Washington and Lee Law Review

Volume 40 | Issue 1 Article 13

Winter 1-1-1983

Separation Of Powers: Legislators Serving On Administrative Boards

SEPARATION OF POWERS: LEGISLATORS SERVING ON ADMINISTRATIVE BOARDS

The principle of separation of powers is a cornerstone of the American system of government.[1] America's early leaders considered separation of powers to be of primary importance.[2] Even though the federal constitution and a number of state constitutions contain no express provisions requiring separation of powers, federal and state courts that have considered the issue have held that separation of powers is a

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[1] *See, e.g.*, Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 443 (1977) (proper balance must be maintained between coordinate braches of government); Buckley v. Valeo, 424 U.S. 1, 124 (1976) (separation of powers woven into Constitution); O'Donoghue v. United States, 289 U.S. 516, 530 (1933) (separation of powers not merely matter of convenience or governmental mechanism); Springer v. Philippine Islands, 277 U.S. 189, 201 (1928) (separation of powers inherent in American constitutional system); Kilbourn v. Thompson, 103 U.S. 168, 190 (1880) (separation of powers one of chief merits of American system of written constitutional law); Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 421 (9th Cir. 1980), *appeal pending*, 454 U.S. 812 (Oct. 5, 1981) (no. 80-1832) (doctrine of separation of powers vital to constitutional government); Bradner v. Hammond, 553 P.2d 1, 5 (Alaska 1976) (separation of powers important to avoid consolidation of power in single branch of government); Opinion of the Justices, 380 A.2d 109, 113 (Del. 1977) (separation of powers fundamental principle of constitutional law); Jewett v. Williams, 84 Idaho 93, _____, 369 P.2d 590, 594 (1962) (state constitution requires separation of basic powers of the three branches of government); Opinion of the Justices to the House of Representatives, 365 Mass. 639, _____, 309 N.E.2d 476, 478 (1974) (separation of powers fundamental); Opinion of the Justices, 110 N.H. 359, _____, 266 A.2d 823, 825 (1970) (branches of government should be as separate from and independent of each other as nature of free government will admit). *See generally* 2 C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 11:13 (1969) (importance of separation of powers in America throughout years); Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 RUTGERS L. REV. 449 (1958); Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. CHI. L. REV. 385 (1935).

[2] *See* Book v. State Office Bldg. Comm'n, 238 Ind. 120, _____, 149 N.E.2d 273, 294-95 (1958) (quotation from Farewell Address by George Washington); THE FEDERALIST Nos. 47, 48, 51 (J. Madison) (B. Wright ed. 1966); 1 ANDREWS, WORKS OF JAMES WILSON (1896); T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA (W. Peden ed. 1955). In the Federalist Papers, James Madison stressed the importance of preventing any one of the three branches of government from possessing, directly or indirectly, an overruling influence over the other two branches. THE FEDERALIST No. 48, at 343. Madison observed that in the early American state constitutions the legislative branch had powers which were much more extensive and much less susceptible to precise limitation than the powers these constitutions granted to the executive and judicial branches. *Id.* at 344. Madison was concerned that unless the framers of the American Constitution clearly separated the powers of the three branches in the Constitution and gave the executive and judicial branches effective checks against the legislative branch, the legislature, by complicated and indirect means, would be able to encroach on the other two branches. *Id.* Madison stated that the nation's greatest safeguard against a gradual concentration of all governmental powers in one branch of government lay in giving the officials of each branch the necessary constitutional means and personal motives to resist encroachment by the other branches. THE FEDERALIST No. 51, at 356. Madison, however, rejected an overly strict application of the separation of powers doc-

constitutional requirement.[3] Separation of powers serves the important purposes of preventing concentration of power in one branch of govern-

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trine. THE FEDERALIST No. 47, at 338. Madison emphasized that separation of powers did not require that the departments of government "have no *partial agency* in, or no *control* over, the acts of each other." *Id.* Rather, stated Madison, separation of powers requires only that "the *whole* power of one department" should not be exercised "by the same hands which possess the *whole* power of another department . . . ." (emphasis in original). *Id.* James Wilson, one of the framers of the Constitution and later a Justice of the Supreme Court, emphasized that the independence of each branch of government, legislative, executive, and judicial, required that each branch, in the exercise of its functions, should be free from the remotest influence, direct or indirect, of the other two branches. ANDREWS, *supra*, at 367. Thomas Jefferson observed that a major weakness of the Virginia Constitution of 1781 was that the document provided no safeguards against concentration in the legislative branch of the powers of all three branches of government. JEFFERSON, *supra*, at 120. Jefferson noted that the result of such a concentration would be an elective despotism. *Id.* Jefferson stressed that an elective despotism was not the type of government for which the American colonies fought. *Id.* Jefferson warned that unless the American Constitution divided the powers of government among several branches and gave each branch effective checks on the other branches, the American government would be no more than an elective despotism. *Id.*

In his Farewell Address, George Washington warned that abuses of the separation of powers doctrine could destroy the American system of government. 238 Ind. at _____, 149 N.E.2d at 294-95. Washington stressed the importance of dividing the powers of government among the branches and giving each branch reciprocal checks on the other branches. *Id.* at _____, 149 N.E.2d at 294. Washington stated that unless each branch jealously guarded its powers from intrusion by the other branches, a spirit of encroachment would tend to consolidate the powers of all the branches into one. *Id.* at _____, 149 N.E.2d at 294. *See generally* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 at 150-61, 446-53, 602-06, 608 (1969) (development of separation of powers doctrine in America prior to framing of Constitution).

[3] *See* Myers v. United States, 372 U.S. 52 (1926). The *Myers* Court noted that the delegates to the Constitutional Convention of 1787 embraced Montesquieu's view that the maintenance of independence between the legislative, executive, and judicial branches was essential to insure the liberty of the people. *Id.* at 116. The *Myers* Court reasoned that in furtherance of Montesquieu's view, the framers of the Constitution set out the executive, legislative, and judicial functions of the government in three distinct articles. *Id.* From this clearcut division within the structure of the Constitution, the *Myers* Court concluded that the Constitution required separation of powers. *Id.*; *see also* O'Donoghue v. United States, 289 U.S. 516 (1933). The *O'Donoghue* Court noted that, in distributing the powers of government, the framers of the Constitution had created three distinct and separate departments. *Id.* at 530. The *O'Donoghue* Court reasoned that the fact that the Constitution contained an occasional specific provision which conferred powers upon one branch which by their nature might belong to another branch served only to emphasize the framers' overriding desire to keep the powers of government separate. *Id.* The *O'Donoghue* Court therefore joined the *Myers* Court in inferring the requirement of separation of powers from the structure of government set forth in the Constitution, even though the Constitution contains no express provision which requires separation of powers.

The United States Constitution does not require the states to distribute governmental power among branches of state government in a manner similar to the federal distribution. Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (separation of powers concept embodied in United States Constitution not mandatory in state governments); Parcell v. Kansas, 468 F.Supp. 1274, 1277 (D. Kan. 1979), *aff'd sub nom* Parcell v. Governmental Ethics Comm'n, 639 F.2d 628 (10th Cir. 1980) (distribution by state of power among its governmental branches is

ment[4] and promoting governmental efficiency.[5] In accord with these two purposes, both federal and state courts have found a wide variety of governmental arrangements violative of the separation of powers principle.[6]

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for state itself to decide); Rite Aid Corp. v. Board of Pharmacy, 421 F.Supp. 1161, 1178 (D. N.J. 1976) (federal doctrine of separation of powers is no limitation on state governments). Federal separation of powers cases, therefore, do not control the resolution of separation of powers questions litigated within the state courts. 468 F.Supp. at 1277. Nevertheless, state courts have implied the requirement of separation of powers in the absence of an express constitutional provision. *See, e.g.*, Opinion of the Justices, 380 A.2d 109, 113 (Del. 1977) (separation of powers implied as fundamental aspect of state constitutional law); Vansickle v. Shanahan, 212 Kan. 426, _____, 511 P.2d 223, 241 (1973) (separation of powers inherent in republican form of government).

