the heart of the problem. For quite fundamentally that is what the separation of powers fight is all about: can a seemingly all-powerful legislature assert the dual claim of having the power both to enact and enforce the laws? The answer to this question is simply no. The legislature can certainly enact the laws, but it is not authorized by the constitution to enforce them. The latter is strictly an executive prerogative. For as the Rhode Island constitution clearly states, the executive power is vested in the governor. Hence, the usurpation of the enforcement function by the legislature is an egregious violation of the separation of powers doctrine.

Acknowledging its doubtful legality, one must ask the obvious questions. Does the doctrine of separation of powers prohibit the legislature from appointing individuals to offices outside the legislative branch? What are the political consequences when legislators become administrators? Does their plural office-holding amount to a conflict of interest? Should legislators, who decide how the public purse is spent, also determine how public agencies conduct their operations? Is the public interest served when legis-

35. See Conley, supra note 5, at 9-10.
37. See R.I. Const. art. VI, § 2.
38. See id. art. IX, § 1.
39. See id.
lators appropriate money for the public boards on which they serve? Does their infiltration of these agencies constitute an abuse of the governor's constitutional duty to faithfully execute the laws? Does this phenomenon diminish his or her effectiveness as the political chief executive? Is it a prescription for executive impotency? What about the democratic theory of accountability for the administration of public agencies funded by citizens with public funds? Does the blurring of boundary lines between the legislative and executive branches undermine that accountability? What does all of this have to say about the principle of executive control? My list of questions is far from complete. Many other questions may need to be asked and answered, but this approach at least helps us to sharpen our focus.

**Consensus Building and the Emerging Consensus**

These questions of public policy and public management and their ramifications have been debated with increasing fervor in Rhode Island.40 Several watchdog groups and prominent public figures have spearheaded the effort to jump-start a response to a perceived public need for resolving the public dispute.41 Their political activity provides an important source of civic engagement and commitment. John Kingdon perceptively points out:

"In the policy stream, consensus is built largely through the processes of persuasion and diffusion. If an idea survives scrutiny according to a set of criteria for survival, it diffuses within the policy community. There is also consensus building in the political stream. However, the processes which set bandwagons in motion are radically different in the two streams. In contrast to the policy stream's emphasis on persuasion, the political stream's consensus building is governed by bargaining. 42"

To his credit, Sheldon Whitehouse has played a key role in bringing the issue to light and putting it on the public agenda.43

41. See Lord, supra note 3, at Al.
Whitehouse, the former United States Attorney for Rhode Island, has fully grasped the stakes. He has found political company and support from civic activists and elected officials from a variety of positions and perspectives. The most politically visible and influential include Common Cause, the Environmental Council of Rhode Island, the State Council of Churches, Red Alert, the League of Women Voters and Operation Clean Government. These watchdog groups see a troubling pattern of behavior on the part of legislators. They have highlighted the deleterious effects of legislative infiltration and intrusion upon the executive branch. As journalist Peter Lord writes, "[a]ll paint a bleak picture of legislative interference, conflicts of interest and poor decision-making."45

In a contentious world, trying to achieve a consensus on the issue has not been easy. Common Cause, the League of Women Voters and Red Alert, Inc. have taken lead positions, claiming there is an inherent conflict of interest when the people who write the law are the same people who administer it. These public advocacy groups have enhanced public awareness of the problem and demanded reform. The reformers have been able to effect a loose alliance among their divergent forces; this alliance has included important interest groups as well as some of the most influential members of the bar.48

Amid this flurry of activity, the outlines of the legislative-executive struggle for control of the bureaucracy have taken shape. Not surprisingly, the Democratic legislators have fiercely resisted the objectives of their reform-minded opponents. The question of whether legislative appointments contravene the state constitution has been brought before the Rhode Island Supreme Court twice within the past 12 years.49 Getting its act together on this issue has proved difficult for the judiciary. In 1986, Superior Court Judge Ronald Lagueux ruled that the legislative appointments to the Coastal Resources Management Council were unconstitutional.50 On appeal, however, the state's high court unanimously

