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Legislative Control Over the Coastal Resources Management Council After Separation of Powers: Grasping at Thin Air, Land, and Water

Thomas R. Bender*

In his first inaugural address, Abraham Lincoln acknowledged a fundamental aspect of American government – if the people grow “weary of the existing government” they have the option to “exercise their constitutional rights of amending it.”1 State governments are formed and defined by a constitution, an instrument “aptly termed a legislative act by the people themselves in their sovereign capacity.”2 And “in their hands it is as clay in the hands of a potter: they have the right to mold, to preserve, to improve and to refine, and finish it as they please.”3

INTRODUCTION

In 1854 the Rhode Island Supreme Court described the

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separation of powers clause of the state constitution as "the great principle of American liberty," and recognized that "[t]he rights, property, and the liberties of the people depend upon the due observance of each department of the constitutional limitations and restrictions upon its authority." In 1999, however, notwithstanding the state constitution's explicit distribution of power into legislative, executive, and judicial departments, and the vesting of the governor with the executive power, a majority of the justices of the Rhode Island Supreme Court joined an important advisory opinion. The justices concluded that the Rhode Island General Assembly had exercised substantial executive functions throughout the state's constitutional history. Specifically, the justices found that, historically, the General Assembly had participated in a long-standing practice of making appointments to, and seating themselves on, boards, commissions, and other state entities exercising executive power.

The 1986 Constitutional Convention re-adopted the state constitution's reserved powers clause, which read: "[t]he general assembly shall continue to exercise the powers it has heretofore exercised, unless prohibited in this constitution." The justices reasoned that this clause implicitly affirmed the General Assembly's historic exercise of these executive functions as constitutionally permissible. Anticipating the controversy to which this opinion might give rise, however, the justices noted that if the historical practice was deemed undesirable, the state constitution would have to be amended. And that is exactly what happened. By an overwhelming electoral majority, Rhode Island voters, in 2004, enacted four separate constitutional amendments to halt the legislative exercise of executive power.

The first and perhaps most significant amendment was the

4. In re Dorr, 3 R.I. 299, 301 (1854).
6. Id.
7. See id. at 64-65.
8. Id. at 63 (citing R.I. CONST. art. VI, § 10).
9. Id.
10. See id. at 72.
11. See, e.g., R.I. CONST. art. III, § 6 (amended 2004); id. at art. V; id. at art. VI, § 10 (repealed 2004); id. at art. IX (amended 2004).
repeal of the reserved powers clause. The reserved powers clause was the basis for affirming the constitutional exercise of executive power by the legislature. Thus, this amendment served as a very distinct signal that the General Assembly's past historical practices would no longer have any constitutional import.

The second change was to the distribution of powers clause. The distribution of powers clause was amended to distribute the legislative, executive, and judicial powers into "three separate and distinct departments" rather than the former, less precise distribution "into three departments." This change emphasized that the legislative and executive powers are not only assigned to separate departments, but their exercise is limited to those departments as well.

The third amendment explicitly prohibited elected members of the General Assembly from serving on state entities exercising executive power. Last, and certainly not least, the governor was given the constitutional power to appoint all members of state entities exercising executive power. This final amendment served as an unmistakable indication that manning such entities is now deemed to be a core executive function under the state constitution.

Notwithstanding the 2004 amendments, however, this new constitutional scheme has not yet been applied to the Coastal Resources Management Council (hereinafter CRMC). The CRMC is an independent regulatory agency charged with exercising executive power. Specifically, the CRMC implements, enforces, and executes the laws pertaining to the state's coastal resources. On the last day of the Rhode Island General Assembly's 2006 session, legislation was proposed in the House of Representatives that would continue to permit legislators to sit

12. See R.I. Const. art. VI, § 10 (repealed 2004).
13. See id.
15. See id. at art. III, § 6.
16. See id. at art. IX, § 5.
17. See id.
on, and appoint members to, the CRMC. At the same time this legislation was proposed, the House of Representatives passed a resolution seeking an advisory opinion from the Rhode Island Supreme Court, asking four questions concerning the constitutionality of the proposed legislation in light of the 2004 amendments. Specifically referencing the third clause of section 17 of the "Declaration of Certain Rights and Principles," the House's resolution suggested that this clause gives the General Assembly exclusive governmental authority over environmental matters, and intimated that this clause places combined legislative and executive authority in the general assembly with respect to environmental issues. In essence, the resolution suggested that the House of Representatives anticipates that the Rhode Island Supreme Court will agree that a single clause of article I, section 17 is a "mini" reserved powers clause for environmental matters. The House expects the court to conclude that the fundamental constitutional principles of separation of powers, so overwhelmingly embraced by the voters in 2004, was not intended to apply to state governmental action with respect to the environment. That legislative reach, however, exceeds its grasp.

Although the CRMC exercises powers resembling legislative and judicial functions, they are only quasi-legislative and quasi-judicial in nature. These powers therefore do not constitute the constitutional exercise of legislative or judicial power. The only constitutional power an administrative entity such as the CRMC can exercise is executive power. Consequently, the 2004 amendments unmistakably prohibit legislators from serving as members of the CRMC, and unmistakably give the governor the

21. Id.
22. Id.
23. Id.
25. See, e.g., R.I. CONST. art. III, § 6 (amended 2004); id. at art. VI, §10 (repealed 2004); id. at art. IX, § 5 (amended 2004).
constitutional power to appoint its members.\textsuperscript{26} Clause 3 of section 17 cannot, and does not, trump the design and distribution of power established by the 2004 amendments.\textsuperscript{27} In fact, clause 3 is a \textit{limitation} on the only governmental power possessed by the legislative branch – the power to enact legislation – and not an extraordinary grant of combined legislative and executive power. The plain import of clause 3 is to impose a duty upon the General Assembly to enact a specific type of environmental legislation – legislation that preserves and protects the state's natural resources. Nothing in section 17 remotely suggests any intent to empower the General Assembly to exercise the executive authority to implement and administer environmental legislation it enacts.\textsuperscript{28}

The request for an advisory opinion, however, goes beyond the issues specifically related to the CRMC. It also raises a significant issue with respect to control over the pace and timing of implementing the 2004 amendments throughout state government. In its resolution, the House of Representatives also sought advice from the justices as to whether the governor's new appointment power was self-executing.\textsuperscript{29} The House sought to discover whether the governor's power was immediately vested in that office upon passage of the amendment, or whether the General Assembly must enact implementing legislation before the governor is permitted to exercise it.\textsuperscript{30} Given the two-year delay to date, and the struggle over the CRMC, the House of Representatives' apparent position is that the appointment power must remain dormant unless and until the General Assembly enacts appropriate implementing legislation.\textsuperscript{31} That view, however, is at odds with the modern constitutional view that holds a strong presumption in favor of self-executing constitutional provisions that are immediately executable – a presumption that exists precisely to prevent legislative control over when a power

\begin{itemize}
\item \textsuperscript{26} See R.I. Const. art. I, § 17.
\item \textsuperscript{27} See id.
\item \textsuperscript{29} See id.
\item \textsuperscript{30} See id.
\item \textsuperscript{31} See, e.g., Morgan v. Bd. of Sup'rs, 192 P.2d 236, 241 (Ariz. 1948); Davidson v. Sandstrom, 83 P.3d 648, 658 (Colo. 2004); Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960); Ohio ex rel. Russell v. Bliss, 101 N.E.2d 289, 291 (Ohio 1951); Beatty v. Wittekamp, 172 S.E. 122, 125 (S.C. 1933).
\end{itemize}
may be exercised, and prevents the will of the people from being frustrated by legislative inactivity.\textsuperscript{32}

Certainly the General Assembly may enact legislation imposing conditions on the governor's appointment power, subject to judicial review concerning the appropriate constitutional limits on any such conditions. It does not follow, however, that the governor's exercise of the appointment power must await such legislation. The amendment places only two limitations on the governor's appointment power. First, the appointments are subject to the advice and consent of the senate.\textsuperscript{33} Second, the power applies only to boards, commissions, or agencies that exercise executive power.\textsuperscript{34} Submitting appointments to the advice and consent of the Senate plainly requires no legislation to implement. While the power is limited to boards, commissions, or agencies that exercise "executive power," the concept of executive power is a constitutionally sufficient principle to guide the exercise of the governor's appointive power. If a dispute between the legislative and the executive branches arises over whether a particular entity exercises "executive power," settling that dispute would fall to the judicial branch.\textsuperscript{35}

This Article will demonstrate that the governor's appointment power is self-executing; that the CRMC exercises executive power in a constitutional sense; and that the governor, therefore, has the constitutional authority and duty to appoint all members of the CRMC. Further, this Article will show that article I, section 17 of the Rhode Island Constitution does not shield the CRMC, or any other state agency or council dealing with environmental matters from the impact of the 2004 amendments. Nor does article I, section 17 alter or affect the governor's appointment power or permit legislators to sit on the CRMC. To begin, however, it is necessary to briefly address four basic components to the questions at hand: (1) article I, section 17, (2) the CRMC, (3) the 2004 constitutional amendments, and (4) the questions submitted by the House of Representatives to the Rhode Island Supreme

\begin{footnotes}
\footnote{33. See R.I. CONST. art. IV, § 5 (amended 2004).}
\footnote{34. See id. at art. X, § 3 (stating that "[t]he judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly").}
\footnote{35. Id. at art. I.}
\end{footnotes}
ART. I, SEC. 17 – THE "PRIVILEGES OF THE SHORE" AND PROTECTION OF THE ENVIRONMENT

Article I of the Rhode Island Constitution sets forth a "Declaration of Certain Constitutional Rights and Principles." Along with individual constitutional rights, such as equal protection of the laws, due process, freedom of religion, and the right to trial by jury, Rhode Island citizens enjoy constitutional rights related to the "privileges of the shore." Since the adoption of Rhode Island's first constitution in 1843, article I, section 17 has provided: "[t]he people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state." In 1986, the legislature clarified section 17, to better describe what types of "privileges of the shore" were constitutionally protected. The legislature achieved this objective by adding the phrase: "including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore." Combining the two parts, the first clause of article I, section 17 declares:

The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore.