[4] *See, e.g.*, Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 422 (9th Cir. 1980), *appeal pending*, 454 U.S. 812 (Oct. 5, 1981) (No. 80-1832); Opinion of the Justices, 380 A.2d 109, 113 (Del. 1977); State *ex rel.* Schneider v. Bennett, 219 Kan. 285, _____, 547 P.2d 786, 790 (1976). The *Chadha* court examined the historical background of separation of powers and concluded that the reason the framers of the Constitution separated the three branches and gave each branch checks over the other two was to prevent any one branch from attaining hegemony. 634 F.2d at 422-23. In *Opinion of the Justices*, the Delaware Supreme Court recognized the two main purposes of the separation of powers doctrine. 380 A.2d at 113. The first purpose is to protect the liberty of the citizens. *Id.* The court stated that the second purpose is to safeguard the independence of each branch of government and to protect each branch from domination and interference by the other branches. *Id.* The *Bennett* court stated that the purpose of the separation of powers doctrine was to avoid the dangerous concentration of power in one branch of government and to ensure an efficient allocation of governmental functions among the several branches of government. 219 Kan. at _____, 547 P.2d at 790. *See generally*, ANTIEAU, *supra* note 1, § 11:13 (historical background on primary purposes of separation of powers).

[5] Chadha v. Immigration & Naturalization Serv., 634 F.2d 408 (9th Cir. 1980), *appeal pending*, 454 U.S. 812 (Oct. 5, 1981) (No. 80-1832). The *Chadha* court noted that the doctrine of separation of powers enhances the efficiency of government in two ways. 634 F.2d at 423. First, the doctrine prevents the legislative branch from becoming entangled in the myriad details arising from the execution of its laws. *Id.* The *Chadha* court further reasoned that a corollary of the separation doctrine, the rule against undue delegation, prevents one branch from abdicating its authority in a wholesale and standardless manner. *Id.* at 424. The rule against undue delegation prohibits one branch of government from abdicating or transferring its essential constitutionally assigned duties to either another branch of government or to a private entity. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935). *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 28-86 (1965) (delegation of legislative power to administrative agencies); 1 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 3.03 (1982) (delegation of power); Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969) (same); Annot., *Permissible Limits of Delegation of Legislative Power*, 79 L.Ed. 474, 485 (1935) (same).

[6] *See, e.g.*, O'Donoghue v. United States, 289 U.S. 516, 551 (1933) (congressional reduction of salaries of federal judges already in office violative of separation of powers); Myers v. United States, 272 U.S. 52 (1926) (requirement of Senate consent prior to President's exercise of power to remove executive officers violative of separation of powers); Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 435-36 (9th Cir. 1980), *appeal pending*, 454 U.S. 812 (Oct. 5, 1981) (No. 80-1832) (congressional veto of administrative determination violates separation of powers); Anderson v. Lamm, 195 Colo. 437, _____, 579 P.2d 620, 627 (1978) (requirement that governor obtain legislative approval prior to making allocations of

In recent years the courts have confronted separation of powers questions with increasing frequency in cases involving legislators serving on administrative boards.[7] The issue usually arises when a state legislature enacts a measure providing for membership of legislators on an administrative board.[8] Then, typically, either private taxpayers or state executive or administrative officials bring a lawsuit challenging the legislators' service on the board as violative of the doctrine of separation of powers.[9] Although resolution by the courts of the separation of powers issues raised by legislators serving on administrative

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funds already appropriated by legislature contravenes separation of powers); Opinion of the Justices, 380 A.2d 109, 116 (Del. 1977) (wholesale transfer of division of maintenance for state office buildings from executive branch control to legislative branch control violative of separation of powers).

[7] *See, e.g.*, Starnes v. Sadler, 237 Ark. 325, _____, 372 S.W.2d 585, 585-86 (1963) (taxpayers brought action charging that legislators' service on Board of Pardons and Parole and State Board of Higher Education violated separation of powers); Greer v. State, 233 Ga. 667, 667, 212 S.E.2d 836, 837 (1975) (attorney general instituted declaratory judgment action challenging right of legislators to serve on governing board of World Congress Center); Murphy v. State, 233 Ga. 681, 681, 212 S.E.2d 839, 840 (1975) (attorney general brought action charging that appointment of legislators as members of State Properties Commission violated separation of powers); Jewett v. Williams, 84 Idaho 93, _____, 369 P.2d 590, 592 (1962) (state auditor refused to issue warrants to cover expenses incurred by legislative members of State Children's Commission on grounds that legislators' service on commission violated separation of powers); Book v. State Office Bldg. Comm'n, 238 Ind. 120, _____, 149 N.E.2d 273, 277-78 (1958) (taxpayer alleged that legislators' service on State Office Building Commission violated separation of powers); Opinion of the Justices, 110 N.H. 359, _____, 266 A.2d 823, 824 (1970) (governor sought advisory opinion on whether statute requiring that governor submit proposed salary increases of executive branch officials to fiscal committee of legislature for approval violated separation of powers); State *ex rel.* Wallace v. Bone, 304 N.C. 591, 591-92, 286 S.E.2d 79, 79-80 (1982) (attorney general alleged that legislators' service on Environmental Management Commission compromised separation of powers doctrine); Aiken County Bd. of Educ. v. Knotts, 274 S.C. 144, 146-47, 262 S.E.2d 14, 15-16 (1980) (county board of education charged that state statute requiring that county legislative delegation approve any increase in school tax leview violated separation of powers).

[8] *See, e.g.*, Opinion of the Justices, 244 Ala. 386, 387-89, 13 So.2d 674, 675-77 (1943) (legislative act providing for appointment of legislators to War Emergency Council); Smith v. Faubus, 230 Ark. 831, _____, 327 S.W.2d 562, 562-64 (1959) (statute allowing legislative leadership to appoint legislators to State Sovereignty Commission); State *ex rel.* Fatzer v. Kansas Turnpike Auth., 176 Kan. 683, _____, 273 P.2d 198, 200-01 (1954) (statute providing for service of legislators on Turnpike Authority); State *ex rel.* Ray v. Blease, 95 S.C. 403, _____, 79 S.E. 247, 249-50 (1913) (legislative act placing legislators on State Sinking Fund Commission).

[9] *See, e.g.*, Parcell v. Kansas, 468 F.Supp. 1274, 1275 (D. Kan. 1979), *aff'd sub nom* Parcell v. Governmental Ethics Comm'n, 639 F.2d 628 (10th Cir. 1980) (action for injunctive relief by election campaign contributor); Book v. State Office Bldg. Comm'n, 238 Ind. 120, _____, 149 N.E.2d 273, 277 (1958) (action by taxpayer); State *ex rel.* Anderson v. Fadely, 180 Kan. 652, _____, 308 P.2d 537, 540 (1957) (action in mandamus brought by attorney general); Opinion of the Justices to the House of Representatives, 365 Mass. 639, _____, 309 N.E.2d 476, 478 (1974) (action by legislators to obtain advisory opinion); State *ex rel.* State Bldg. Comm'n v. Bailey, 151 W.Va. 79, 80, 150 S.E.2d 449, 450 (1966) (action in mandamus by commission against Secretary of State).

boards is largely on a case-by-case basis,[10] two distinct approaches have emerged.[11] Under the first approach, courts apply the separation of powers principle strictly, striking down legislators' service on administrative boards unless the service is incidental to the legislative function.[12] Under the second approach, courts follow a more flexible application of separation of powers.[13] Courts which adopt the second ap-

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[10] *See, e.g.*, MacManus v. Love, 179 Colo. 218, _____, 499 P.2d 609, 610 (1972) (because state constitution does not place exact limits on executive, legislative, and judicial powers courts should decide separation of powers questions on case-by-case basis); State *ex rel.* Meyer v. State Bd. of Equalization & Assessment, 185 Neb. 490, _____, 176 N.W.2d 920, 926 (1970) (impossibility of placing exact limits on separation of powers mandates that courts resolve separation of powers problems on case-by-case basis).

[11] *See infra* text accompanying notes 23-60 (cases following strict approach to separation of powers); *infra* text accompanying notes 67-113 (cases adopting flexible approach to separation of powers).