44. See Lord, supra note 3, at A1.
45. Id.
46. See id.
47. See id.
48. See, e.g., id.
49. See Garland, supra note 34, at A1.
50. See id.
overturned Lagueux's decision.\textsuperscript{51} It managed to sidestep the constitutional issue by ruling that the trial judge did not have the power to review the constitutionality of the statute.\textsuperscript{52} A similar fate befell the reformers in 1996 when they attempted to obtain a more definitive judgment.\textsuperscript{53} By a vote of 2 to 2, with one vacancy existing on the high court, the justices divided evenly on the constitutional question.\textsuperscript{54} The problems inherent in the wording of the opinion became painfully apparent in their split decision. This tie vote resulted in a "presumption of constitutionality" that in effect preserved the status quo.\textsuperscript{55} Despite the court's indecisiveness, the seeds of the conflict had been sown and had taken root.

\textbf{Once More into the Breach}

And this is but a part of the story. It helps explain the tortuous path of the institutional reform litigation, where the main advocates seem to share the same philosophical stance. Although the reformers lost the first two skirmishes, they have persisted in their efforts to achieve genuine institutional change. Indeed, they have not wavered in that singular purpose. Those who watched these events unfold could have foreseen that the two great laws of timing and momentum were moving in their direction. It has taken awhile to get the focus back, but now it is happening. In hindsight, the two previous legal battles were only warm-ups for the main event, setting the stage for what followed.

Initially rebuffed by the courts, the reformers are still trying to find a feasible solution. On May 5, 1997, the state Ethics Commission fashioned a new strategy for implementing such change.\textsuperscript{56} Whatever the inspiration, it concluded that when members of the General Assembly make appointments, a conflict of interest arises.\textsuperscript{57} Acting pursuant to its constitutional power under Article

\textsuperscript{51} See id.
\textsuperscript{52} See Easton's Point Ass'n v. Coastal Resources Management Council, 522 A.2d 199, 202 (R.I. 1987).
\textsuperscript{53} See In re Commission on Judicial Tenure and Discipline, 670 A.2d 1232 (R.I. 1996).
\textsuperscript{54} See id. at 1233.
\textsuperscript{55} Id.
\textsuperscript{56} See Brief of Governor Lincoln C. Almond at 1-2, In re Advisory Opinion to the Governor (Separation of Powers) (No. 97-572-M.P.) (referring to the Letter from Gov. Almond to the Rhode Island Supreme Court, November 20, 1997).
\textsuperscript{57} See id. at 1.
III, Section 8 the Ethics Commission promulgated an administrative ruling that prohibits lawmakers and their appointees from serving on administrative boards and commissions that exercise executive powers. This ruling (Regulation #36-14-5014) is scheduled to go into effect on July 1, 1999.

Whatever its merits, this strategy has stirred the embers of the controversy and reopened the constitutional question. On November 20, 1997, Governor Almond asked the state Supreme Court for an advisory opinion with regard to its constitutionality. Once again, the judiciary finds itself at the eye of the storm. The anti-legislative forces have only lost a little time; and if the high court rules in their favor, this may turn out to have been no real loss at all.

RESOLVING BOUNDARY DISPUTES

As a point of departure, it is important to acknowledge that all political systems have boundaries within which they operate. These boundaries greatly influence what actions occur in the political arena. They are never entirely constant or stable. Thus the tension is continuing. Some of the conflict that is normal in a political system is the struggle to maintain, extend or retract the boundaries of the system. In this context, the ongoing controversy in Rhode Island strikes me as being analogous to a border skirmish. Robert Wood explains, "[b]order wars can find acceptable resolution, be accidentally begun and ended, or be intolerable and completely destructive. In no instance, however, do they yield to pure reason." Values and vested interests are at stake as well as pride and ambition. Power intoxicates people; it is never voluntarily surrendered.