36. See id. at art. I, § 2.
37. See id.
38. See id. at art. I, § 3.
39. See id. at art. I, § 15.
40. Id. at art. I, § 17.
41. See id. See also R.I. CONST. art. I, § 17 (1842).
44. Id.
The Rhode Island Supreme Court has interpreted clause 1 as a codification of the common law public trust doctrine, a common law doctrine in existence at the time the state constitution was enacted. Under the common law, Rhode Island holds title to all tidal lands in a proprietary capacity for the benefit of the public. The state’s title, however, is characterized by “two separate yet tightly woven interests: the *jus privatum* and the *jus publicum*.” The *jus privatum* relates to the state’s title to tidal lands, whereas the *jus publicum* relates to the public rights to which the state’s title is subject, such as navigation and fishing. Thus, the state’s plenary authority over tidal lands is limited by the state’s common law public trust responsibilities, which are now embodied in the first clause of article I, section 17. Consequently, the common law accounts for the state’s title to tidal lands, while clause 1 of section 17 protects the rights comprising the privileges of the shore, thereby limiting the manner in which the state may exercise ownership of tidal lands.

While clause 1 restricts the exercise of governmental power with respect to public trust lands, the electorate augmented section 17 in 1970 to address legislative responsibility with respect to the whole of the environment generally. The electorate added a second clause, declaring that all the state’s citizens “shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values.” Finally, a third clause was added that declared:

and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to

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46. *Id.* at 1165 (citing Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1259 (R.I. 1999); Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1041 (R.I. 1995)).
47. *Id.* Tidal land is land lying seaward of the mean high water mark.
48. *Id.* at 1666 (citing Providence Steam-Engine Co. v. Providence and Stonington Steamship Co., 12 R.I. 348, 258 (1879) (Potter, J., concurring)).
49. *Id.* (citing Shively v. Bowlby, 152 U.S. 1, 13 (1894)).
51. *See, e.g.*, R.I. CONST. art. I., § 17; *Tillison*, 823 A.2d at 1166.
adopt all means necessary and proper by law to protect the natural environment of the people of this state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.\textsuperscript{53}

Clause 3 is, in essence, a constitutional environmental protection amendment. It directs the General Assembly to use its legislative power to conserve, preserve, protect, regenerate, and restore the natural environment of the state, by “provid[ing] adequate resource planning” and “adopt[ing] all means necessary and proper by law” for those purposes.\textsuperscript{54} One year after this mandate was placed in the state constitution, the legislature met this obligation with respect to a limited, but significant, portion of the state’s natural resources by creating the CRMC, “an administrative agency, charged with the responsibility of the preservation, protection, development and, where possible, the restoration of the state’s coastal resources.”\textsuperscript{55}

**THE COASTAL RESOURCES MANAGEMENT COUNCIL**

The current statutorily required composition of the CRMC consists of: two members of the House of Representatives appointed by the speaker, one of whom must represent a coastal community; two members of the senate appointed by the president of the senate, each of whom represents a coastal community; two members of the general public appointed by the speaker; two members of the public from coastal communities appointed by the speaker; four members appointed by the governor, all of whom must be appointed or elected officials of a local government; and three members of the public from coastal communities appointed by the governor with the advice and consent of the Senate.\textsuperscript{56} An appointee may only be removed for just cause, and then only by the authority making the appointment.\textsuperscript{57}

By statute, the CRMC’s primary responsibility is the

\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{56} See R.I. GEN. LAWS § 46-23-2(a) (1996 Reenactment).
\textsuperscript{57} Id. at § 46-23-2.1(d).
"planning for and management of the resources of the state's coastal region."\textsuperscript{58} The coastal region extends from two hundred feet upland of the mean high water mark, or to that distance "necessary to carry out effective resources management programs,"\textsuperscript{59} to below the mean high water mark "extending out to the extent of the state's jurisdiction in the territorial sea."\textsuperscript{60} In other words, the CRMC has jurisdiction over public trust tidal lands plus two hundred feet above mean high tide.

The CRMC is designated by law to be the principle mechanism for management of the coastal resources in Rhode Island,\textsuperscript{61} and is charged with measuring, judging, and regulating all environmental alterations of coastal resources.\textsuperscript{62} It is the CRMC's primary responsibility to plan and manage coastal resources by identifying their potential problems as well as uses, and then create programs to address them.\textsuperscript{63} Statutory authority exists\textsuperscript{64} that enables the CRMC to adopt rules and regulations consistent with the Administrative Procedures Act (APA), to implement the various management programs it devises,\textsuperscript{65} and to grant permits, licenses and easements.\textsuperscript{66}

To execute and enforce its programs and policies, the CRMC employs a "commissioner of coastal resources management."\textsuperscript{67} The commissioner has the power to order violators to cease and desist from activities in the state's coastal region.\textsuperscript{68} The commissioner has the authority to remedy violations if activities violate the provisions of Chapter 23 "or any rule, regulation, assent, order or decision of the counsel."\textsuperscript{69} If the violating party does not remedy its action, or if the violator does not obey the commissioner's order, either the CRMC's chairperson or the executive director may assess an administrative penalty in

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{58} Id. at § 46-23-6(1)(i).
\item \textsuperscript{59} Id. at § 46-23-6(2)(iii).
\item \textsuperscript{60} Id. at § 46-23-6(2)(ii)(A).
\item \textsuperscript{61} Id. at § 46-23-1(c).
\item \textsuperscript{62} Id. at § 46-23-1(a).
\item \textsuperscript{63} Id. at § 46-23-6(1)(i), (ii).
\item \textsuperscript{64} Id. at § 42-35-1 to § 42-35-18.
\item \textsuperscript{65} See, e.g., id. at § 46-23-6(2)(i); id. at § 46-23-11.
\item \textsuperscript{66} Id. at § 46-23-16.
\item \textsuperscript{67} Id. at § 46-23-4.1.
\item \textsuperscript{68} Id. at § 46-23-7(a)(1).
\item \textsuperscript{69} Id. at § 46-23-7(a)(1).
\end{enumerate}
\end{footnotesize}
accordance with certain statutory guidelines. Additionally, administrative or judicial proceedings may be instituted to enforce the CRMC's programs, rules, regulations or orders. All contested cases are required by statute to be heard before administrative hearing officers appointed by the governor with the advice and consent of the senate. The hearing officer then makes proposed findings of fact and conclusions of law that are submitted to the CRMC, which may, with an appropriate written rationale, adopt, modify, or reject them.

In sum, the CRMC is a quintessential independent regulatory agency. It is "a form of administrative government that is responsible to regulate human activities and is placed outside any cabinet department and under the leadership of a college of commissioners." It is a "combined-function agency" which makes the rules, investigates, prosecutes, and adjudicates, all with the aim of enforcing and thus executing the laws enacted by the legislature with respect to Rhode Island's coastal resources.

THE 2004 AMENDMENTS

In 2004, the electorate approved several changes to the state constitution that were specifically designed to alter the existing distribution of power between Rhode Island's executive and legislative branches. Although the state constitution has always commanded that "[t]he powers of government shall be distributed into three departments: the legislative, executive and judicial," this clause was amended to emphasize that the departments and their respective powers were to be truly separate and distinct. Specifically, the clause declared that "[t]he powers of government shall be distributed into three separate and distinct departments: the legislative, executive and judicial."

Next the state's chief executive received a constitutional appointment power that the office had not previously possessed.

70. Id. at § 46-23-7.1 to 7.2.
71. Id.
72. Id. at § 46-23-20 to 20.1.
73. Id. at § 46-23-20.4 (1996).
75. Id. at 617 (footnote omitted).
77. Id. (emphasis added).
The electorate approved article IX, section 5, which provided:

The governor shall, by and with the advice and consent of the senate, appoint all officers of the state whose appointment is not herein otherwise provided for and all members of any board, commission or other state or quasi-public entity which exercises executive power under the laws of this state; but the general assembly may by law vest the appointment of such inferior officers, as they deem proper, in the governor, or within their respective departments in the other general officers, the judiciary or in the heads of departments. 78

In addition to giving the executive branch the power to appoint all members of any boards or commissions exercising "executive power under the laws of this state," or any state or quasi-public entity exercising such power, the state constitution was amended further to specifically prohibit any state senator or representative from sitting as a member of any such entity. 79

Article III, section 6 now provides:

No senator or representative shall, during the time for which he or she was elected, be appointed to any state office, board, commission or other state or quasi-public entity exercising executive power under the laws of this state . . .

and further that:

No person holding any executive office or serving as a member of any board, commission or other state or quasi-public entity exercising executive power under the laws of this state shall be a member of the senate or house of

78. Id. at art. IX, § 5. Under the Federal Constitution the President holds a similar appointments power. U.S. CONST. Art. II, § 2 provides that:

[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appointment Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

representatives during his or her continuance in office.80

Lastly, in order to emphasize the new constitutional governmental structure, the reserved powers clause, which originally provided: "[t]he general assembly shall continue to exercise the powers it has heretofore exercised, unless prohibited by this Constitution," was repealed in its entirety.81

QUESTIONS POSED TO THE RHODE ISLAND SUPREME COURT

On May 31, 2006, house bill, 06-H 8170, "An Act Relating to Waters and Navigation - Coastal Resources Management Council" was introduced and referred to the House Separation of Powers Committee.82 If enacted, this bill would have repealed chapter 23 of Title 46, - the chapter creating, organizing and empowering the CRMC.83 In its place, the bill would have enacted chapter 23.3, a chapter identical in every respect to the current chapter 23.84 In the resolution seeking an advisory opinion, the House of Representatives indicated the proposed legislation was intended to carry out the General Assembly's duty under clause 3 of article I, section 17:

> to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state . . . and for the preservation, regeneration and restoration of the natural environment of the state.85

Notwithstanding the 2004 separation of powers amendments, house bill 06-H 8170 would continue to permit members of the

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80. Id. The corresponding provision in the Federal Constitution provides: [N]o Senator or Representative shall, during the Time for which he was elected, he appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. CONST. Art. I, § 6, cl. 2 (emphasis added).