[12] *See* Stockman v. Leddy, 54 Colo. 24, 129 P. 220 (1912), *overruled on other grounds*, 188 Colo. 310, _____, 535 P.2d 200, 204 (1975); Book v. State Office Bldg. Comm'n, 238 Ind. 120, 149 N.E.2d 273 (1958); State *ex rel.* Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982); State *ex rel.* State Bldg. Comm'n v. Bailey, 151 W.Va. 79, 150 S.E.2d 449 (1966). In *Stockman*, the court considered whether a statute which empowered a joint committee of the legislature to investigate violations of the state's water rights and to institute lawsuits to vindicate the state's water rights contravened the doctrine of separation of powers. 54 Colo. at _____, 129 P. at 220-22. The *Stockman* court noted that the legislature could have appointed a committee of legislators to investigate water rights violations as an aid to the lawmaking function without violating separation of powers. *Id.* at _____, 129 P. at 223. The court held, however, that the legislature made no pretense of appointing the committee to conduct investigations with a view toward future legislation. *Id.* at _____, 129 P. at 223. Rather the legislature appointed the water rights committee with the intent that the committee would take actions to enforce the state's water rights. *Id.* at _____, 129 P. at 223. The *Stockman* court concluded that by appointing its own members to the water rights committee, the legislature was attempting to confer executive power upon a collection of its own members. *Id.* at _____, 129 P. at 223. The court therefore held that the legislators' service on the water rights committee contravened the doctrine of separation of powers. *Id.* at _____, 129 P. at 223. The *Book* court held that the membership of legislators on the State Office Building Commission violated separation of powers because the primary duties of the legislators on the Commission were executive in nature and in no way incidental to the legislative power. 238 Ind. at _____, 149 N.E.2d at 296. The *Book* court noted, however, that the separation of powers doctrine does not bar the legislature from undertaking activities which are properly incidental and germane to its legislative function. *Id.* at _____, 149 N.E.2d at 296. The *Bone* court found the service of legislators on the state Environmental Management Commission violative of separation of powers because the legislators' duties as Commission members had no relation to the legislators' lawmaking function. 304 N.C. at _____, 286 S.E.2d at 88. The *Bailey* court noted, in holding that service of legislators on the State Building Commission violated separation of powers, that legislators may exercise executive or judicial powers only to the extent that such powers are incidental to the functions which the state constitution assigns to the legislature. 151 W.Va. at _____, 150 S.E.2d at 453. *See infra* text accompanying notes 35-45 (discussion of *Book*); *infra* text accompanying notes 46-60 (discussion of *Bone*).

[13] *See, e.g.*, Parker v. Riley, 18 Cal.2d 83, _____, 113 P.2d 873, 877 (1941) (separation of powers does not require rigid classification of all incidental activities of government); Gillespie v. Barrett, 368 Ill. 612, _____, 15 N.E.2d 513, 514 (1938) (separation of powers is merely statement of underlying principle of American form of government); State *ex rel.*

proach uphold legislators' membership on administrative boards if the courts are convinced that the legislators' membership represents a cooperative effort with the executive branch.[14]

In deciding whether the service of legislators on a given administrative board violates the separation of powers doctrine, courts look first to the functions performed by board members.[15] Courts generally characterize legislative functions as including fact-finding,[16] determining public policy,[17] and appropriating money.[18] Courts define executive functions as functions necessary to implement laws,[19] including

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Schneider v. Bennett, 219 Kan. 285, _____, 547 P.2d 786, 791 (1976) (strict application of separation of powers inappropriate in complex state government in which administrative agencies often exercise blend of legislative, executive, and judicial powers); State *ex rel.* McLeod v. Edwards, 269 S.C. 75, _____, 236 S.E.2d 406, 409 (1977) (separation of powers doctrine does not prevent legislators from serving on administrative boards in cooperative effort with executive branch).

[14] *See, e.g.* State *ex rel.* Schneider v. Bennett, 219 Kan. 285, _____, 547 P.2d 786, 792 (1976) (no usurpation of powers unless one department significantly interferes with operations of another); State *ex rel.* McLeod v. Edwards, 269 S.C. 75, _____, 236 S.E.2d 406, 409 (1977) (separation of powers doctrine does not prevent legislators from serving on administrative board or commission in cooperative effort with executive branch). *See infra* text accompanying notes 74-93 (discussion of *Bennett*); *infra* text accompanying notes 106-113 (discussion of *Edwards*).

[15] *See, e.g.*, Book v. State Office Bldg. Comm'n, 238 Ind. 120, _____, 149 N.E.2d 273, 296 (1958) (court examined functions performed by State Office Building Commission before ruling on separation of powers violation); State *ex rel.* Schneider v. Bennett, 219 Kan. 285, _____, 547 P.2d 786, 793 (1976) (first step court took in determining whether service of legislators on state finance council violated separation of powers was to examine nature of council functions).

[16] *See* McGrain v. Daugherty, 273 U.S. 135 (1927). The *McGrain* court recognized that the power of inquiry, with authority to enforce compliance, is an essential and appropriate auxiliary to the legislative function. *Id.* at 174. State courts also have held that the legislature has broad investigative powers, including the power to subpoena records and witnesses. *See, e.g.*, Parker v. Riley, 18 Cal.2d 83, _____, 113 P.2d 873, 877-78 (1941) (legislators can serve on commission to investigate problems of interstate concern); Sheridan v. Gardner, 347 Mass. 8, _____, 196 N.E.2d 303, 307 (1964) (legislators can serve on commission to study crime); State *ex rel.* James v. Aronson, 132 Mont. 120, _____, 314 P.2d 849, 861-62 (1957) (legislators can serve on board of examiners organized by statute for purpose of investigating and reporting on proposed legislation); Morss v. Forbes, 24 N.J. 341, _____, 132 A.2d 1, 7-8 (1957) (legislators can serve on committee to study unauthorized wiretapping).

[17] *See* City of Sand Springs v. Department of Pub. Welfare, 608 P.2d 1139, 1146 (Okla. 1980) (essence of legislative function is determination of policy).

[18] *See, e.g.*, Welden v. Ray, 229 N.W.2d 706, 710 (Iowa 1975) (inherent in legislature's power to appropriate is power to specify how executive branch shall spend money); State *ex rel.* Anderson v. Fadely, 180 Kan. 652, _____, 308 P.2d 537, 545 (1957) (except as limited by constitution, legislature has exclusive power to decide how, when, and for what purposes to appropriate public funds); State *ex rel.* Meyer v. State Bd. of Equalization & Assessment, 185 Neb. 490, _____, 176 N.W.2d 920, 926 (1970) (legislature can impose ceilings on spending as incident of power to appropriate).

[19] *See, e.g.*, Greer v. State, 233 Ga. 667, 669, 212 S.E.2d 836, 838 (1975) (implementation of specific legislation is duty of executive branch); Book v. State Office Bldg. Comm'n, 238 Ind. 120, _____, 149 N.E.2d 273, 296 (1958) (exercise of judgment and discretion in implementing law enacted by legislature is executive function).

the managing of departments of government[20] and spending money appropriated by the legislature.[21] Most legislators serving on administrative boards, however, do not perform functions which are clearly executive or clearly legislative in nature.[22] Thus, whether the participation of legislators who perform duties that are not clearly either legislative or executive in nature violates separation of powers will depend on whether the court employs a strict or flexible application of the doctrine.

Springer v. Philippine Islands[23] was the most influential case in a line of early Supreme Court cases in which the Court gave the doctrine of separation of powers a strict application.[24] In *Springer*, the legislature of the Philippine Islands passed acts which provided that the Governor-General, President of the Senate, and Speaker of the House of Representatives should sit as a Board of Control over a government-owned bank and coal company.[25] In these acts, the legislature gave the Board of Control voting power over the stock of the bank and coal company and the power to elect boards of directors and managing agents.[26] Because the President of the Senate and Speaker of the House voted together, the legislature had control of appointments to the boards of directors.[27] The Governor-General brought an action in quo warranto challenging the right of the two legislative members of the Board of Control to vote for directors.[28]

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[20] *See, e.g.*, Starnes v. Sadler, 237 Ark. 325, _____, 372 S.W.2d 585, 586 (1963) (day-to-day management of state colleges and prisons is executive function); Opinion of the Justices, 380 A.2d 109, 116 (Del. 1977) (day-to-day management of state capitol is executive function).