This is especially true in a state like Rhode Island where the legislature has reigned supreme as the dominant political institu-

58. This section of the Rhode Island Constitution of 1986 gives the Ethics Commission the authority to prohibit conflicts of interest.
60. See id. at 2.
61. See id. at 2-3.
tion for more than three centuries. At the root of the problem then are quite different conceptions of the political system. On the one hand, observing political life suggests that political systems are very complex, involving history, culture, personalities, institutional arrangements, special interests, ethnicity and participation. On the other hand, state constitutional politics involves both issues peculiar to particular states and common concerns that arise periodically in state after state. Alan Tarr, who has written extensively on the subject, identifies three recurring issues in state constitutional politics: (1) the intrastate distribution of political power; (2) the scope of government activity; and (3) the relation of state government to economic activity.

THREE PARADIGMS OF STATE CONSTITUTIONAL POLITICS

A constitution is supposed to be a succinct document establishing a government's structure and its limitations of power. Americans tend to trust that the distribution of government will produce "good government." Our tendency to revere constitutional documents sometimes leads us to overlook one important fact about them. They not only provide the basic rules about how politics is to be conducted in a given state, but they also affect the locus of power.

Alan Tarr identifies three theories that help to explain the dynamics of state constitutional politics and constitutional change. First, some scholars subscribe to the "political-culture" model espoused by Daniel Elazar. They look at state constitutions as embodiments of a particular state's political culture because they find dominant political forces use their state's constitution to promote their own values. The reasoning is that the state's constitution should follow the changing political culture. Second, other scholars have proposed what might be called the "historical-movement"

63. See Conley, supra note 5, at 9.
66. Id. at 81.
67. See Tarr, supra note 64, at 4.
68. Id.
69. See id.
70. See id.
model. They contend that state constitutions reflect national political forces dominating at the time the state adopted its constitution rather than the distinct political cultures within the state. According to this theory, "[s]tate constitutional politics is thus national politics writ small." Finally, still another set of scholars have advanced what is referred to as the "ordinary-politics model." They argue that a state's constitutional politics are merely reflections of the state's political decisions in other areas. Based on this theory, "the constitution registers the result of group [interaction and] conflict within the state at the point at which various provisions were adopted."

In more than a superficial way each of these paradigms accurately describes many aspects of the Rhode Island political system. Despite the striking differences of these theories, they tend to overlap to some degree. Tarr explains:

The indigenous political forces emphasized by the ordinary-politics model may well reflect the political culture of the state or mirror political cleavages found throughout the nation. Moreover, as we shall see, national political developments can influence the political culture of a state or affect the fortunes of political forces within it. Finally and most important, each model may accurately depict an aspect of state constitutional politics but need integration into a more comprehensive and yet more nuanced account.

RHODE ISLAND'S CONSTITUTIONAL HISTORY

From 1643 to 1842, Rhode Island's government existed under two written charters. But the power to govern contained in these charters did not originate from the people. Kevin Leitao has noted:

Although the people played a role in the design of the charters, the British Sovereign was the source of the charters and

71. Id.
72. See id.
73. Id.
74. Id.
75. See id.
76. Id. at 4-5.
77. Id. at 5.
78. See Leitao, supra note 6, at 35.
79. See id.
granted certain rights to the people of the colony. The first charter, obtained in 1643, was a parliamentary patent . . . Following the restoration of the monarchy in 1660, the 1643 charter was replaced by a royal charter granted by Charles II in 1663. The charters established Rhode Island as a corporate colony. As a corporate colony, the residents of Rhode Island were granted virtual self governance. 80

Shortly after the colonies severed their bonds with England, eleven of the thirteen original states adopted new constitutions. 81 By 1780, Rhode Island and Connecticut were the only states not governed by a state constitution. They simply revised their charters to encompass their newly proclaimed independence. 82 Rhode Islanders relished in their corporate charter, and valued the religious freedom it guaranteed; therefore, they retained their charter throughout the American Revolution, and beyond, when the several colonies discarded their royal charters for written constitutions. 83

The early state constitutions provide evidence of the political thinking then prevalent on questions of governmental practice and institutions. 84 Concerns of the colonists were heightened because of the tyranny of their own governors and the vast patronage powers they possessed. 85 Constitution writers consistently emphasized legislative power because they associated the alleged misuse of power by the King—their enemy—with the general threat of executive power. 86 Also, rivalry between the King’s agents—the [royal] governors—and colonial legislative bodies magnified the tensions growing between London and the colonies. 87 Accordingly, the prestige of executive authority deteriorated, and the people feared its misuse. 88 The provinces stood on guard against the governor’s dangerous patronage powers and the corruption of the legislature. 89