83. Id.

84. Id.

legislature to sit as members of the CRMC, and to divide the appointment power among the speaker of the house, the president of the Senate, and the governor.\footnote{86} The House of Representatives sought the Rhode Island Supreme Court's advice on the constitutionality of that continued arrangement in light of the 2004 amendments by posing the following three questions:

(1) Would the proposed act, if duly enacted into law, which permits members of the General Assembly to sit as members of the Coastal Resources Management Council (CRMC) . . . violate the constitutional amendment to Article IX, Section 5, so-called Separation of Powers Amendment, passed by the electorate on November 2, 2004, which calls into question the constitutionality of the appointing authority?

(2) Would the proposed act, if duly enacted into law, permit the Speaker of the House to appoint public members to the Coastal Resources Management Council (CRMC) . . .?

(4) Is the Coastal Resources Management Council (CRMC) by its nature, purpose, and operation a legislative function?\footnote{87}

Lastly, the House of Representatives posed a fourth question not specifically related to the CRMC.\footnote{88} This question related solely to article IX, section 5, the 2004 amendment giving the governor appointing authority for all state and quasi-public entities exercising executive power. The question stated: "(3) Is the Constitutional Amendment to Article IX, Section 5, so-called Separation of Powers Amendment, passed by the electorate on November 2, 2004, which calls into question the constitutionality of the appointing authority, self-executing or does it require legislative enactment for its implementation?"\footnote{89}

On November 22, 2006, however, the justices issued an order stating "we are unable to entertain the request set forth in the . . .

\footnotesize{88. Id.}
\footnotesize{89. Id.}
House resolution.”90 The justices explained that they “refrain from answering requests for advisory opinions from either House of the General Assembly when the composition of the legislative body that propounded the question inevitably will change as a result of an intervening general election.”91

Taking notice of the fact that a Rhode Island general election was held on November 7, 2006, the justices reasoned that given the passage of time and “the fact that this Court has not yet issued an Order requesting briefing from the parties or setting a date for oral argument, we will not reasonably be able to respond before the newly composed House is engaged this January [2007].”92 The justices did remark, however, that:

Our decision herein must not be interpreted as an attempt to diminish the gravity of the issues presented by this request for our advisory opinion. Clearly, the Honorable House of Representatives as constituted as of January 2, 2007, may adopt a new resolution, propounding these same inquiries to the justices of this Court.93

Notwithstanding the justices’ caution in addressing the 2004 amendments for the first time in an advisory opinion, the issues presented by the House resolution present the first test of the meaning, scope, and strength of the amendments, and how they will be implemented. Whether addressed in 2007 by the justices in the legal arena, or by elected representatives in the legislative arena, they must be addressed. Considering that two years have passed since the voters approved a redistribution of governmental power, and significant questions have yet to be resolved, this Article will attempt to address them here and now.

The House directed three questions (questions 1, 2, and 4) to the Rhode Island Supreme Court to determine whether the state constitution still permits legislators to sit on the CRMC or to appoint other persons who will. That arrangement can only be constitutional, however, under one of two circumstances. The first

91. Id. at 275.
92. Id.
93. Id. at 276.
circumstance is narrow while the other is potentially very broad. The narrow circumstance is if the CRMC does not in fact exercise "executive power under the laws of this state." The broader and potentially more far-reaching issue is with regard to the invocation of clause 3 of article I, section 17 by the General Assembly. Assuming the CRMC does exercise executive power, several questions arise. Is the General Assembly's duty under clause 3 to "provide for the conservation of the ... natural resources of the state," and "to adopt all means necessary and proper by law to protect the natural environment," a grant of sole and exclusive combined governmental power with respect to environmental matters? If so, this grant of power would permit the legislature to configure and control the CRMC without regard to the 2004 separation of powers amendments. Or is clause 3 instead a restriction on the legislative power as are all the other protections of article I's "Declaration of Certain Constitutional Rights and Principles"? Is clause 3 a directive on how the General Assembly must exercise its legislative power, thereby constitutionally obliging the General Assembly to enact only environmental legislation that is consistent with "the preservation, regeneration and restoration of the national environment of the state," setting that as the constitutional standard by which environmental legislation must be judged? In order to resolve these issues, it is important to understand some of Rhode Island's constitutional history leading up to the 2004 amendments to the state constitution, a constitutional history that is necessarily related to America's constitutional history.

DISTRIBUTION AND SEPARATION OF GOVERNMENTAL POWER – A FUNDAMENTAL ASPECT OF THE AMERICAN GOVERNMENTS FORMED BETWEEN 1776 AND 1787

"Perhaps no principle of American constitutionalism has attracted more attention than that of separation of powers. It has in fact come to define the very character of the American political

96. R.I. CONST. art. I.
97. Id. at art. I, § 17.
An early articulation of the principle by the French political philosopher Montesquieu declared: "When the legislative and executive powers are united in the same person, in the same body of magistrates, there can be no liberty."99 Americans, however, in 1776, and more emphatically in the subsequent decade through 1787, elevated the doctrine into what James Madison would call "a first principle of free government."100 This principle was "born during the state constitution-making period between 1775 and the early 1780s."101 Initially, Americans were mostly concerned with prohibitions against dual-office holding.102 As a result, they gave only verbal recognition to separation of powers in the early post-Revolutionary state constitutions.103 After 1776, however, concerns arose with respect to "the effects of legislative sovereignty and the unanticipated excesses of the Revolutionary constitutions."104 The principle of separation of powers was invoked to address "what seemed to be a dangerous blurring of the three major functions of government," the executive, legislative, and judicial.105 According to historian Gordon S. Wood, nearly all of the proposals for constitutional change occurring between 1776 and 1787 were means of separating these three functions of government.106

The assumption behind this remarkable elaboration and diffusion of the idea of separation of powers was that all governmental power, whether in the hands of governors, judges, senators, or representatives, was essentially indistinguishable;

* * *

By the 1780's many had come to believe that the principle

99. Id. at 152 (quoting MONTESQUIEU, SPIRIT OF THE LAWS 151-52 (Newmann Bk. XI, Sec. 6)).
100. Id. (quoting James Madison, PHILADELPHIA NATIONAL GAZETTE, Feb. 6, 1792; THE WRITINGS OF JAMES MADISON 91 (Gaillard Hunt, ed.)).
102. Wood, supra note 98, at 153-54, 156.
103. Id.
104. Id. at 451.
105. Id.
106. Id. at 452.
of separation of powers was "the basis of all free governments," the most important attribute of the kinds of governments they had fought for.\textsuperscript{107}

It embodied the political philosophy that, in Thomas Jefferson's words, "the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."\textsuperscript{108}

Separation of powers, whether describing executive, legislative, and judicial separation or the bicameral division of the legislature . . . was simply a portioning of political power, the creation of a plurality of discrete governmental elements, all detached from yet responsible to and controlled by the people, checking and balancing each other, preventing any one power from asserting itself too far. The libertarian doctrine of separation of powers was expanded and exalted by the Americans to the foremost position in their constitutionalism, premised on the belief, in John Dickinson's words, that "government must never be lodged in a single body."\textsuperscript{109}

In short, the belief took hold that "[t]he separation of this governmental power, rather than simply the participation of the people in a part of government, became the best defense of liberty," and protection against the potential abuse of governmental power.\textsuperscript{110}

RHODE ISLAND'S EARLY SEPARATION OF POWERS DOCTRINE – IMPLIED PROHIBITION

Despite the evolution and general recognition of separated and distributed powers as an important principle of American government in the years following independence, Rhode Island's charter government did not embrace the principle of separation of power. Following the Declaration of Independence, the authority of general sovereignty passed to each of the former colonial states,

\textsuperscript{107} Id. at 453 (quoting PORTSMOUTH N.H. GAZETTE, March 15, 1783).
\textsuperscript{108} Id. (quoting THOMAS JEFFERSON, NOTES ON VIRGINIA, 120 (Peden, ed.)).
\textsuperscript{109} Id. at 604.
\textsuperscript{110} Id. at 608.
and Congress passed a resolution advising the colonies to form new governments.\textsuperscript{111} While most colonies formed governments adhering to the notion of separation of powers,\textsuperscript{112} Rhode Island did not.\textsuperscript{113} Rhode Island's original Royal Charter of 1663 remained its governing document,\textsuperscript{114} revised only to eliminate references to the crown.\textsuperscript{115} Under the Royal Charter, the General Assembly possessed and controlled all the attributes of sovereignty,\textsuperscript{116} and it exercised "every kind of governmental power, legislative, executive, and judicial."\textsuperscript{117}

By 1841, however, "the omnipotence and adamancy of the legislature," along with limited suffrage and increasing mal-apportionment, became grievances severe enough for the establishment of a new constitutional document.\textsuperscript{118} The text of the constitution adopted in 1842, unlike the earlier federal constitution, contained an explicit distribution of powers clause that declared: "[t]he powers of government shall be distributed into three departments; the legislative, executive, and judicial."\textsuperscript{119} The distribution of powers clause vested in the governor, the "chief executive power," thereby requiring him or her to "take care that the laws be faithfully executed."\textsuperscript{120} The clause vested the judicial power "in one supreme court, and in such inferior courts as the general assembly may, from time to time, ordain and establish"\textsuperscript{121} and the legislative power "in two houses, the one to be called the senate, the other the house of representatives; and both together

\textsuperscript{112} Id. at 990.
\textsuperscript{113} Id.
\textsuperscript{114} In re Advisory Opinion (Chief Justice), 507 A.2d 1316, 1330 (R.I. 1986) (Kelleher, J., dissenting).
\textsuperscript{115} Wood, supra note 3, at 913.
\textsuperscript{117} Gorham v. Robinson, 186 A. 832, 839 (1936); see also City of Providence v. Moulton, 160 A. 75, 78 (1932) (under the Charter, the General Assembly "exercised supreme legislative, executive and judicial power").
\textsuperscript{119} R.I. CONST. of 1842, art. III (1843).
\textsuperscript{120} Id. at art. VII, §§ 1, 2.
\textsuperscript{121} Id. at art. X, § 1.
the general assembly."\textsuperscript{122} The new constitution, however, also contained a separate provision related to the legislature, declaring that: "[t]he general assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this constitution."\textsuperscript{123}

Notwithstanding the nominal distribution of powers among three different governmental entities, the General Assembly continued to exercise both ultimate judicial power,\textsuperscript{124} and "substantial executive functions," including appointments to "executive-type boards."\textsuperscript{125} The General Assembly's post-constitution exercise of judicial power was the subject of \textit{In re Dorr},\textsuperscript{126} and \textit{Taylor v. Place},\textsuperscript{127} the first judicial decisions to address the new state constitution's text, organizational structure, and governing principles.