[21] *See* Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620 (1978) (en banc). The *Anderson* court observed that the executive branch has the power to administer funds which the legislature has appropriated for programs which the legislature has enacted. *Id.* at _____, 579 P.2d at 623-24.

[22] *See, e.g.*, Parcell v. Kansas, 468 F.Supp. 1274, 1279 (D. Kan. 1979), *aff'd sub nom* Parcell v. Governmental Ethics Comm'n, 639 F.2d 628 (10th Cir. 1980) (legislatively appointed members of Governmental Ethics Commission performed blend of executive and legislative functions); State *ex rel.* Wallace v. Bone, 304 N.C. 591, 593, 286 S.E.2d 79, 80 (1982) (Environmental Management Commission had quasi-legislative and quasi-judicial powers); *see infra* text accompanying notes 94-105 (discussion of *Parcell*); *infra* text accompanying notes 46-60 (discussion of *Bone*).

[23] 277 U.S. 189 (1928).

[24] *See, e.g.*, Myers v. United States, 272 U.S. 52, 116 (1926) (courts should keep three branches of government separate unless Constitution expressly requires blending); Kilbourn v. Thompson, 103 U.S. 168, 190 (1880) (courts should clearly define lines separating the three branches of government).

[25] *Springer*, 277 U.S. at 197-98; *see* Act of March 5, 1919, No. 2822, Philippine Legislature (Board of Control has voting power over coal company); Act of January 30, 1921, No. 2938, Philippine Legislature (gave Board of Control voting power over bank).

[26] 277 U.S. at 198.

[27] *Id.* at 199.

[28] *Id.* Quo warranto is a remedy which belongs to the state in its sovereign capacity. Citizens Util. Co. v. Superior Court, 56 Cal. App.3d 399, 405-06, 128 Cal. Rptr. 582, 588 (1976). The purpose of a quo warranto action is to prevent a continuing exercise by a public office-holder of unlawfully asserted authority. People *ex rel.* Cromer v. Village of Maywood,

The *Springer* Court noted that the Organic Act of the Philippine Islands placed the power to appoint government officials solely with the Governor-General.[29] Considering the managing officers of the government-owned bank and coal company to be government officials, the Court held that in voting for the boards of directors the legislators on the Board of Control were exercising an executive function.[30] The *Springer* Court reasoned that the power to elect board members did not aid the legislators in performance of their duties as lawmakers.[31] Under the strict reading of separation of powers, the Court therefore found the power of the legislators to elect the boards of directors violative of separation of powers.[32] The *Springer* Court affirmed the judgment of the Supreme Court of the Philippine Islands ousting the legislative members from the Board of Control.[33] The Supreme Court continued this strict interpretation of separation of powers in subsequent cases.[34]

Book v. State Office Building Commission[35] is one of several decisions in which state courts followed the Supreme Court's strict application of separation of powers. In *Book*, the Indiana Supreme Court considered whether the creation by the Indiana legislature of the State Of-

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381 Ill. 337, _____, 45 N.E.2d 617, 619 (1942). State attorneys general ordinarily have responsibility for prosecuting quo warranto actions on behalf of their states. *See* State *ex rel.* Fatzer v. Kansas Turnpike Auth., 176 Kan. 683, 273 P.2d 198 (1954).

[29] 277 U.S. at 201; *see, e.g.*, Philippine Islands Organic Act, ch. 416, §§ 21-22, 39 Stat. 545 (1916). Section 21 of the Organic Act gave the Governor General supervisory powers over all of the departments and bureaus of the Philippine government and made the Governor General responsible for the faithful execution of the laws. 277 U.S. at 200; *see* Organic Act, § 21. Section 22 vested the Governor General with the power to appoint government officials. 277 U.S. at 201; *see* Organic Act, § 22.

[30] 277 U.S. at 202. The *Springer* Court reasoned that even if the boards of directors of the bank and coal company were not public officials in the strict sense, the board members at least were public agents charged with day-to-day supervision of the bank and coal company. *Id.* at 203. The Court therefore concluded that by electing these directors, the legislators on the Board of Control were usurping the executive power of appointment. *Id.* The *Springer* Court found *Stockman v. Leddy* analogous. *Id.*; *see* Stockman v. Leddy, 54 Colo. 24, 129 P. 220 (1912), *overruled on other grounds*, 188 Colo. 310, _____, 535 P.2d 200, 204 (1975).

[31] 277 U.S. at 202.

[32] *Id.* at 201-02. Justice Holmes registered a vigorous dissent in *Springer*. *Id.* at 209. Justice Holmes argued that the proper application of the great principles of the Constitution is not perfectly clear-cut. *Id.* Justice Holmes observed that courts would face an impossible task in attempting to distinguish between legislative and executive action with mathematical precision. *Id.* at 211. Justice Holmes concluded that division of the three branches of government into watertight compartments not only was undesirable but also was not a requirement of the Constitution. *Id.*

[33] *Id.* at 209.

[34] *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 630-32 (1935) (President's power to remove government officials does not extend to officials in agency wholly unconnected with executive department); O'Donoghue v. United States, 289 U.S. 516, 530, 551 (1933) (one branch of government should never exert coercive influence directly or indirectly over either of other two branches).

[35] 238 Ind. 120, 149 N.E.2d 273 (1958).

fice Building Commission, composed of both legislators and executive department officials, violated separation of powers.[36] Legislators made up a majority of the Commission membership.[37] The primary duties of the Commission included acquiring a site for a new state office building, adopting a design for the building, issuing bonds to finance its construction, overseeing its construction, and allocating office space in the building among state agencies.[38] The legislature also vested the Commission with power to hire employees and agents to carry out the Commission's functions.[39] A state taxpayer brought an action charging that the legislators' exercise of these powers as members of the Commission violated the doctrine of separation of powers.[40]

The *Book* court noted that the powers the Indiana legislature vested in the Commission, which included the appointment of public officials and general administration of the new office building, were essentially executive in nature.[41] The *Book* court further concluded that the performance of the Commission's legislative members was unrelated to their duties as lawmakers.[42] The court reasoned that as members of the Commission, the legislators were exercising the type of judgment and discretion which the state constitution reserved to executive branch officials.[43] The *Book* court, therefore, held that the legislators' service on the Commission violated the principle of separation of powers.[44] The *Book* court further ruled that the governor had the power to appoint Commission

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[36] *Id.* at _____, 149 N.E.2d at 293; *see* IND. CODE ANN. §§ 60-2101—60-2134 (Burns Supp. 1951) (legislation creating State Office Building Commission) (renumbered as IND. CODE ANN. §§ 4-13-11-1—4-13-11-38 (Burns 1974) and repealed by Acts 1977, P.L. 31, § 7).

[37] 238 Ind. at _____, 149 N.E.2d at 293.

[38] *Id.* at _____, 149 N.E.2d at 295-96.

[39] *Id.* at _____, 149 N.E.2d at 295-96.

[40] *Id.* at _____, 149 N.E.2d at 277-78.

[41] *Id.* at ____, 149 N.E.2d at 296; *see supra* text accompanying notes 19-21 (traditionally executive functions).

[42] 238 Ind. at _____, 149 N.E.2d at 296.

[43] *Id.* at _____, 149 N.E.2d at 296.