80. Id. at 35-36.
81. See Lockard, supra note 65, at 70.
82. See id.
83. See Conley, supra note 5, at 9.
84. See Lockard, supra note 65, at 72.
85. See id. at 72 & n.12.
86. See id.
87. See id.
88. See id.
89. See Marc W. Kruman, Between Authority and Liberty 116 (1997).
Separation of powers was very popular at this time, in part because much of America had read Baron DeMontesquieu's *The Spirit of the Laws*. However, separation of powers was only a theoretical concept; in substance, most early state governments exemplified legislative supremacy. Therefore, chief executives only enjoyed a modicum of independent power. Few governors were granted veto power; their respective legislatures also exercised control by electing them. Moreover, the legislature often circumvented the executive in effecting significant appointments. Lockard argues:

There is thus an anomaly in these early constitutions: they establish in many instances virtual legislative supremacy while simultaneously proclaiming the doctrine of separation of powers. Were they maliciously being misleading? The answer lies in the political realities they faced, the traditions they knew, and the fact that they—not unlike other generations of politicians—were able to live with certain contradictions partly because they did not recognize them as such. There were those who recognized the discrepancy, however, and—fearing undue legislative authority—complained of the error. Thomas Jefferson was alarmed at the great power of the legislature granted by the Virginia constitution.

Revolutionary activists who supported a constitutional separation of powers carefully addressed the problems of patronage and plural office-holding. These activists "were concerned not only about the magistrate's manipulation of a representative assembly but also about the concentration of all power in the legislature." In his aptly titled book, *Between Authority and Liberty*, historian Marc W. Kruman argues:

The fear of executive manipulation of the legislature influenced state constitution makers, but it neither encompassed what the revolutionaries meant by a separation of powers nor fully explained their concerns about plural officeholding. They feared both the magistrate's manipulation of the legisla-

90. See Lockard, supra note 65, at 72.
91. See id. at 73.
92. See id.
93. See id.
94. See id.
95. Id. at 72.
96. See Kruman, supra note 89, at 116.
97. Id.
ture through patronage and the dangerous accumulation of both executive and legislative powers in the same hands . . . .

Convention delegates did not seek merely to prohibit a man from holding more than one office, they prevented officials in one branch from also becoming officials in another. They hoped thereby to avoid concentrations of power in any one branch of government or any group of men . . . .

If representatives and executive officials were the same persons, they would pursue their own interests at the expense of the public's.98

The charter that King Charles II had granted to Rhode Island in 1663 provided for legislative supremacy, denying the governor any significant executive power.99 Under the second charter, all power was vested in the General Assembly, which remained the dominant political force in state politics.100 For more than a century after 1663, the legislature was for all practical purposes the state government.101

During the first half of the nineteenth century, population shifts within the thirteen original states fueled conflicts over voting rights and representation in the state legislatures.102 Because state legislatures were apportioned by state constitutions, those unhappy with the political system could only remedy their discontent through constitutional reform.103 This discontent of the governed gave impetus to campaigns for constitutional conventions.104 When the Rhode Island legislature adamantly refused to sanction a convention, insurgent elements joined in a rebellion.105 They de-

98. Id. at 117.
99. See Conley, supra note 5, at 9 ("Constitutionally the governor was scarcely more than the executive agent of the General Assembly.").
100. See id.
102. See Tarr, supra note 64, at 6.
103. See id.
104. See id.
105. See id. (referring to the Dorr Rebellion of 1841 and citing Marvin E. Gettleman, The Dorr Rebellion (1973)).
vised a new constitution and held elections under it.\textsuperscript{106} For a short period of time, the state had two rival governments.\textsuperscript{107}