\textit{In re Dorr} considered the General Assembly's constitutional authority to enact legislation "to reverse and annul the judgment of the Supreme Court of Rhode Island for treason rendered against Thomas W. Dorr."\textsuperscript{128} The court issued an advisory opinion, which concluded that the General Assembly no longer had authority to exercise "judicial" power.\textsuperscript{129} The justices based their conclusion on the premise that where the constitution's text vested one branch with legislative authority and another with judicial, "[e]ach is vested with exclusive power in its appropriate sphere," and "[t]he power exclusively conferred upon the one department is, by necessary implication, denied to the other."\textsuperscript{130} The justices concluded that the object of the constitution was to guard against the "union of all the powers of government in the

\begin{itemize}
\item\textsuperscript{122} \textit{Id.} at art. IV, §§ 2, 10.
\item\textsuperscript{123} \textit{Id.}
\item\textsuperscript{124} \textit{See Taylor v. Place, 4 R.I. 324, 348-49 (1856).} The first digest of laws enacted after the constitution became effective, the \textit{General Laws of 1844}, contained an act modernizing the method of petitioning the General Assembly for review of decisions of the court. \textit{See} Patrick T. Conley, \textit{Article VI, Section 4: A Case Study in Constitutional Obsolescence}, 53 R.I. B.J. 7, 9 (2004).
\item\textsuperscript{125} \textit{In re} Advisory Opinion to the Governor, 732 A.2d 55, 64 (R.I. 1999).
\item\textsuperscript{126} \textit{In re} Dorr, 3 R.I. 299, 300 (R.I. 1854).
\item\textsuperscript{127} \textit{Taylor}, 4 R.I. at 324.
\item\textsuperscript{128} \textit{Dorr}, 3 R.I. at 299. The judgment was rendered on June 25, 1844. \textit{Id.}
\item\textsuperscript{129} \textit{Id.}
\item\textsuperscript{130} \textit{Id.} at 300-01.
\end{itemize}
same hands,” and the judicial power conferred on the courts was “necessarily prohibited to the General Assembly.”

Addressing the reserved powers clause, the justices concluded the term “power” as used in this clause meant the General Assembly could continue to exercise the legislative power it previously exercised, not the judicial power it had exercised prior to the constitution’s adoption. Section 10 did not “reserve” the authority of the General Assembly to exercise judicial power as it had prior to the constitution’s enactment, because, as the justices’ concluded:

all judicial power . . . is prohibited to the General Assembly[,] by implication, it is true - but the prohibition is as strong as if it were expressed.

To construe the section, therefore, as conferring judicial power, would bring its two points in direct conflict with each other, and render the whole nugatory; for as all judicial power is prohibited to the General Assembly by other provisions of the Constitution, none would be conferred by [Section 10].

The justices found it would be “unreasonable” to conclude the constitutional text permitted “unit[ing] in one body” the powers that previous provisions had specifically vested in several bodies, “more especially when we recollect that the distribution of these powers is declared by the constitution to be its fundamental principle.”

Two years later, in Taylor v. Place, the Rhode Island Supreme Court again addressed the same question - whether the General Assembly could exercise judicial power under the state constitution as it had under the charter. In holding that it could not, the court related the political philosophy of Montesquieu to the new state constitution’s distribution of

131. Id. at 301.
132. Id. at 304.
133. Id. (emphasis added).
134. Id. at 304-05 (emphasis added).
135. Taylor v. Place, 4 R.I. 324, 324 (1856). Taylor involved a justiciable case or controversy between adversaries and was therefore a decision by the court exercising judicial power, as opposed to Dorr, which was a non-judicial advisory opinion.
powers. The court stated that “[t]here can be no liberty where the legislative and executive powers are united in the same person or body of magistrates”; or, “if the power of judging be not separated from the legislative and executive powers.”

The court began its analysis by setting forth the pertinent distribution of powers provisions of the new constitution. Article III, section 1 distributed the powers of government into three departments: the legislative, the executive, and the judicial. Article IV, section 2 vested “the legislative power under the constitution” in the general assembly. Article VII, section 1 vested “the chief executive power” in the governor. Article X, section 1 vested the “judicial power of this State” in the supreme court and in inferior courts established by the General Assembly. Lastly, Article IV, section 10 contained a reservation, providing that “[t]he general assembly shall continue to exercise the powers they have hitherto exercised, unless prohibited in this constitution.”

To the 1856 Rhode Island Supreme Court, “the unity of design and purpose manifested in” these provisions was obvious. The provisions had to be read in light of the principle of the separation of the powers of government, which had a “well known history” and a “long and firmly established meaning and purpose.” The new state constitution distributed the powers of government between different departments “for the purpose of excluding each department from exercising those appropriate to the others.”

Equally significant, if not more so, the court embraced and applied the rule that “[a]ffirmative words, vesting power under a constitution, are construed as prohibiting the exercise of the power by all other departments of the government . . . when otherwise, the words would have no operation at all, or would not have their full and proper operation.” The implied prohibition

136. Id. at 341.
137. Id.
139. Id. at art. IV, § 2.
140. Id. at art. VII, § 1.
141. Id. at art. X, § 1.
142. Id. at art. IV, § 10.
144. Id.
145. Id. at 354 (emphasis added).
146. Id. at 358 (emphasis in original). The court noted this rule had
against legislative exercise of the powers explicitly delegated to the judicial and executive departments was so plain, so unavoidable, that it was "equivalent to an express . . . prohibition." Consequently, although the General Assembly had exercised judicial power, this clause did not reserve the exercise of that power. Exercise of judicial power by the General Assembly was "prohibited in this constitution" by the vesting of that power in the courts. In other words, the judicial power had been specifically divested from the General Assembly.

After Taylor, the court continued to voice approval of the "implied prohibition" theory of the state constitution's separation of powers. In Payne & Butler v. Providence Gas Company, the court recognized that, unlike the federal constitution, the object of a state constitution "is not to grant legislative power, but to confine and restrain" its power. The power starts as plenary, and the limitations on that power "are created and imposed by express words, or arise by necessary implication." In fact, the court emphasized:

The leading feature of the Constitution is the separation and distribution of the powers of the government. It always been applied to the clauses distributing the powers of government in American constitutions and that it would "apply to the same clause of our constitution." Id. (citing Marbury v. Madison, 5 U.S. 137 (1803)) (emphasis added).

147. Id. at 359 ("[T]he affirmative words giving a class of powers to one department, no less plainly and imperatively prohibit the exercise of them by another.").

148. Id. at 361.

149. The court has vigilantly and continuously guarded against the General Assembly's attempted exercise of essentially judicial power throughout our state history. See, e.g., City of Providence v. Employee Retirement Bd., 749 A.2d 1088, 1098 (R.I. 2000); State v. Almonte, 644 A.2d 295, 298 (R.I. 1994); Bartlett v. Danti, 503 A.2d 515, 517 (R.I. 1986); Lemoine v. Martineau, 342 A.2d 616, 620 (R.I. 1975); State v. Garnetto, 63 A.2d 777, 779-80 (R.I. 1949). It has also sent polite messages concerning potential violations of the separated judicial and legislative powers. See State v. Price, 672 A.2d 893, 896 n.2 (R.I. 1996) ("Given our holding in Taylor and our conclusion that the power to punish for contempt rests inherently in the courts, were the General Assembly to enact legislation regulating the contempt powers of this state's courts, such action could give rise to a fundamental issue of separation of powers.").

150. 77 A. 145 (1910).

151. Id. at 154 (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 241 (7th ed. 1903)).
takes care to separate the executive, legislative, and judicial powers, and to define their limits. The executive can do no legislative act, nor the Legislature any executive act, and neither can exercise judicial authority.\textsuperscript{152}

Thus, the plenary power of the General Assembly, namely "all the powers of the crown and parliament . . . other than those which the constitution textually commits to other branches of our state government",\textsuperscript{153} is a plenary legislative power.\textsuperscript{154} "[T]he state legislature has jurisdiction of all subjects on which its legislation is not prohibited,"\textsuperscript{155} but not the plenary power to exercise \textit{all of the several powers} of government.\textsuperscript{156}

Although the court in Taylor was specifically concerned with the legislature's continued exercise of judicial power, its strong implied prohibition rationale also logically and necessarily applied to the legislature's continued exercise of executive powers. The court did not address that issue, however, until 1999.\textsuperscript{157} But rather than applying an "implied prohibition" rationale to prevent the general assembly's exercise of executive power, the court applied an "implied authorization" rationale.\textsuperscript{158} This rationale permitted members of the legislature to continue to sit on, and appoint individuals to, agencies, commissions and boards administering and executing laws passed by the General Assembly, notwithstanding the explicit constitutional text

\textsuperscript{152} Id. Accord Creditor's Serv. Corp. v. Cummings, 190 A. 2, 8 (R.I. 1937) ("The constitutional distribution of the powers of government is at once a grant of specific power to each department and a prohibition to the other two with reference to that same power.").