[44] *Id.* at _____, 149 N.E.2d at 296-97; *see also* Greer v. State, 233 Ga. 667, 669-70, 212 S.E.2d 836, 838-39 (1975). The *Book* court warned that if legislatures could appoint their own members to boards exercising executive and administrative functions, the potential would exist for the legislature to assume complete control over the executive branch. 238 Ind. at _____, 149 N.E.2d at 296-97. The *Book* court observed that since six of the eight State Office Building Commission members were legislators, the legislature could control every act of the Commission. *Id.* at _____, 149 N.E.2d at 296-97. The *Greer* court shared the *Book* court's concern that by permitting legislators to serve on boards performing executive and administrative functions, courts would be allowing legislatures to appoint ad hoc committees of their own members to implement specific legislation. 233 Ga. at 669, 212 S.E.2d at 838. In *Greer*, even though only six of the twenty members of the administrative board in question were legislators, the court concluded that the lawmakers' presence on the board usurped executive powers. *Id.* at 669-71, 212 S.E.2d at 837-39. The *Book* court was careful to point out, however, that the doctrine of separation of powers does not bar the legislature from engaging in activities which are properly incidental and germane to the legislative power. 238 Ind. at _____, 149 N.E.2d at 296.

members to fill the positions that the legislative members formerly held.[45]

The strict approach to separation of powers issues advocated by the *Book* court recently received strong reaffirmance by the North Carolina Supreme Court in *State ex rel. Wallace v. Bone*.[46] In *Bone*, the North Carolina legislature increased the size of the state Environmental Management Commission in order to allow the legislature to appoint four of its own members to the Commission.[47] Prior to the legislature's action, the Commission was staffed by administrative officials, all appointed by the governor.[48] Powers exercised by Commission members included promulgating standards and regulations concerning air and water pollution, granting and revoking permits, conducting investigations, and instituting court actions against violators.[49] Additionally, the Commission had the duty of general supervision over local air pollution control programs.[50] A group of the Commission's original members brought suit, charging that the statute providing for appointment of legislators to the Commission violated the doctrine of separation of powers.[51]

The trial court in *Bone* concluded that the legislative members of the Commission, who were in the minority, were in no position to usurp executive branch functions.[52] The trial court, therefore, upheld the legislators' service on the Commission as a cooperative effort with the executive branch.[53] The North Carolina Supreme Court reversed after considering the history of the separation of powers doctrine in North Carolina and in other states.[54] The *Bone* court observed that North Carolina courts traditionally had followed a strict application of separation of powers.[55] The court also considered a strict interpretation of the

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[45] *Id.* at _____, 149 N.E.2d at 298.

[46] 304 N.C. 591, 286 S.E.2d 79 (1982).

[47] *Id.* at 593-94, 606-07, 286 S.E.2d at 79-80, 87. Before the North Carolina legislature passed the statute providing for the appointment of four legislators to the Environmental Management Commission, the Commission consisted of thirteen members. *Id.* at 593, 286 S.E.2d at 80. The statute provided for the speaker of the state house of representatives to appoint two house members to the Commission and for the president of the state senate to appoint two senate members. *Id.* at 592, 286 S.E.2d at 79-80.

[48] *Id.* at 593, 286 S.E.2d at 80.

[49] *Id.* at 607, 286 S.E.2d at 88.

[50] *Id.* at 607-08, 286 S.E.2d at 88.

[51] *Id.* at 591-92, 286 S.E.2d at 79.

[52] *Id.* at 594, 286 S.E.2d at 81. The *Bone* trial court emphasized that the clear minority position of legislators on the Commission was a critical factor in its decision. *Id.* at 594, 286 S.E.2d at 81. The trial court judge stated that he found the South Carolina Supreme Court's decision in *State ex rel. McLeod v. Edwards* to be very persuasive. 304 N.C. at 604, 286 S.E.2d at 86; *see* State *ex rel.* McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977); *infra* text accompanying notes 106-113 (discussion of *Edwards*).

[53] 304 N.C. at 594, 286 S.E.2d at 81.

[54] *Id.* at 595-606, 609, 286 S.E.2d at 81-87, 89.

[55] *Id.* at 599-601, 286 S.E.2d at 83-84. The *Bone* court noted that each subsequent redrafting of the North Carolina Constitution retained a strongly worded separation of

doctrine to be consistent with the decisions of other courts.[56] The *Bone* court reasoned that the fundamental importance of the separation of powers to sound governmental operation justified a strict application of the doctrine.[57] The *Bone* court held that the duties of the Commission clearly were executive or administrative in nature and had no relation to the lawmaking function of the executive branch.[58] The North Carolina Supreme Court, therefore, held that the legislature's appointment of lawmakers as Commission members violated separation of powers.[59] The *Bone* court allowed the Commission to continue in existence without the legislative members.[60]

The recent rise in prominence of administrative agencies has complicated greatly the task of the courts in ruling on separation of powers violations.[61] In an effort to deal with the increasingly complex problems

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powers clause. *Id.* at 595, 286 S.E.2d at 81. The *Bone* court also observed that the fact that North Carolina is one of the few states which does not empower its governor to veto legislative enactments is an indication that the state follows a strict approach to separation of powers. *Id.* at 599, 286 S.E.2d at 83. Numerous efforts to amend the constitution to give the governor the veto power had failed, leading the court to draw the implication that the people of North Carolina do not want the governor to have any direct control over the legislative branch. *Id.* at 599, 286 S.E.2d at 83. The *Bone* court concluded that the small number of cases over the years in which a party alleged that a branch of the North Carolina government was violating separation of powers was also strong evidence that the North Carolina government had adhered strictly to the separation of powers doctrine. *Id.* at 599-601, 286 S.E.2d at 83-84.

[56] *Id.* at 601, 286 S.E.2d at 84. The *Bone* court gave detailed consideration to a number of strict separation of powers cases. *Id.* at 601-06, 286 S.E.2d at 84-87. Among the cases the *Bone* court cited were O'Donoghue v. United States, 289 U.S. 516 (1933); Stockman v. Leddy, 54 Colo. 24, 129 P. 220 (1912), *overruled on other grounds*, 188 Colo. 310, _____, 535 P.2d 200, 204 (1975); Greer v. State, 233 Ga. 667, 212 S.E.2d 836 (1975); Book v. State Office Bldg. Comm'n, 238 Ind. 120, 149 N.E.2d 273 (1958); State *ex rel.* State Bldg. Comm'n v. Bailey, 151 W.Va. 79, 150 S.E.2d 449 (1966). 304 N.C. at 601-04, 286 S.E.2d at 84-86. The *Bone* court also considered State *ex rel.* Schneider v. Bennett, 219 Kan. 285, 547 P.2d 786 (1976), and State *ex rel.* McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977), two cases which advocated a flexible approch. 304 N.C. at 604-06, 286 S.E.2d at 86-87. The *Bone* court, however, chose not to follow *Bennett* and *Edwards*, reasoning that the courts which decided those two cases had deviated from the principle of separation of powers. *Id.* at 604, 286 S.E.2d at 86. The *Bone* court further distinguished *Edwards* on the ground that the legislators serving on the State Budget and Control Board in *Edwards* were *ex officio* members, while the North Carolina legislators serving on the Environmental Management Commission were not *ex officio*. *Id.* at 604, 286 S.E.2d at 86; *see infra* note 109 (explanation of *ex officio* status).

[57] 304 N.C. at 601, 286 S.E.2d at 84.

[58] *Id.* at 608, 286 S.E.2d at 88.

[59] *Id.* at 608-09, 286 S.E.2d at 88-89. Although the *Bone* court held that membership of legislators on the Commission violated separation of powers, the court recognized the beneficial effects of cooperation between the executive and legislative branches. *Id.* at 608, 286 S.E.2d at 88. In particular, the *Bone* court observed that the work of study commissions, on which both legislators and executive officials served, had resulted in many excellent proposals for new legislation. *Id.* at 608, 286 S.E.2d at 88.

[60] *Id.* at 608-09, 286 S.E.2d at 88 (invalidation of statute merely removed legislators from Commission).

[61] *See* FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). In his

facing modern society, legislatures have created and utilized administrative agencies.[62] Legislatures typically vest these agencies with a blend of executive, lawmaking, and judicial powers.[63] Thus, most administrative agencies do not fit neatly within one of the three traditional branches of government.[64] In deciding whether legislators' service on administrative boards violates the separation of powers doctrine, courts have endeavored to balance two conflicting considerations. On one hand, courts wish to allow legislatures sufficient flexibility to employ innovative governmental arrangements.[65] On the other hand, the courts have an obligation to insure that the legislature does not usurp functions properly belonging to the executive or judicial branches.[66]

Ruberoid dissent, Justice Jackson recognized that administrative agencies have become a fourth branch of government which has disrupted the neat symmetry of the traditional three-branch system. *Id.* at 487. Justice Jackson observed that courts at various times have labeled administrative agencies as quasi-legislative, quasi-executive, or quasi-judicial. *Id.* Justice Jackson stated that the use of the term "quasi" signifies that the traditional classifications have broken down. *Id.* at 487-88. Justice Jackson likened "quasi" to "a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *Id.* at 488. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.09 (1958) (complication of separation of powers issue as result of increased use of administrative agencies).