This armed attempt at a \textit{coup d'état} failed, but it incited the ruling aristocrats to frame a new constitution in 1842.\textsuperscript{108} The principle of legislative supremacy was carried over to the new constitution.\textsuperscript{109} Essentially, its framers put in constitutional form what was contained in the royal charter.\textsuperscript{110} At the time, the governor's formal role in policy-making was very small; his informal authority depended largely upon his personality and party strength.\textsuperscript{111} The chief executive lacked both constitutional appointive power and the veto; he derived most of his power from other than constitutional sources.\textsuperscript{112} After 1843, the governor was routinely granted statutory power to appoint and remove officers of his own choosing to and from state boards and commissions.\textsuperscript{113} During the second half of the nineteenth century, it became customary for governors to make administrative appointments.\textsuperscript{114} A few post-Civil War governors became effective party leaders, but their power still paled by comparison to the legislature.\textsuperscript{115}

As time went on, fear of the executive gradually waned and the governor's powers were eventually expanded.\textsuperscript{116} The rise of technology robbed life and therefore government of the simplicity that had previously existed in a pre-urban and pre-industrial society. Twentieth century conditions and the complexity of the subjects to be regulated forced the granting of subsidiary rule-making power to the bureaucracy.\textsuperscript{117} The complexity of policy invited the governor to assume the role of public policy leader.\textsuperscript{118} Later on, the chief executive was given the veto power and greater control

\begin{itemize}
  \item \textsuperscript{106} \textit{See id.} at 6.
  \item \textsuperscript{107} \textit{See id.}
  \item \textsuperscript{108} \textit{See Lockard, supra note 11, at 174.}
  \item \textsuperscript{109} \textit{See Telephone interview with Francis Leazes, supra note 2.}
  \item \textsuperscript{110} \textit{See id.}
  \item \textsuperscript{111} \textit{See id.}
  \item \textsuperscript{112} \textit{See id.}
  \item \textsuperscript{113} \textit{See Brief of the Amici Curiae Common Cause of Rhode Island et al., at 23, \textit{In re} Advisory Opinion to the Governor (Separation of Powers) (No. 97-572-M.P.).}
  \item \textsuperscript{114} \textit{See id.} at 23-24.
  \item \textsuperscript{115} \textit{See Telephone interview with Francis Leazes, supra note 2.}
  \item \textsuperscript{116} \textit{See Conley, supra note 5, at 10.}
  \item \textsuperscript{117} \textit{See Telephone interview with Francis Leazes, supra note 2.}
  \item \textsuperscript{118} \textit{See id.}
\end{itemize}
over the executive branch. But it was not until as late as 1986 that the Rhode Island governor was given the power to submit a formal budget. In 1992, his term of office was increased from two to four years. As it happened, Lincoln Almond was the first governor to be elected to a four-year term.

The present constitution has served the state of Rhode Island for 155 years. What is evident from this history is that Rhode Islanders have shown a particular attachment to their constitutions. Even so, they have been willing to amend, revise and revisit the fundamental law document as frequently as they deem necessary. According to Donald Lutz, there has been a total of 53 amendments to the state constitution.

THE SEPARATION OF POWERS DOCTRINE

The authors of the Federalist papers understood: that the best way of preserving liberty was to divide power. If power is concentrated in any one place, it can be used to crush individual liberty. Even in a democracy there can be the tyranny of the majority, the worst kind of tyranny because it is so stifling and complete . . . . Early [American] federalism was built on the principle of dual sovereignty. The federal Constitution divided sovereignty between state and nation, each in control of its own sphere. To further achieve the blessings of liberty, its framers devised a central government that incorporated the separation of powers with countervailing checks and balances.

The Rhode Island Constitution contains a specific declaration concerning the separation of powers. Article V declares that "[t]he powers of the government shall be distributed into three de-

119. See id.
120. See id.
121. See id.
122. See id.
123. See Donald S. Lutz, Patterns in the Amending of State Constitutions, in Constitutional Politics in the States, supra note 64, at 24, 33 tbl. 2.1. The base year for this calculation is 1843, when the first constitution was adopted.
124. See id.
125. See id.
128. See R.I. Const. art. V.
partments: the legislative, executive and judicial." Alpheus Mason and William Beaney, write:

From this separation of the departments is derived the doctrine that certain functions, because of their essential nature, may properly be exercised by only a particular branch of the government; that such functions cannot be delegated to any other branch; and that one department may not interfere with another by usurping its powers or by supervising their exercise.