\textsuperscript{154} Kass, 567 A.2d at 361; Payne & Butler, 77 A. at 154.

\textsuperscript{155} 77 A. at 154 (emphasis added).

\textsuperscript{156} See 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, 163-64 (1998) ("Focus on the meaning of 'legislative power' is still necessary even where broad, plenary state legislative power is recognized . . . [t]he legislative power is, itself, conceptually limited to the notion of 'legislating.'").

\textsuperscript{157} In re Advisory Opinion to the Governor (R.I. Ethics Comm'n - Separation of Powers), 732 A.2d 55 (R.I. 1999).

\textsuperscript{158} Id. at 71-72.
distributing the powers of government, and installing the chief executive power in the governor.\textsuperscript{159}

\textbf{ABANDONING IMPLIED PROHIBITION FOR IMPLIED AUTHORIZATION}

\textit{In re Advisory Opinion to the Governor (Rhode Island Ethics Commission - Separation of Powers)}\textsuperscript{160} considered the authority of the state Ethics Commission to enact an ethics regulation that would have prohibited members of the legislative branch from sitting on, or appointing representatives to, all state executive, public and quasi-public boards, authorities, corporations, commissions, councils, or agencies, unless the entity either functioned solely in an advisory capacity to the legislature or exercised "solely legislative functions."\textsuperscript{161} Four of the five justices concluded that the ethics commission's constitutional authority to adopt a code of ethics under article III, section 8 did not provide it with the power to adopt such a regulation.\textsuperscript{162} The justices set forth two basic reasons.

First, the justices concluded article III, section 8 of the 1986 constitution, which mandated the creation of the Ethics Commission, did not authorize the Commission "to adopt a regulation that presumes and predetermines \textit{a priori}, without evidence of violation and without providing a hearing," that a legislator sitting on a board, or appointing someone to a board, was guilty of a conflict of interest, nor was such an arrangement inherently unethical.\textsuperscript{163} Secondly, the justices determined that the state constitution did not prohibit legislative participation on, or appointments to, "executive-type boards."\textsuperscript{164} They determined that, as an historical matter, "legislative appointment of executive-type boards has been a long-standing practice in this state even under the first Constitution as early as 1844."\textsuperscript{165} The court further noted that the practice had continued "well into the 20\textsuperscript{th} century," with the legislature exercising "substantial

\begin{footnotes}
\item[159] \textit{Id.}
\item[160] \textit{Id. at 55.}
\item[161] \textit{Id. at 57.}
\item[162] \textit{Id. at 65.}
\item[163] \textit{Id. at 66, 69.}
\item[164] \textit{Id. at 64.}
\item[165] \textit{Id. at 64-65.}
\end{footnotes}
executive functions."\textsuperscript{166}

The court focused on three issues: the lack of a specific appointment clause on behalf of the chief executive similar to that contained in the federal constitution, the absence of a prohibition on dual office holding such as in Article I, section 6 of the Federal Constitution, and the 1986 constitutional convention's readoption of the reserved powers clause.\textsuperscript{167} The justices concluded that they "discern no authority in our 1986 state constitution suggesting that any of its provisions were intended to remove from the General Assembly its long acknowledged authority and practice to appoint individuals from its membership to state governmental public boards, commissions, or agencies."\textsuperscript{168} They construed the re-adoption of the reserved powers clause as a specific "reaffirmation of the [appointment] powers historically exercised by the Legislature under the prior constitution."\textsuperscript{169}

Absent from the justices' advisory opinion, however, was any discussion of the distribution of powers under article III, section 1, or the "implied prohibition" analysis that was so predominant in Taylor v. Place and which the court has resorted to continuously in order to constitutionally restrain the legislative exercise of judicial power. Instead of applying the implied prohibition rationale to likewise restrain the legislature's exercise of executive power, the justices relied on past historical practice, notwithstanding its apparent conflict with the distribution of powers clause.\textsuperscript{170} The justices opined that "the sole and proper procedure for restricting legislators from serving on or appointing any other person to executive boards and commissions [was] through an amendment to the constitution approved by the electorate."\textsuperscript{171} In fact, the advisory opinion encouraged a citizen movement leading precisely to that result.

\textsuperscript{166} Id.
\textsuperscript{167} Id. at 64-65, 71.
\textsuperscript{168} Id. at 71.
\textsuperscript{169} Id. at 63 (quoting Kass v. Ret. Bd. of the Employees' Ret. Sys., 567 A.2d 358, 361 (R.I. 1989) (emphasis added)).
\textsuperscript{170} Id. at 72.
\textsuperscript{171} Id. (internal quotations omitted).
THE 2004 AMENDMENTS – PROHIBITING THE LEGISLATIVE EXERCISE OF EXECUTIVE POWER

The separation of powers constitutional amendments, proposed by the General Assembly and approved by 78% of the voters in November 2004, addressed and attacked the very basis for the 1999 advisory opinion's conclusion. The opinion concluded that there was no constitutional impediment to legislators sitting on state entities administering and implementing the laws, or to the General Assembly or its members appointing the individuals who would exercise that authority.

First, to emphasize a complete departure from "the powers historically exercised by the Legislature under the prior constitution," including appointments to "executive type boards," the reserved powers clause was eliminated. Whereas the retention of that clause in the 1986 constitution signified to the justices an assent to the powers historically exercised by the legislature, its repeal in 2004 signified an explicit rejection of the historical exercise of those powers. In the absence of the reserved powers clause, which had been used to cloud the distribution of legislative and executive power seemingly mandated by the distribution of powers clause, that distribution of powers became endowed with a correspondingly greater meaning and purpose.

Equally significant, the intended separation of legislative, executive, and judicial power was fortified by changing article V's mandate that "[t]he powers of government shall be distributed into three departments," to the substantially more specific mandate that those powers "shall be distributed into three separate and distinct departments." The clear implication of this change is that the power vested in one department could not be exercised by the other departments vested with "separate and

173. Id.
175. R.I. CONST. art. VI, § 10.
176. Id. at art. V.
distinct" powers.\textsuperscript{177} The addition of the phrase "separate and distinct" underscored that, not only were the legislative, executive, and judicial powers to be \textit{distributed} among three different branches, but that both the powers and \textit{the exercise} of those distributed powers was to be \textit{separate and not shared}. Together these two changes were an explicit pronouncement by the people that the legislature shall not exercise executive power, as clear and forceful as the pronouncement by the Rhode Island Supreme Court in \textit{Taylor v. Place} that the legislature shall not exercise judicial power.

The amendment of the distribution of powers clause\textsuperscript{178} and the repeal of the reserved powers clause\textsuperscript{179} addressed the distribution and separation of powers generally. The remaining two amendments, however, targeted a specific part of state government exercising increasing power and influence in governing, namely statutorily created administrative and regulatory entities.

The growth of administrative and regulatory agencies at both the state and federal levels has been described as "massive," with state agencies approaching their federal counterparts in both size and power.\textsuperscript{180} This expanding administrative state has occurred in Rhode Island, with one study concluding that Rhode Island has 429 agencies, boards, and commissions; as many as seventy-three perform executive functions.\textsuperscript{181} The 2004 amendment to article III, section 6 specifically prohibits senators or representatives from being "appointed to any state office, board, commission or other state or quasi-public entity exercising executive power under the laws of [Rhode Island]."\textsuperscript{182} More importantly, the amendment to article IX, section 5 shifted the power of appointment over entities exercising executive power, formerly exercised by the legislature, to the governor, who "shall, by and with the advice and consent of the senate, appoint . . . all members of any board commission or

\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{Id.} at art. VI, § 10.
\textsuperscript{182} R.I. CONST. art. III, § 6.
other state quasi-public entity which exercises executive power under the laws of this state."\(^{183}\)

The separation and distribution of powers in the 1842 constitution was arguably focused to a significant degree on halting the General Assembly's exercise of judicial power, and to enhance the role of the judiciary.\(^{184}\) The separation and distribution of powers adopted by the people in 2004, however, was *unarguably* designed to halt the General Assembly's exercise of executive power, and to enhance the role of the executive.\(^{185}\) Any analysis of a legislative attempt to control or exercise executive functions performed by administrative and regulatory entities such as the CRMC must be informed by, and responsive to, the historic mandate represented by the 2004 amendments.

**THE CRMC EXERCISES THE EXECUTIVE POWER OF GOVERNMENT**

With respect to the applicability of the 2004 amendments to the CRMC, one must first determine whether the CRMC "exercises executive power under the laws of this state."\(^{186}\) To determine whether it does, it is helpful to determine what constitutional powers it *does not exercise*. Because it does not exercise either judicial or legislative power in a constitutional sense, it therefore must exercise the only power left – the executive power.

The Rhode Island Supreme Court has previously held that the CRMC, although it exercises quasi-judicial power, does not exercise constitutional judicial power.\(^{187}\) The administrative hearings of the CRMC "are not judicial in nature, for the 'tribunal' is totally lacking in power to enforce its purported decree."\(^{188}\) A decision of the CRMC, after a hearing, is not enforceable by virtue of its own power.\(^{189}\) Instead, the CRMC must apply to a court of

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\(^{183}\) *Id.* at art. IX, § 5.


\(^{185}\) *Id.*

\(^{186}\) R.I. Const. art. IX, § 5. *See also* R.I. Const. art. III, § 6 ("exercising executive power under the laws of this state").


\(^{188}\) *Id.* (citing Taylor v. Place, 4 R.I. 324, 336 (1856)).