[62] *See, e.g.*, Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940). The *Opp* Court observed that in an increasingly complex society, Congress could not perform its functions if courts required Congress to research all the subsidiary facts underlying the defined legislative policy with respect to tariff rates, railroad rates, and minimum wage rates. 312 U.S. at 145. The *Opp* Court stated that to fulfill the legislative function, Congress merely has to determine legislative policy and formulate this policy as a rule of conduct. *Id.* The *Anthracite Coal* Court observed that the delegation of legislative power to administrative agencies "has long been recognized as necessary in order that the exertion of legislative power does not become a futility." 310 U.S. at 398. *See generally* DAVIS, *supra* note 61, § 1.09, at 73; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 33-40 (1965). Davis points out that Montesquieu and other early philosophers who advocated a strict separation of the three branches of government had no idea that governments would be involved in regulating airlines, television networks, railroads, or securities exchanges. DAVIS, *supra* note 61, at 73. Jaffe indicates that legislatures are most likely to delegate power to administrative agencies when the matters requiring regulation are highly technical or when their regulation requires a course of continuous decision. JAFFE, *supra*, at 36. Jaffe further argues that in areas of regulation in which both technical skill and continuous judgment are necessary, legislatures would be helpless without the expertise of administrative agencies. *Id.* at 37.

[63] *See supra* text accompanying note 22 (examples of administrative agencies exercising blend of legislative, executive, and judicial functions).

[64] *See supra* note 61 (difficulty of classifying administrative agencies as within one of three traditional branches of government).

[65] *See, e.g.*, Opinion of the Justices, 380 A.2d 109, 114 (Del. 1977) (certain degree of pragmatic flexibility necessary in courts' application of separation of powers to allow for newly perceived needs and practical exigencies); Greer v. State, 233 Ga. 677, _____, 212 S.E.2d 836, 838 (1975) (separation of powers sufficiently flexible to permit practical arrangements in complex government); State *ex rel.* Schneider v. Bennett, 219 Kan. 285, _____, 547 P.2d 786, 791 (1976) (courts must maintain sufficient flexibility in political system to experiment and seek new methods of improving governmental efficiency).

[66] *See, e.g.*, Opinion of the Justices, 380 A.2d 109, 113 (Del. 1977) (courts must apply

In response to legislatures' increased reliance upon administrative agencies and the consequent blurring of distinctions among the three branches of government, federal courts have begun to adopt a flexible approach to the doctrine of separation of powers.[67] In *Nixon v. Administrator of General Services*,[68] former President Nixon challenged as violative of separation of powers an act of Congress which regulated the disposition and custody of the former President's executive documents.[69] The Supreme Court, however, rejected Nixon's argument.[70] The Court emphasized that Nixon's view that the separation of powers doctrine required three airtight departments of government was inconsistent with the origins of the doctrine, recent Supreme Court decisions, and the contemporary realities of the political system.[71] The *Nixon* Court held that a legislative act violates the separation of powers doctrine only if the act significantly disrupts the executive branch's performance of its duties and is unnecessary to promote an overriding objective within the legislature's constitutional authority.[72]

A number of recent state cases have followed the Supreme Court's lead in adopting a flexible approach to separation of powers.[73] In *State*

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separation of powers doctrine to prevent one branch of government from encroaching upon another branch's domain); State *ex rel.* Schneider v. Bennett, 219 Kan. 285, _____, 547 P.2d 786, 791 (1976) (courts must never lose sight of danger of unchecked power concentrated in one branch of government).

[67] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 121 (1976) (Constitution by no means contemplates hermetic sealing off of three branches of government from one another); United States v. Nixon, 418 U.S. 683, 707 (1974) (framers of Constitution never intended that three branches of government should operate with complete independence); Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 421-22 (9th Cir. 1980), *appeal pending* 454 U.S. 812 (Oct. 5, 1981) (No. 80-1832) (separation of powers pervasive in American system of government yet sufficiently fluid to allow novel governmental arrangements); United States v. Northside Realty Ass'n Inc. (In re Grand Jury Proceedings), 613 F.2d 501, 504 (5th Cir. 1980) (separation of powers requires only proper balance among three branches of government); Duplantier v. United States, 606 F.2d 654, 667 (5th Cir. 1979) (separation of powers merely prohibits one branch from unduly impeding operation of coordinate branch), *cert. denied* 449 U.S. 1076 (1981); United States v. Brainer, 515 F.Supp. 627, 630 (D.Md. 1981) (framers of Constitution never intended complete separation of powers).

[68] 433 U.S. 425 (1977).

[69] *Id.* at 429. Former President Nixon challenged the Presidential Recordings and Material Preservation Act, which directed the administrator of General Services to take custody of former President Nixon's presidential papers and tape recordings, as violative of separation of powers. *Id.*; *see* 44 U.S.C. § 2107 (1976 & Supp. IV 1980).

[70] 433 U.S. at 441.

[71] *Id.* In concluding that a rigid application of separation of powers was inappropriate, the Supreme Court in *Nixon v. Administrator of General Services* placed primary reliance on *United States v. Nixon*. *Id.* at 442-46; *see* United States v. Nixon, 418 U.S. 683, 707 (1974) (in dividing the powers of government among three co-equal branches framers of Constitution did not intend that separate powers should operate with absolute independence).

[72] 433 U.S. at 443.

[73] *See, e.g.*, Opinion of the Justices, 380 A.2d 109, 114 (Del. 1977) (certain degree of pragmatic flexibility in application of separation of powers essential to maximum success of American constitutional system); State *ex rel.* Schneider v. Bennett, 219 Kan. 285, _____, 547 P.2d 786, 791 (1976) (strict application of separation of powers inappropriate in complex

ex rel. Schneider v. Bennett,[74] the Kansas Supreme Court used a flexible approach to find membership of legislators on the State Finance Council impermissible.[75] In *Bennett*, the attorney general brought a quo warranto action challenging, on separation of powers grounds, the right of state legislators to serve on the State Finance Council.[76] The Council consisted of the governor and eight legislators holding leadership positions in the Kansas legislature.[77] The Council's principal duties included administering the Kansas civil service act and supervising both the state department of administration and the state division of personnel.[78] The Finance Council's duties also included approving supplemental appropriations to departments of state government[79] and making appropriations from the state emergency fund.[80]

Before ruling on whether the service of legislators on the Finance Council violated separation of powers, the *Bennett* court examined the development, in previous Kansas cases, of a flexible approach to separation of powers.[81] The *Bennett* court reasoned that a legislative measure does not usurp executive branch functions and thus does not violate separation of powers unless the measure significantly interferes with executive branch operations.[82] The *Bennett* court developed a four-part

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state government); State *ex rel.* McLeod v. Edwards, 269 S.C. 75, _____, 236 S.E.2d 406, 409 (1977) (separation of powers doctrine is sufficiently flexible to permit cooperative efforts between legislative and executive branches); Coates v. Windham, 613 S.W.2d 572, 576 (Tex. Civ. App. 1981) (courts should not interpret separation of powers in way which hinders cooperation or coordination between two or more branches of government); *see infra* text accompanying notes 74-93 (discussion of *Bennett*); *infra* text accompanying notes 106-113 (discussion of *Edwards*).

[74] 219 Kan. 285, 547 P.2d 786 (1976).

[75] *Id.* at _____, 547 P.2d at 797-98.

[76] *Id.* at _____, 547 P.2d at 789; *see supra* note 28 (definition of quo warranto).

[77] *Id.* at _____, 547 P.2d at 794.

[78] *Id.* at _____, 547 P.2d at 795.

[79] *Id.* at _____, 547 P.2d at 795-96. The state Finance Council in *Bennett* had the power to make supplemental appropriations to government departments to meet unforseen contingencies arising while the legislature was not in session. *Id.* at _____, 547 P.2d at 795-96.