At the core of the concept is the notion that the governor and the legislature are independent of each other, owing their allegiance to the electorate.

The three branches of government, in their individual functions, endeavor to respond to the needs of their constituencies and try to resolve public problems. The Legislature responds to their individual constituents; the President represents the "public will" in general and the courts interpret the laws. In reality, each institution is highly sensitive to the concerns and pressures of civic activists, lobbies, interest groups and other intervening elites.

Clashes between executive and legislative officials constitute the more difficult grist for the judicial mill. Those who hold power are usually unwilling to allow those considered to be rivals for power to sit in judgment on their prerogatives. Not surprisingly, the primary beneficiaries under the current distribution of political power are also the most vocal in opposing change. Only grudgingly and under pressure do they yield to piecemeal accommodation. This is quite a challenge to lay on a judiciary that has not always been known for its independence. Up until 1994, state Supreme Court justices were still elected by the General Assembly and subject to arbitrary removal by that body. Now they are

129. Id.
133. Id.
134. See id.
135. See Tarr, supra note 64, at 5.
136. See Garland, supra note 34, at A1.
137. See Conley, supra note 5, at 10.
appointed by the governor and enjoy life terms under a constitutional amendment approved by the voters in 1994.\textsuperscript{138}

If the political culture is to be confronted, that challenge is much greater than one might ordinarily think. Judges, of course, are not free agents. They are constrained by the rules of the judicial proceedings, the nature of the adversary process, appellate review and other restraints.\textsuperscript{139} Phillip Cooper puts it this way:

The judge is caught up in the law of political interface because he or she is called upon to perform a kind of unique task—that is to say, to reconcile demands for rule-of-law concerns, on the one hand, with pragmatic understanding of the political environment in the year he or she operates, on the other.\textsuperscript{140}

Given its prior lack of judicial independence and fear of political reprisal, there are some in Rhode Island who are doubtful about the high court's ability to affect the political culture positively.\textsuperscript{141} They think the judges will rule narrowly on the issue and say that the controversy over legislative appointments is a political question rather than a constitutional one.\textsuperscript{142}

RIHODE ISLAND'S POLITICAL CULTURE

Conventionally, the term "political culture" is defined as the predominant way people think, feel and believe about a political system.\textsuperscript{143} In other words, it is a collective psychological orientation toward government structure, incumbents in public office, and particular policies, decisions, and the enforcement of decisions. Daniel Elazar has defined it as "the particular pattern of orientation to political action in which each political system is embedded."\textsuperscript{144}

\begin{enumerate}
\item[(138)] See R.I. Const. art. X, § 4 (amended Nov. 8, 1994).
\item[(139)] See Remedial Law, \textit{supra} note 36, at 29.
\item[(140)] Id.
\item[(141)] See Interview with Vincent A. Cianci, Jr., Mayor of Providence, Rhode Island, in Boston, Ma. (Apr. 15, 1998).
\item[(142)] See Curran, \textit{supra} note 2, at B7.
\item[(143)] David C. Saffell, State and Local Government 22 (1978).
\item[(144)] Daniel J. Elazar, American Federalism: A View from the States 79 (1966); \textit{see}, e.g., Gabriel A. Almond & Sidney Verba, The Civic Culture (Little, Brown and Co., 1965) (1963).
\end{enumerate}
Stephen Bailey and his colleagues observe that Rhode Island politics do not exemplify the democratic ideal. It is the “product of years of bitter partisan strife,” urban-rural rivalries, religious and ethnic differences and old class antagonisms. An unyielding Republican conservatism eventually gave way to a New Deal Democratic liberalism, swayed by ethnic and nationality considerations. As all of this might suggest, the political history of Rhode Island has been tumultuous. To quote Lockard again:

A certain amount of bitterness in the politics of any of our states can be anticipated, but bitterness backed up with nearly or actually rebellious force is hardly customary. Yet such extremes are endemic in Rhode Island policies. True, there has been only one armed attempt at a coup d'état—and that unsuccessful—but near coups and violent wrangling have characterized the state's politics. Riots, exile, legislative fistfights, stolen elections, disregard for the spirit and the letter of the constitution—all these and more have been features of Rhode Island's political history.