\(^{189}\) *Id.* (citing R.I. Gen. Laws § 46-23-7 (1996)).
competent jurisdiction for enforcement of its determination.\textsuperscript{190} Because the CRMC's authority is exercised "subject to judicial intervention at the appropriate juncture in the proceedings[,]" the court has held that "the CRMC does not exercise judicial power."\textsuperscript{191}

Neither does the CRMC exercise "legislative power" in a constitutional sense. Article VI, section 2 vests the legislative power of government "in two houses, the one to be called the senate, the other the house of representatives, and both together the general assembly [, and t]he concurrence of the two houses shall be necessary to the enactment of laws."\textsuperscript{192} It is the enactment of laws that is the constitutional exercise of legislative power, and in American constitutional law, the bicameralism requirement serves as a restraint on the exercise of legislative power and an internal check within the legislative department itself.\textsuperscript{193} By dividing the legislative power between two distinct houses, and requiring the concurrence of both for the passage of law, bicameralism works to ensure that legislation is carefully and fully considered before it becomes law.\textsuperscript{194}

The constitutional exercise of legislative power also has an additional requirement – presentment.\textsuperscript{195} Article IX, section 14 requires that bills, resolutions, and votes that have been passed by both houses of the General Assembly "shall be presented to the governor[,]" who has a qualified right to reject the proposed law.\textsuperscript{196} If the governor vetoes the proposed law, it may not become operative unless passed by a three-fifths vote in each house.\textsuperscript{197} The decision to provide the chief executive with a limited and qualified power to nullify proposed legislation by veto is based on the belief that the legislative power should be circumscribed even

\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id. Compare} Michigan Chiropractic Council v. Comm'n of the Office of Fin. Servs., 716 N.W.2d 561, 567 n.18 (Mich. 2006) ("[A]n administrative agency does not possess 'judicial power'; rather, the authority of the administrative agency is derived from the statute that created it.").
\textsuperscript{192} R.I. CONST. art. IX, § 14.
\textsuperscript{193} \textit{See} Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 948-49 (1983).
\textsuperscript{194} \textit{Id. at} 949.
\textsuperscript{195} \textit{Id. at} 946-47.
\textsuperscript{196} R.I. CONST. art. IX, § 14.
\textsuperscript{197} \textit{Id.}
beyond the bicameralism requirement. This power provides the executive with an "effectual power of self defense" against legislative invasion of the rights of the executive, and protects against "oppressive, improvident, or ill-considered measures." In sum, it serves as an executive check upon the legislative branch superimposed over the internal check created by the requirement of bicameralism.

The United States Supreme Court has described the dual requirement of bicameralism and presentment as a "prescription for legislative action," which represents a decision that legislative power "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Since constitutional legislative power can only be exercised by the House of Representatives and the Senate, and only after complying with the requirements of bicameralism and presentment, the CRMC cannot exercise the legislative power authorized by the constitution. Consequently, because the CRMC does not, and cannot, exercise either judicial or legislative power in a constitutional sense, the only constitutional governmental power left for it to exercise is necessarily, therefore, the executive power.

Executive power is the power "to execute the laws," and "the power to administer and enforce laws as enacted by the legislature and as interpreted by courts." By definition, administrative
agencies administer and enforce the statutes pertinent to their mission and existence.\textsuperscript{203} In fact, the term "administrative" is synonymous with "executive."\textsuperscript{204} The term "[c]onnotes of or pertains to administration, especially management, as by managing or conducting, directing, or superintending the execution, application or conduct of persons or things."\textsuperscript{205} Indeed, administrative acts are "[t]hose which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body."\textsuperscript{206} Administrative agencies therefore serve to "effectuate the obligation of the executive branch to see that the laws are faithfully executed."\textsuperscript{207}

Article VI, sections 1 and 2 of the Rhode Island Constitution forbid the General Assembly from delegating the constitutional power to enact legislation to agents or even a limited number of its own members.\textsuperscript{208} The state constitution does permit, however, the General Assembly to "engage the expertise and assistance of administrative agents to effectuate" legislation it enacts.\textsuperscript{209} The General Assembly may thereby constitutionally confer a cabined decision-making authority upon an agency, commission, or council by enacting legislation that provides "standards or principles to

\textsuperscript{203} ("Generally speaking, the Legislature enacts the law, the Governor and the various agencies of the executive implement the law, and the courts interpret the law, adjudicating individual disputes arising thereunder."); \textit{see also} McInnish v. Riley, 925 So. 2d 174, 179 (Ala. 2005) ("[T]he core power of the legislative branch is, therefore, the making of laws, while the core power of the executive branch is the enforcement of those laws.") (internal quotations omitted) (emphasis removed); Salt Lake County Cottonwood Sanitary v. Sandry City, 879 P.2d 1379 (Utah Ct. App. 1994) ("Simply stated, legislative powers are policy \textit{making} powers while executive powers are policy \textit{execution} powers.") (emphasis in original).

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} Id. (quoting BLACK'S LAW DICTIONARY 45 (6th ed. 1990)) (emphasis added).

\textsuperscript{206} Id.

\textsuperscript{207} Galbraith, 964 F. Supp. at 894 (citing \textit{City of Hackensack}, 410 A.2d 1146).

\textsuperscript{208} Marran v. Baird, 635 A.2d 1174, 1179 (R.I. 1994).

\textsuperscript{209} Id. (citing Davis v. Woods, 427 A.2d 332, 335-36 (R.I. 1981)) (emphasis added).
confine and guide" the decision-making power.\textsuperscript{210} Decision-making authority exercised by administrative entities to effectuate legislation, whether in the form of rule-making or administrative adjudication, is an exercise of executive power and authority.

In the context of administrative matters delegated to an agency by the legislature, it is presumed "that the Legislature intended for the agency to interpret legislative language, in a reasonable manner consistent with legislative intent, in order to develop the necessary policy to respond to unaddressed or unforeseen issues."\textsuperscript{211} The United States Supreme Court has observed that "interpreting a law enacted by [the Legislature] to implement the legislative mandate is the very essence of the 'execution' of the law."\textsuperscript{212} Additionally:

an agency to which [the legislative branch] has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent [executive] administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices - resolving the competing interests, which [the legislative branch] itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with administration

\textsuperscript{210} Davis, 427 A.2d at 336. \textit{Cf.} Whitman v. American Trucking Assoc., Inc., 531 U.S. 457, 472 (2001) ("Article I, §1, of the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States. This text permits no delegation of those powers . . . and so we repeatedly have said that when Congress confers decision-making authority upon agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.") (internal quotations omitted) (emphasis in original); Chevron, U.S.A. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (internal quotations omitted).


\textsuperscript{212} Bowscher v. Synar, 478 U.S. 714, 733 (1986).
of the statute in light of everyday realities.\textsuperscript{213}

The Rhode Island Supreme Court has previously upheld the General Assembly's delegation of authority to the CRMC, holding that the legislature sufficiently defined the policy underlying the creation of the CRMC: “to preserve, protect, develop and where possible, restore the coastal resources of the state for this and succeeding generations through comprehensive and coordinated long-range planning and management designed to produce the maximum benefit for society from such coastal resources.”\textsuperscript{214} The General Assembly cabined the CRMC's decision-making authority, however, by mandating that its actions be guided by a "single overriding criteria."\textsuperscript{215} Namely, the General Assembly required that "preservation and restoration of ecological systems shall be the primary guiding principle upon which environmental alteration of coastal resources will be measured, judged and regulated."\textsuperscript{216}

Consequently, when the CRMC develops plans in accordance with the legislatively declared policy of managing the coastal resources; when it enacts rules and regulations to implement and administer those plans; when it issues licenses, permits and easements; and when it investigates, holds hearings, and enforces those regulations by fines, orders, and administrative and judicial hearings, it is exercising executive power. In administering the provisions of chapter 23 of title 46 of the Rhode Island General Laws, the CRMC acts in an executive capacity. The CRMC's law-executing actions, although sometimes resembling legislative or judicial action, are executive actions from a constitutional perspective.\textsuperscript{217} The CRMC is “always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of the [Legislature] to modify or revoke the authority entirely.”\textsuperscript{218}

\textsuperscript{213} City of Albuquerque, 79 P.3d at 306 (citing Chevron, 467 U.S. at 865-66).
\textsuperscript{215} Id. at 271 (quoting R.I. GEN. LAWS § 46-23-1 (1980 Reenactment)).
\textsuperscript{216} Id.
\textsuperscript{217} Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 953 (1983).
\textsuperscript{218} Id.; see also Sartor v. Coastal Res. Mgmt. Council, 542 A.2d 1077,
In sum, the constitutional and governmental power that administrative entities such as the CRMC exercise is executive. Administrative rule-making and adjudication are executive functions that are part and parcel of implementing and enforcing the laws enacted by the legislature and interpreted by the courts. This executive power is checked by the judiciary’s authority to ensure the agency’s actions conform to its statutory authority, as well as the power of the legislature to modify or withdraw the agency’s authority altogether by repealing or modifying the enabling statute. The CRMC is therefore a “board, commission or other state or quasi-public entity which exercises executive power under the laws of this state.” Legislators are barred from being members of the CRMC under article III, section 6, and the power of appointing its members belongs exclusively to the governor under article IX, section 5.

No Combined Legislative and Executive Power Under Either the Common Law Public Trust Doctrine or Clause 1 of Sec. 17

It seems reasonably clear that the CRMC “exercises executive power under the laws of this state,” as set forth in both article IX, section 5 and article III, section 6. Notwithstanding the executive nature of the CRMC’s functions, however, the House of Representatives’ reference to article I, section 17 suggests that it still believes it possesses the constitutional authority to appoint the CRMC's members, or authorize members of the House of Representatives or Senate to sit on the CRMC themselves.