[80] *Id.* at _____, 547 P.2d at 796. The purpose of the Finance Council's power to make appropriations from the state emergency fund was to meet extraordinary conditions when prompt state action was essential to preserve public health and welfare, such as natural disasters. *Id.* at _____, 547 P.2d at 796.

[81] *Id.* at _____, 547 P.2d at 790-92. The *Bennett* court noted that Kansas courts had applied the separation of powers doctrine both in a strict and in a flexible manner. *Id.* at _____, 547 P.2d at 790. State *ex rel.* Fatzer v. Kansas Turnpike Auth., 176 Kan. 683, 273 P.2d 198 (1954), and State *ex rel.* Anderson v. Fadely, 180 Kan. 652, 308 P.2d 537 (1957), were two earlier cases the *Bennett* court relied on which also involved legislators' service on administrative boards. 219 Kan. at _____, 547 P.2d at 792. The *Fatzer* and *Fadely* courts both held that a legislator may serve on an administrative board so long as his service does not constitute an attempt to usurp executive branch functions. *Id.* at _____, 547 P.2d at 792.

[82] *Id.* at _____, 547 P.2d at 792; *see* Note, *Treatment of the Separation of Powers Doctrine in Kansas*, 29 KAN. L. REV. 243 (1980) (development of doctrine).

test for determining whether a legislator's service on an administrative board usurps executive branch functions and therefore violates the principle of separation of powers.[83] The first factor was whether the essential nature of the power being exercised by the legislators on the board is legislative or executive in nature.[84] The second factor was whether the legislative branch exerts any control over the executive branch by vesting the legislative members of the board with executive duties.[85] The *Bennett* court's third factor was whether the legislature appoints its own members to administrative boards in order to foster cooperation with the executive branch or to establish superiority over the executive branch.[86] The fourth factor was whether the board's blending of legislative and executive powers results, over a period of time, in the legislature's usurpation of executive branch functions.[87]

The *Bennett* court devoted the bulk of its analysis to the first factor, whether the Council's members performed executive or legislative functions.[88] The court reasoned that the Finance Council's supervisory power over the department of administration, the civil service act, and the division of personnel involved the legislative members of the Council in the day-to-day operations of the executive branch.[89] The *Bennett* court concluded that these supervisory powers were executive in nature.[90] Concerning the second factor, whether the legislators' membership allows the legislature to exert control over the executive branch, the *Bennett* court concluded that by vesting supervisory powers in the Finance Council, the legislature exerted a coercive influence over the executive branch.[91] Of particular importance to the court's finding of coercive influence was the fact that the department of administration could not function effectively unless the Finance Council, in which legislators were the majority, approved the rules and regulations governing the department's everyday operations.[92] Having concluded, on the basis of the first two factors of its proposed test, that the legislators' membership was impermissible, the *Bennett* court considered the application of the final two factors unnecessary.[93]

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[83] *Id.* at _____, 547 P.2d at 792-93.

[84] *Id.* at _____, 547 P.2d at 792.

[85] *Id.* at _____, 547 P.2d at 792; *see supra* text accompanying notes 19-21 (definition of executive duties).

[86] *Id.* at _____, 547 P.2d at 792.

[87] *Id.* at _____, 547 P.2d at 792.

[88] *Id.* at _____, 547 P.2d at 793-97.

[89] *Id.* at _____, 547 P.2d at 797.

[90] *Id.* at _____, 547 P.2d at 797; *see supra* text accompanying notes 19-21 (definition of executive duties).

[91] *Id.* at _____, 547 P.2d at 797-98.

[92] *Id.* at _____, 547 P.2d at 797.

[93] *Id.* at _____, 547 P.2d at 798. The *Bennett* court upheld the Finance Council's power to make appropriations from the state emergency fund as a cooperative venture between the legislative and executive branches. *Id.* at _____, 547 P.2d at 798. Because the Finance

In *Parcell v. Kansas*[94] the United States District Court for the District of Kansas applied the four-part *Bennett* test to another separation of powers challenge.[95] In *Parcell*, a contributor to the campaign of a candidate for state office sought to enjoin enforcement of the Kansas Campaign Finance Act.[96] The contributor argued that a provision of the Act which empowered the legislature to appoint several members of the Governmental Ethics Commission violated the separation of powers doctrine.[97] Duties of the Commission involved adopting rules and regulations for administration of the Act, reviewing campaign finance reports of elected state officials, and investigating alleged violations of the Act.[98]

Concerning the first factor of the *Bennett* test, whether the powers exercised by Commission members were executive or legislative in nature, the *Parcell* court concluded that Commission members performed a blend of legislative and executive functions.[99] Important to the *Parcell* court's conclusion on the first factor were the facts that the Commission's duties included historically legislative functions, such as the power to conduct investigations and the duty to submit an annual report and recommendations to both the governor and the legislature.[100] Concerning the second factor of the *Bennett* test, the degree of control over the Commission exercised by the legislature, the *Parcell* court concluded that even though legislators had the power to appoint a majority of Commission members, the legislature's control of the Commission was not coercive.[101] Regarding the third factor of the *Bennett* test, whether

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Council could invoke this emergency appropriation power only by unanimous vote and only in extraordinary situations such as major disasters, the court ruled that the legislators' participation in the exercise of this power did not usurp executive functions. *Id.* at _____, 547 P.2d at 798.

[94] 468 F.Supp. 1274 (D. Kan. 1979), *aff'd sub nom* Parcell v. Governmental Ethics Comm'n, 639 F.2d 628 (10th Cir. 1980).

[95] 468 F. Supp. at 1278-80. Even though the litigants in *Parcell* chose to pursue the case in federal court, the controversy in *Parcell* took place in Kansas and involved the interpretation of a Kansas statute. 468 F.Supp. at 1277. Since the federal constitution does not require states to follow the federal doctrine on separation of powers, Kansas law on separation of powers governed the *Parcell* court's determination. *Id.* at 1278; *see supra* note 3 (states not bound by federal separation of powers law).

[96] 468 F.Supp. at 1275; *see* KAN. STAT. ANN. §§ 25-4101—25-4141 (1981) (repealed by L. 1981, ch. 171, § 51).

[97] 468 F.Supp. at 1276.

[98] *Id.* at 1278-79.

[99] *Id.* at 1279.

[100] *Id.*

[101] *Id.* Important to the *Parcell* court's conclusion that the legislature did not exercise a coercive influence over the Governmental Ethics Commission was the fact that the legislature had split up the power to appoint six Commission members among four individual legislators. *Id.* Additionally, the court observed that the Kansas Campaign Finance Act did not require the legislature to confirm the five appointments made to the Commission by the governor. *Id.* Even though the Act required the vote of only six Commission members to conduct business, the court did not consider the legislature's control over the Commission violative of separation of powers. *Id.*

the legislature intended to usurp executive functions, the *Parcell* court reasoned that the appointment scheme, which the legislature had designed to insure an independent Commission, was evidence that the legislature had not intended to usurp executive functions.[102] With respect to the fourth factor of the *Bennett* test, the practical result of blending executive and legislative functions in the Commission, the *Parcell* court observed that allowing legislators to serve as Commission members had aided the Commission in conducting investigations.[103] On the basis of the *Bennett* test, the *Parcell* court concluded that the blending of executive and legislative powers had not resulted, as a practical matter, in any significant encroachment by the legislative branch on the executive.[104] The *Parcell* court therefore held that even though the Act gave legislators the power to appoint a majority of Commission members, no separation of powers violation existed.[105]

In *State ex rel. McLeod v. Edwards*,[106] the South Carolina Supreme Court also followed a flexible approach to separation of powers.[107] In *Edwards*, the South Carolina Attorney General brought suit alleging that the service of legislators on the State Budget and Control Board violated the separation of powers doctrine.[108] The Board consisted of the governor, the state treasurer, the controller general, the chairman of the senate finance committee, and the chairman of the house ways and means committee, all *ex officio* members.[109] The Board performed its duty of

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[102] *Id.* The *Parcell* court observed that the Kansas legislature had designed the appointment scheme to provide for a Commission with a balanced membership both along political party lines and executive and legislative branch lines. *Id.* Under the Act no more than three of the five Commission members appointed by the governor could be from the same political party as the governor. *Id.* The Act divided the legislative power to appoint Commission members so that the president of the senate and the speaker of the house each would appoint two, and the minority leader of the senate and the minority leader of the house each would appoint one. *Id.* Thus, even if the house speaker and president of the senate were from the same political party as the governor, no more than seven of the Commission members could be of the same party affiliation. *Id.* The *Parcell* court therefore concluded that the legislature's reason for developing this appointment system was not to usurp executive functions, but rather to insure that the Commission would have the necessary independence to investigate the election campaign finances of any elected state officials. *Id.*

[103] *Id.* In ruling on the fourth factor of the *Bennett* test, the *Parcell* court merely stated that the court found that the appointment scheme devised by the legislature probably had aided the Commission in conducting investigations into the campaign finances of the appointing authorities. *Id.* The court accepted the stipulation of the parties that the Commission routinely had conducted such investigations. *Id.*

[104] *Id.*

[105] *Id.*

[106] 269 S.C. 75, 236 S.E.2d 406 (1977).