Over the past several decades, race track lobbies, legislative corruption and suspicious election day stratagem have depicted Rhode Island politics. Despite these blemishes, the Rhode Island political system embodies the principles of structure, sequence and simplicity. Cumulatively, even these small discoveries become important properties in describing a political process, its texture and context, and in forecasting its evolution.

The state's small geographical size is another important characteristic. While “Little Rhody” is the smallest state in the nation, it is the second most densely populated state with slightly under one million inhabitants. This fact makes personal and official contact with politicians easy and somewhat frequent. Legislators drive no more than an hour to arrive at the State

146. Id.
147. See id.
148. Lockard, supra note 11, at 190.
149. See Bailey, supra note 145, at 82.
150. See id.
151. See id.
153. See Bailey, supra note 145, at 82.
Campaigning to "blanket the grass roots" cannot extend more than forty miles from the capital city of Providence without traversing the state line. Bailey observes:

The 100-member House in the General Assembly and the 44-member Senate are the smallest in New England, and members come quickly to know one another. The ease of communication—between interest group and official, . . . and the familiarity in which each refers to the other—is further bound by the metropolitan magnet of Providence. In three office buildings—the Hospital Trust, the Industrial Trust [Fleet Bank] and the Turks Head—within a three-block radius are housed the offices of almost all important law firms and hence important political figures in the state.

**WHAT IS TO BE DONE?**

Now that Rhode Island faces the ultimate question, what should it do? Several courses of action are open presumably; what specifically should be done will depend in large measure on what the Rhode Island Supreme Court says when it issues its advisory opinion. As Sheldon Whitehouse sees it:

The court has three basic choices under the state constitution: It can say the constitution forbids legislative appointments; it can say that the constitution neither forbids nor requires such appointments; or it can say that appointments to office are legislative duties so "usual or ordinary" that the constitution requires the legislature to perform them.

Whitehouse, in reviewing other cases, concludes:

Given that almost every other court in the country finds legislative appointments outright forbidden by American constitutions, it seems unlikely the court would follow the third course. If the court follows the first course, the ethics regulations are moot and void. But if the court follows the second course, it leaves the area open to regulation by the Ethics Commission, expanding the commission's realm of authority.

154. See id.
155. Id.
156. Id.
158. Id.
While my purpose here today is not to suggest what the high court should do, it is my intent to endorse the approach taken by the state Ethics Commission. I do so on grounds of both feasibility and desirability about which road to follow. Undeniably simplistic, the ethics regulations are designed to curb patronage and corruption by eliminating plural office-holding and political conflicts of interest.\textsuperscript{159} Professionalism, resources and motivation are not unrelated. The central provisions of the administrative ruling are logical and linked. They seem to support the juncture of good theory and good practice. The policy initiative of the state Ethics Commission is "an idea in good currency," as they say.\textsuperscript{160} The same cannot be said of legislative appointments. Put in prohibitive terms, interbranch appointments do more harm than good; as such they are incompatible with the public interest. Worse yet, they raise the specter of corruption and arbitrary power. Joseph Larisa argues that the General Assembly's custom of appointing its own members on public boards "makes a mockery of separation of powers."\textsuperscript{161} I wholeheartedly agree with him.

The prime justification lawmakers offer for making such appointments is that they enable them to exercise direct oversight of the executive branch.\textsuperscript{162} This is a spurious argument, mainly because it completely overlooks the fact that they already possess the means for doing so. They can exert powerful oversight through public hearings, legislative investigations, appropriations and authorization legislation.\textsuperscript{163} A strong measure of irony attaches to the fact that legislative oversight of agencies with legislative ap-

\textsuperscript{159} See Brief of Governor Lincoln C. Almond at 1-2, \textit{In re Advisory Opinion to the Governor (Separation of Powers)} (No. 97-572-M.P.) (referring to Letter from Gov. Almond to the Rhode Island Supreme Court, November 20, 1997).