During the 2006 legislative session, at a joint hearing of the Senate Committee on Environment and Agriculture and the Committee on Government Oversight, one witness cited language from the post-2004 amendment decision in Town of Westerly v. Bradley. In Bradley, the Rhode Island Supreme Court wrote:

1081 (R.I. 1988).
219. Chadha, 462 U.S. at 953 n.16.
221. Id.; id. at art. IX, § 10.
222. Id. at art. IX, § 5; id. at art. III, § 6.
224. Joint Hearing to Review the Functions and Responsibilities of the Rhode Island Coastal Resources Management Council, Before the S. Comm.
"Under the public trust doctrine, the General Assembly is vested with the authority and responsibility for regulating and preserving tidal lands and may determine appropriate uses for tidal land, grant tidal land to another, or 'delegate the authority to regulate that land on the state's behalf.' The Bradley decision stated that exclusive jurisdiction over the state's tidal lands, purportedly belonging to the General Assembly, has been delegated to the CRMC. From this language, the witness apparently extrapolated that a single branch of state government, the General Assembly, has exclusive authority to govern with respect to public trust tidal lands. Accordingly, the CRMC performs a "legislative function." The flaw fatal to the analysis, however, is that the common law public trust doctrine vests title to, and authority over, tidal lands in the State of Rhode Island, and not just the legislative branch of the state's tripartite government.

It is "the state [that] possesses broad power over tidal land," not merely the General Assembly. The General Assembly may enact legislation affecting tidal lands and has by statute created the CRMC and conferred to it authority over those tidal lands. These powers do not mean, however, that the state's legislative branch has exclusive state authority over those lands. From the

on Env't and Agric. and S. Comm. on Gov't Oversight 33-34 (R.I. 2006) (statement of Robert Goldberg, citizen).

225. 877 A.2d at 606-07 (quoting Thorton-Whitehouse, 740 A.2d at 1259-60) (emphasis added).

226. Id. at 607.


228. Id.

229. See, e.g., Bradley, 877 A.2d at 607 ("The state's plenary authority over tidal lands is nevertheless restricted by art. I, sec. 17"); Champlin's Realty Assoc. v. Tillson, 823 A.2d 1162, 1165-66 (R.I. 2003) (quoting Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1041 (R.I. 1995)) ("The public trust doctrine dictates that the state holds title to all land below the high-water mark in a proprietary capacity for the benefit of the public. ...The jus privatum relates to the state's title to tidal lands.'"); Thorton-Whitehouse, 740 A.2d at 1259 ("Under the public-trust doctrine, the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public. ...The state's authority over that land is limited by article I, sec. 17, of the Rhode Island Constitution.") (all emphasis added).

time of Lord Matthew Hale’s celebrated treatise, De Jure Maris,\(^{231}\) to the American Revolution, and up through today, the public trust doctrine has placed title to submerged lands in the sovereign,\(^{232}\) that is, the people of the state.\(^{233}\) As a single department of state government, the General Assembly only has as much authority over the state’s tidal lands as is conferred by the people through the device of the state constitution. That does not, however, include the executive power to administer laws concerned with such public trust lands. That power remains with the executive. The common law rule that the state, as the expression of the people’s sovereignty, holds title to tidal lands simply does not confer exclusive, or even legislative and executive, governmental power over those lands to the General Assembly.

Moreover, the aspect of the public trust doctrine that places title to submerged lands in the state, the *jus privatum*, is not codified in the state constitution. Article I, section 17 does not vest title in the state to any lands, much less tidal lands.\(^{234}\) What it does codify is the *jus publicum* aspect of the doctrine, which holds that the state’s common law title is subject to certain rights of the public.\(^{235}\) The *jus publicum* aspect of the public trust doctrine codified in clause 1 of article I, section 17, not only does not confer executive governmental power on the legislature, but it *limits* the manner in which it may legislate.\(^{236}\) The General Assembly may not constitutionally enact legislation that impossibly curtails “the rights of fishery, and the privileges of the shore.”\(^{237}\)

Consequently, if article I, section 17 is to empower the

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233. *In re Narragansett Indians*, 40 A. 347, 367 (R.I. 1898) (“for when the Revolution took place, . . . the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their [own] common use” (quoting Martin v. Waddell, 41 U.S. 367, 410 (1842))).
235. *id.* at art. I.
236. *id.* at art. I, § 17.
237. *id.*
General Assembly to exercise both legislative and executive power over tidal lands, then that authorization must be found in clause 3 of that provision. Clause 3 is, however, like clause 1, a *limitation* on the General Assembly’s legislative power rather than a *grant* of a consolidated legislative and executive power. It is in essence a constitutional environmental protection clause.

**No Combined Legislative and Executive Power Under Clause 3 of Sec. 17**

As set forth earlier, the third and final clause of section 17 declares that “it shall be the duty of the general assembly to provide for the conservation of the . . . [state’s] natural resources[,] and to adopt all means necessary and proper by law to protect the natural environment . . . by providing adequate resource planning for the control and regulation of [those] natural resources.” The request for an advisory opinion suggests that the House of Representatives believes this clause, contained in the “Declaration of Certain Constitutional Rights and Principles,” decapitates the fundamental distribution and separation of executive and legislative power effected by the 2004 amendments with respect to the environment. The request also intimates that the House of Representatives believes that the clause grants the General Assembly a constitutional mandate to exercise both legislative and executive powers over all environmental matters. The House request suggests that, notwithstanding article IX, section 5, the clause excludes the state’s chief executive officer from any constitutional role in appointing the membership of independent regulatory bodies that are responsible for environmental regulation - even when they exercise executive power. It further suggests that, notwithstanding article III, section 6, it permits members of the General Assembly to exercise executive power as members of those bodies, including the CRMC.

To determine whether the state constitution can be interpreted in such an extraordinary way, the analysis must start

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238. *Id.* at art. I, § 17, cl. 3.
239. *Id.*
241. *Id.*
242. *Id.*
with two basic propositions recognized long ago by the Rhode Island Supreme Court in *Payne & Butler v. Providence Gas Company.* First, unlike the Federal Constitution, the general object of the state constitution "is not to grant legislative power but to confine and restrain" its power which is otherwise plenary. Second, "[t]he leading feature of the [state] Constitution is the separation and distribution of the powers of government... and to define their limits." The House of Representatives' suggestion that neither of these principles applies to governmental regulation of the environment, and that the General Assembly has complete and unfettered control in that arena, cannot be supported by any reasoned analysis of the location and language of clause 3.

As an initial matter, clause 3 appears in the state constitution's "Declaration of Certain Constitutional Rights and Privileges," the state analog of the Federal Constitution's Bill of Rights. Like much of the Bill of Rights as applied through the Fourteenth Amendment, the rights declared in article I of the state constitution declare limits on the legislative power of the General Assembly. Article I would be an exceptionally awkward and inappropriate section of the state constitution to insert a clause granting an extraordinary combined legislative and executive authority, when all other parts of article I serve to limit governmental authority.

Moreover, the language of clause 3 plainly contemplates that the duty imposed on the General Assembly applies only to its role of enacting legislation. By its terms, clause 3 directs the General Assembly "to adopt all means necessary and proper by law to protect the natural environment." The Rhode Island Supreme Court has consistently understood "adopt" to mean "create,"

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244. *Id.* at 154.
245. *Id.* (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 241 (7th ed. 1903)).
246. R.I. CONST. art. I; *id.* at art. I, § 17, cl. 3.
247. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985) ("[T]he developed application... of the greater part of the Bill of Rights to the States limits the sovereign authority that States otherwise would possess to legislate with respect to their citizens and conduct their own affairs.").
248. R.I. CONST. art. I, § 17, cl. 3 (emphasis added).
"develop," and "enact," and has found that adopt "is synonymous with 'enact.'" Applying the plain meaning to clause 3 compels the conclusion that this clause imposes a duty on the General Assembly to enact legislation "necessary and proper by law to protect the environment." To interpret the language as authorizing the General Assembly to move beyond enacting laws to executing and enforcing those same laws would stretch the language beyond all reasonable intendment, and would explode the structure of government contemplated by the 2004 amendments. The United States Supreme Court has rejected a similar argument made by Congress with respect to its authority over congressional elections set forth in article I, section 4 of the Federal Constitution. That section provides: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." In *Buckley v. Valeo*, the Court considered the constitutional propriety of Congress' appointment of individuals to serve on the Federal Elections Commission (FEC). The Court concluded that the federal Appointments Clause authorized only the President to make such appointments. The FEC argued that because it exercised executive and administrative authority and did not "operate[] merely in aid of congressional authority to legislate," the case stood "on a different footing than if Congress had exercised its legislative authority in another field." Rejecting the argument as both "novel and contrary to the language of the Appointments Clause," the Supreme Court reasoned:

Congress has plenary authority in all areas where it has

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249. *In re* Advisory Opinion to the Governor (Ethics Commission), 612 A.2d 1, 8-9 (R.I. 1992).
250. R.I. CONST. art. I, § 17, cl. 3; Ethics Commission, 612 A.2d at 8-9.
253. 424 U.S. 1.
254. *Id.* at 124-25, 138-39, 141.
255. *Id.* at 131.
256. *Id.* at 132.
substantive legislative jurisdiction . . . so long as exercise of that authority does not offend some other constitutional restriction. We see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.257

That reasoning finds application here as well. There is no plausible reading of clause 3 that would remotely suggest the General Assembly has any constitutional authority to exercise anything but legislative power over environmental matters. Nor is it logical to except the exercise of governmental authority over environmental matters from the fundamental principle of the separation and distribution of powers clearly present in the 2004 amendments. That is particularly true with respect to the appointment power over any state entity that “exercises executive power under the laws of this state,” which the electorate specifically identified as a core executive function to be performed by the governor.

Nor does the phrase “all means necessary and proper by law” confer any authority on the legislative branch to exercise constitutional executive power with respect to environmental matters, by controlling the appointment of the members of the CRMC in contravention of the governor’s appointment power. In rejecting a similar argument under the Necessary and Proper Clause in Buckley,258 the United States Supreme Court reasonably determined that:

Congress could not, merely because it concluded that . . . a measure was “necessary and proper” to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in§ 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear

257. Id. (emphasis added) (citation omitted).
implication prohibits it from doing so.259

Similarly, the duty "to adopt all means necessary and proper by law to protect the natural environment" does not give the General Assembly the power to enact legislation that would permit it to appoint the members of an entity exercising executive and administrative authority, such as the CRMC.260 Nor can the General Assembly allow its members to be appointed to such an entity because it would be a direct violation of the 2004 amendments to article V, article IX, section 5, or article III, section 6.261 The interpretation of clause 3 suggested by the House of Representatives' request for an advisory opinion would be wholly inconsistent with the predominant intent and feature of the 2004 amendments, namely to distribute and separate the executive and legislative powers with respect to administrative entities.