[107] *Id.* at _____, 236 S.E.2d at 409.

[108] *Id.* at _____, 236 S.E.2d at 406-07.

[109] *Id.* at _____, 236 S.E.2d at 406. An *ex officio* member of a board is one who is a member solely by virtue of his title to a certain office and without further appointment. State *ex rel.* Hennepin County v. Brandt, 225 Minn. 345, _____, 31 N.W.2d 5, 9-10 (1948). In *Edwards*, the legislative members of the State Budget and Control Board held their Board

general supervision of the fiscal affairs of the state government, through three divisions, the Finance Division, the Purchasing and Property Division, and the Division of Personnel Administration.[110] In deciding whether legislators' service on the Board violated separation of powers, the *Edwards* court found dispositive the fact that the legislature had put legislators in a minority on the Board.[111] The court noted that the legislature, by placing the chairmen of the house ways and means committee and senate finance committee on the Board, provided the Board with a great deal of valuable expertise.[112] In view of the *ex officio* nature of the legislators' membership and the minority position of legislators on the Board, the *Edwards* court upheld membership of the lawmakers on the Board as a cooperative effort with the executive branch.[113]

Both courts which apply separation of powers strictly and courts which apply the doctrine flexibly have recognized the benefits of

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memberships solely by virtue of holding the offices of Chairman of the House Ways and Means Committee and Chairman of the Senate Finance Committee. 269 S.C. at _____, 236 S.E.2d at 406.

[110] *Id.* at _____, 236 S.E.2d at 407.

[111] *Id.* at _____, 236 S.E.2d at 408.

[112] *Id.* at _____, 236 S.E.2d at 409.

[113] *Id.* at _____, 236 S.E.2d at 409. *But see* State *ex rel.* McLeod v. McInnis, _____ S.C. _____, 295 S.E.2d 633 (1982). In *McInnis*, the South Carolina Supreme Court held that the South Carolina legislature's creation of a Joint Appropriation Review Committee, composed of six members of the state Senate and six members of the state House of Representatives, violated separation of powers. *Id.* at _____, 295 S.E.2d at 639. The legislature vested the Committee with a veto power over the expenditure and allocation by any agency of state government of funds received by an agency directly from the federal government. *Id.* at _____, 295 S.E.2d at 638. The legislature had formed the Committee in an attempt to regain control over the determination of public policy and the appropriation of moneys within state government. *Id.* at _____, 295 S.E.2d at 637. Many agencies of state government which received substantial federal funds had been able, as a practical matter, to override the legislature's determinations of public policy and appropriations. *Id.* at _____, 295 S.E.2d at 637. The South Carolina Attorney General brought an action for a declaratory judgment in which he attacked the legislature's creation of the committee as an unconstitutional attempt to confer executive authority upon members of the legislature. *Id.* at _____, 295 S.E.2d at 634. The defendant committee members contended, however, that the committee was necessary to the legislature's full and effective exercise of the appropriation power. *Id.* at _____, 295 S.E.2d at 634. In reaching its result, the *McInnis* court noted that the legislature could have exercised control over the expenditure of federal funds by legislation. *Id.* at _____, 295 S.E.2d at 638. The *McInnis* court observed, however, that the legislature had attempted to control the expenditure of federal funds by setting up a committee of twelve legislators as an administrative or executive board. *Id.* at _____, 295 S.E.2d at 638. Thus, the court concluded that the committee violated separation of powers. *Id.* at _____, 295 S.E.2d at 639. The *McInnis* court rejected the defendant's contention that *State ex rel McLeod v. Edwards* controlled the result on the ground that the degree of involvement of the legislators in executive functions was greater in *McInnis* than in *Edwards*. *Id.* at _____, 295 S.E.2d at 639. *See* State *ex rel.* McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977); *supra* text accompanying notes 106-112 (discussion of *Edwards*). The *McInnis* court emphasized that courts must determine each separation of powers controversy on its own facts. _____ S.C. at _____, 295 S.E.2d at 639.

cooperation between the legislative and executive branches of government.[114] A strict application of separation of powers, such as that followed by the *Bone* and *Book* courts, severely limits opportunities for cooperation among the branches of government.[115] A flexible application such as that followed by the *Bennett* and *Edwards* courts maximizes opportunities for interbranch cooperation.[116] Most importantly, a flexible approach adequately safeguards the governmental interests that the framers of the Constitution intended the separation of powers doctrine to protect.[117] Therefore, both on historical grounds and in view of the complex problems facing present day government, a strict application of separation of powers is inappropriate.[118] In ruling on separation of powers challenges to legislators serving on administrative boards, courts should construe the doctrine liberally to uphold legitimate cooperative efforts between the executive and legislative branches whenever possible.[119]

MICHAEL J. FARR

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[114] *See, e.g.*, State *ex rel.* Schneider v. Bennett, 219 Kan. 285, _____, 547 P.2d 786, 793 (1976) (governmental economy and efficiency); Opinion of the Justices to the House of Representatives, 365 Mass. 639, _____, 309 N.E.2d 476, 479 (1974) (governmental economy); State *ex rel.* Wallace v. Bone, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982) (use of interbranch study groups to generate proposals for new laws considered beneficial); State *ex rel.* McLeod v. Edwards, 269 S.C. 75, _____, 236 S.E.2d 406, 409 (1977) (sharing special expertise of each branch).

[115] *See* Opinion of the Justices to the House of Representatives, 365 Mass. 639, 309 N.E.2d 476 (1974). The Massachusetts Supreme Court reasoned that the strict separation of powers provision in the state constitution required that the court strike down a legislative proposal for a central data processing system for all three branches of government. *Id.* at _____, 309 N.E.2d at 478. The court held the plan violative of separation of powers even though the court recognized the advantages of the plan in terms of governmental economy and efficiency. *Id.* at _____, 309 N.E.2d at 479.

[116] *See, e.g.*, Parcell v. Kansas, 468 F. Supp. 1274, 1280 (D. Kan. 1979), *aff'd sub nom* Parcell v. Governmental Ethics Comm'n, 639 F.2d 628 (10th Cir. 1980) (cooperation between executive and legislative branches in enforcing campaign finance statute even though legislators appointed majority of enforcement board); State *ex rel.* McLeod v. Edwards, 269 S.C. 75, _____, 236 S.E.2d 406, 409 (1977) (executive members of Budget and Control Board derived valuable assistance from service on Board of chairmen of the two finance committees of legislature); *see supra* text accompanying notes 94-105 (discussion of *Parcell*); *supra* text accompanying notes 106-113 (discussion of *Edwards*).

[117] *See* THE FEDERALIST No. 47, at 338 (J. Madison) (B. Wright ed. 1966). James Madison argued that Montesquieu's admonition that no liberty can exist when the legislative and executive powers are united in the same branch only meant that when the whole power of one branch exercises the whole power of another branch, the fundamental principles of a free constitution are subverted. *Id.*; *supra* note 2.

[118] *See supra* note 2 (historical background); *supra* note 62 (complex problems requiring governmental action).

[119] *See supra* text accompanying notes 94-105 (application by *Parcell* court of *Bennett* flexible test); *supra* text accompanying notes 106-113 (*Edwards* court cooperative effort flexible approach).