\textsuperscript{160} Telephone interview with Frank Grad, Professor at Columbia Law School (Feb. 23, 1998).

\textsuperscript{161} Brief of Governor Lincoln C. Almond at 50, \textit{In re Advisory Opinion} (No. 97-572-M.P.).

\textsuperscript{162} See Garland, supra note 34, at A1. As the introduction to this symposium indicates: "Some argue that legislative participation in the enforcement of the law helps to ensure that regulatory agencies enforce the law in a manner consistent with the public policy. Others contend that it destroys the checks and balances necessary to prevent power from being misused." Carl T. Bogus, \textit{Introduction} to Symposium: \textit{Separation of Powers in State Constitutional Law}, 4 Roger Williams U. L. Rev. 1 (1998) (citations omitted).

\textsuperscript{163} See \textit{id.}.
pointees seldom if ever occurs. Not coincidentally, these are the same agencies that are the most prone to scandal. The evidence is suggestive, but not conclusive. Meanwhile, the beleaguered Department of Environmental Management has been subjected to intensive legislative investigation.

There are those who claim that the legislature has always been dominant, that the people have accepted this tradition, and that interference with the will of the people defeats another democratic principle. But tradition does not offer much support for plural office-holding—for several reasons. In the first place, it does not take account of the fact that the legislature has slipped in public esteem in part because it has fallen into scandal and disgrace. It is also questionable whether the people have done anything more than accept a fait accompli in their “acceptance” of the status quo. Surely it is fallacious to maintain, as some do, that the people rejected the idea of separation of powers when they ratified the 1986 constitutional amendments.

Another argument offered in defense of the status quo is that state legislators have “plenary” powers—that is to say, their power to legislate is circumscribed only by the grants of power to the federal government and by limitations found in the federal Constitution or in their own constitutions. Congress has limited powers vis-a-vis the states because of principles of American federalism. The Founding Fathers gave some areas to Congress to regulate, and left the rest to state regulation. Where Congress’s power is plenary, it is nevertheless restrained by the principles of separation of powers. The authority of state legislatures in areas not preempted by Congress, though plenary, must still be exercised within the constitutional process of government, whose most vaunted tenet is separation of powers. The point is that the

---

164. See Brief of Governor Lincoln C. Almond at 50, In re Advisory Opinion (No. 97-572-M.P.).
165. See id.
167. See Curran, supra note 2, at B7.
169. See id.
170. See id.
171. See id.
172. See id.
General Assembly cannot exercise even plenary authority by usurping other powers.

However the issue of legislative appointments is resolved, one final dimension of the dispute requires commentary. There are some who apparently feel that the reform proposal under consideration is a hopeless utopian dream. But they are just plain wrong. This reform holds out hope for restoring and reinvigorating state government, if the right coalition of elites, buttressed by a committed and discerning citizenry, join together in the effort. Before we can restore public confidence in the public realm, however, we must first restore competence in government.

The reform movement in Rhode Island has taken place simultaneously with a sea of change in American politics and its social structure. It comes at a time, when responsibility for a wide range of governmental activity is shifting from Washington to the states. In a new age of devolution, the ground rules of our political behavior and the characteristics of our polity are likewise shifting. Federal devolution has shifted the focus of programmatic efforts to the state and local governments, creating heightened expectations in the community. The role of the states in keeping the peace, helping prosperity and ensuring justice is critical. The programs to be carried out are increasingly complex and sophisticated. All of which requires greater managerial competence, not less. One cannot expect executive agencies to improve their performance without taking that sea of change into account.

In the final analysis, the test of a state constitution is how it functions. Professor Frank Grad of Columbia Law School observes: "The least we may demand of our state constitutions is that they interpose no obstacle to the necessary exercise of state powers in response to state residents' real needs and active demands for service." Whether or not the Rhode Island Constitution meets this minimum test is a question that only the state Supreme Court can answer. With its newly-won judicial independence in 1994, which is now based on the merit selection of judges, the court itself is at a historic turning point. No longer can the judiciary afford to evade or sidestep the problem of plural office-holding.

173. See Curran, supra note 2, at B7.