Principles of constitutional interpretation require those who would construe the constitution to "look to the history of the times and examine the state of affairs as they existed when the constitution was framed and adopted."262 Above all, any interpretation must "give effect to the intent of the framers."263 The 2004 amendments were adopted with the specific design of prohibiting the legislature from continuing to exercise executive power.264 The amendments specifically declared that the appointment of the individuals to administrative entities exercising executive power was to be considered a core executive function belonging to the governor.265 As the basic structural design of state government,266 the distribution of powers between

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259. 424 U.S. at 135 (emphasis omitted).
260. R.I. CONST. art. I, § 17, cl. 3.
261. Id.
263. Sundlun, 662 A.2d at 45.
265. Id.
266. See Ethics Commission, 612 A.2d at 18 (stating separation of powers is an "integral element of the republican form of government").
“separate and distinct” departments is the state constitution’s “fundamental principle.” The principle of separation of powers must necessarily permeate all parts of the constitution, including clause 3. If the 2004 amendments establish a clear separation of legislative and executive functions, it would be, in the words of Dorr, “unreasonable,” and unfathomable, to conclude that clause 3 permitted them to be “[re]united in one body.”

A SELF-EXECUTING APPOINTMENT POWER

The final question posed by the House of Representatives in its request for an advisory opinion was a broader attack on the implementation of the 2004 amendments, and in particular, the governor’s new constitutional appointment power. The question concerned whether the new appointments clause is a self-executing constitutional provision, suggesting the governor was not immediately vested with the appointment power when the appointments clause was added to the state constitution. If that interpretation is true, then the governor would not have the constitutional power to appoint the members of the state entities executing executive powers until the General Assembly decides to authorize that power with regard to a particular entity, and enacts legislation doing so. The determinative question is whether this construction can reasonably be seen to reflect the underlying intent of the appointments clause.

“The will of the people is paramount in determining whether a constitutional provision is self-operating[,] and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating.” The reason for this rule is self

268. See Opinion to the House of Representatives, 208 A.2d 126, 127 (R.I. 1965) (interpreting advisory opinion power in light of constitutional separation of powers); see also Opinion to the Governor, 191 A.2d 611, 613 (R.I. 1963) (expressing “reluctance to subvert the principle of separation of powers” in construing advisory opinion power).
269. Dorr, 3 R.I. at 304-05.
271. Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960); see also Morgan v. Bd. of Sup'rs, 192 P.2d 236, 241 (Ariz. 1948) (“The general presumption of the law is that all constitutional provisions are self-executing, and are to be interpreted as such, rather than requiring further legislation.”); Davidson v. Sandstrom, 83 P.3d 648, 658 (Colo. 2004) (en banc) (“Constitutional
evident: "in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people."\textsuperscript{272} The question ultimately is one of the intent of the framers, in this case the electorate. The fundamental object is to construe the amendment "in such manner as to fulfill the intent of the people, never to defeat it."\textsuperscript{273} The state constitution’s new appointments clause "must never be construed in such a manner as to make it possible for the will of the people to be frustrated or denied."\textsuperscript{274}

When it appears that a constitutional provision may take immediate effect without further action by the legislature, the provision is deemed self-executing even though further legislation may clarify or facilitate the execution of the provision.\textsuperscript{275} A constitutional provision need only lay down a sufficient rule governing the exercise of the power.\textsuperscript{276} If a sufficient rule exists, "it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions."\textsuperscript{277} Constitutional theory holds a presumption in favor of self-executing constitutional provisions; where there is a choice, such a construction avoids the possibility of legislative frustration of the people’s will.\textsuperscript{278}

In Rhode Island, the people invested the governor with a very specific power and responsibility: "[t]he governor shall, . . . appoint . . . all members of any board, commission or other state or quasi-public entity which exercises executive power under the laws of

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\item provision are presumed to be self-executing."); Russell v. Bliss, 101 N.E.2d 289, 291 (Ohio 1951) ("[T]he presumption now is that all provisions of the constitution are self-executing."); Beatty v. Wittekamp, 172 S.E. 122, 125 (S.C. 1933) ("The general presumption of the law is that all constitutional provisions are self-executing.").
\item \textsuperscript{272} Gray, 125 So. 2d at 851; \textit{see also} Morgan, 192 P.2d at 241 (constitutional provisions are presumed self-executing “for the reason that, unless such were done, it would be in the power of the Legislature to practically nullify a fundamental of legislation”).
\item \textsuperscript{273} Gray, 125 So. 2d at 852.
\item \textsuperscript{274} \textit{Id}.
\item \textsuperscript{275} Davidson, 83 P.3d at 658.
\item \textsuperscript{276} Davis v. Burke, 179 U.S. 399, 403 (1900).
\item \textsuperscript{277} \textit{Id.}; \textit{see also} Gray, 125 So. 2d at 852.
\item \textsuperscript{278} Gray, 125 So. 2d at 852.
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There are only two limitations on that power apparent from the text of the appointments clause. The first limitation is that the appointment must be confirmed by the Senate, an action that does not require legislation to implement. The governor simply nominates an individual and sends the nomination to the Senate. The Senate has the duty to consider the nomination and confirm or reject. The second limitation is that the appointment may only be exercised with respect to entities that exercise executive power, which means it does not apply to a legislative commission. The sole function of a legislative commission is to assist the General Assembly in the enactment of legislation by performing investigative functions, gathering and reporting information to the legislative body, and making recommendations on the type of legislation that should be enacted. Any entity that has the power to actually implement, execute, administer, and enforce previously enacted statutes, however, falls within the governor's appointment power. The descriptive phrase, "exercising executive power under the laws of this state" is a constitutionally sufficient principle guiding the exercise of the power. This principle, taken together with the presumption in favor of self-executing provisions, compels the conclusion that article IX, section 5 is indeed self-executing.

In the case of most, if not all, of the boards and commissions exercising executive, administrative, and enforcement functions, there are enabling statutes setting forth the number of persons that shall comprise the board or commission. The governor has the power to fill the boards and commissions so that they are manned in conformance with article IX, section 5 and so that they may constitutionally resume their statutory duties. To the extent that the General Assembly determines to enact a statute that governs, limits, guides, or restricts the governor in exercising the power of appointment, it may, subject to judicial review, do

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279. R.I. CONST. art. IX, § 5.
280. Id.
281. See id.
282. Id.
284. See id.
286. Id.
287. See id.
But such legislation is not necessary for the appointive power to be exercised. The will of the people, that the governor appoint the members of administrative and regulatory entities administering and enforcing the law, need not constitutionally be delayed by the deliberations of the General Assembly.

**CONCLUSION**

Although the powers of government are often referred to as the "legislative power," the "executive power," or the "judicial

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289. If article IX, section 5 is not self-executing, a justiciable claim must arise at some point on behalf of the governor if the legislature continues to fail to enact the legislation necessary to implement that office's power of appointment. See Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 265 (Mont. 2005) (Nelson, J., concurring).

Any notion that a constitutionally granted power could be rendered ineffective by the legislature's failure to enact legislation necessary for its exercise must be flatly rejected. *Id.* A non-self-executing constitutional mandate is, by its nature, enacted with the presumption that the legislature will act to implement the mandate. *Id.* Just as legislation that would defeat or restrict a self-executing mandate of the constitution is beyond the power of the legislature, "a legislative failure to act upon a non-self-executing constitutional directive, which defeats or restricts the purpose of that mandate, is just as unacceptable as legislation which defeats or restricts the purpose of a self-executing right." *Id.* at 266. Were that not so, the people's mandate would be effectively frustrated.

Art. VI, sec. 1 of the Rhode Island Constitution specifically declares that the "Constitution shall be the supreme law of the state," that "any law inconsistent therewith shall be void" and that "[t]he general assembly shall pass all laws necessary to carry this Constitution into effect." R.I. CONST. art. VI, § 1 (emphasis added). Where the people have adopted a constitutional provision requiring implementation by the legislature, "it cannot be gainsaid that the people had the right to expect, and do expect that branch of government to, in good faith, carry out its constitutionally imposed obligation to legislate." *Columbia Falls Elementary*, 109 P.3d at 265.

The state constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates, and the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations. General Agric. Corp. v. Moore, 534 P.2d 859, 862-63 (Mont. 1975).

Indeed no branch of government has, in default of its constitutional obligation to act, the power to, *de facto*, write out of the constitution important rights and guarantees which the people sought to secure unto themselves, believing when they did so that their elected officials would, in good faith, honor their command. *Columbia Falls Elementary*, 109 P.3d at 266.
power," each branch of government, and the individuals that have the privilege of occupying positions in that branch, actually enjoy a borrowed power - a power belonging to the state's citizens as the original sovereign. Those citizens have divided the powers of government and conferred a portion of their sovereign power into the three branches. "[E]ach branch, in its own way, is the people's agent, its fiduciary for certain purposes . . . [and] fiduciaries do not meet their obligations by arrogating to themselves the distinct duties of their master's other agents."290 Any attempt to assert legislative control over appointments to the CRMC under either the public duty doctrine or clause 3 of article I, section 17 would be a breach of that fiduciary duty to the citizens who enacted the 2004 amendments.

In his farewell address in 1796, George Washington articulated a principle for those privileged with public office to be guided by. "[T]he habits of thinking in a free country should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another."291 This principle does not sufficiently animate the House of Representatives' contemplated participation in and on the CRMC; and the legislation proposed in the 2006 session would violate the state constitution. In the final analysis, the issues discussed here are not about Democrat versus Republican, or even legislature versus governor, they are about implementing the people's will with respect to the distribution and separation of powers as they have clearly, and forcefully, expressed it in the state constitution.