A STUDY IN SEPARATION OF POWERS: EXECUTIVE POWER IN NORTH CAROLINA

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In the past two decades, Arch Allen has represented officers of North Carolina's executive branch in three cases critical in developing the contours of this state's separation-of-powers doctrine. In this Article, Mr. Allen explores the application of the doctrine to North Carolina's system of government, concentrating on the executive branch. The author first examines the historical roots of the doctrine, from its constitutional underpinnings in the eighteenth century to court cases decided this century. Next, the author discusses the Executive Power and the Appointment Power in North Carolina and the related power struggles that have occurred between the legislature and the governor. In conclusion, Mr. Allen proposes further constitutional reform to effect a unitary executive and establish a true separation of powers in North Carolina's government.

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"The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

—North Carolina Constitution Article I, section 6.

"The executive power of the State shall be vested in the Governor."

—North Carolina Constitution Article III, section 1.

INTRODUCTION

Since the American states declared their independence in 1776, the North Carolina Constitution has proclaimed the primacy of the doctrine of separation of powers.[1] The doctrine had influenced pre-independence political philosophy, including the limited-government theory of John Locke.[2] Montesquieu emphasized and expanded the

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1. *See* N.C. CONST. art. I, § 6; State *ex rel.* Wallace v. Bone, 304 N.C. 591, 595, 286 S.E.2d 79, 81 (1982); John V. Orth, *"Forever Separate and Distinct": Separation of Powers in North Carolina*, 62 N.C. L. REV. 1, 3 (1983).

2. *See* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were To Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 457 &

doctrine, warning that if "the legislative and executive powers are united ... there can be no liberty."[3] Both Locke's political philosophy of limited government and Montesquieu's maxim for maintaining liberty influenced the founding fathers, especially James Madison, who warned that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[4] The Supreme Court has also echoed "the famous warning of Montesquieu, quoted by James Madison in *The Federalist No. 47*, that ' "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." ' "[5] Accordingly, the doctrine of separation of powers has become fundamental to American constitutionalism, both state and federal, and has become a "Classical American Doctrine."[6]

Madisonian principles permeate the North Carolina and Federal Constitutions. To understand why the resulting governmental bureaucracies act as they do, one should turn to *The Federalist No. 51*,[7] where Madison proclaimed the underlying principles of separation of powers:

> In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.[8]

The concept of a "unitary" executive was central to Madison's

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n.31, 459-60 (1991).

3. 1 MONTESQUIEU, THE SPIRIT OF LAWS 152 (Thomas Nugent trans., 1823) (1748).

4. THE FEDERALIST NO. 47, at 329 (James Madison) (Tudor Publishing Co. 1937).

5. Bowsher v. Synar, 478 U.S. 714, 721-22 (1986) (quoting THE FEDERALIST NO. 47, *supra* note 4, at 331 (quoting Montesquieu)).

6. Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 385 (1935).

7. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 28 (1989). Madison's eighteenth century writings continue to be a relevant source of modern separation-of-powers dialogue. In recent years, "no major Supreme Court opinion or law review article on the separation of powers has failed to enlist Madison or Madison's *Federalist* in the contemporary battle for the separation of powers." Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers:* The Federalist Papers *as Political Narrative*, 74 TEX. L. REV. 447, 449-50 (1996).

8. THE FEDERALIST NO. 51, at 353 (James Madison) (Tudor Publishing Co. 1937).

advocacy of separation of powers.[9] Madison's views prevailed in the structure of the federal government, in which the executive power is vested in an elected president,[10] who has the power to appoint other executive officers.[11] North Carolina, however, has never applied completely the concept of a unitary executive. The early North Carolina proclamation of separation of powers exemplified what Madison saw as ineffective "paper" separation between the branches of government.[12] Madison's criticism of the state's provision for legislative election of the governor and appointment of other officers demonstrates that the North Carolina proclamation exaggerated its actual application.[13]

This Article discusses the differences between the proclamation of separation of powers in the North Carolina Constitution and its application to the state's executive from 1776 to the present. Part II summarizes the state's constitutional history, while Part III details some case-law applications of the doctrine of separation of powers. The Article then focuses in Parts IV and V on the executive power, especially the governor's ability to execute the laws through subordinates selected by him and acting under his direction. Sometimes these subordinates are statutory "officers" exercising some of the sovereign power of the state; sometimes they are simply state employees.[14] In either status, they are part of the modern state

9. *See* THE FEDERALIST NO. 47, *supra* note 4, at 329-37.

10. *See* U.S. CONST. art. II, § 1, cl. 1.

11. *See id.* art. II, § 2, cl. 2.

12. *See* THE FEDERALIST NO. 47, *supra* note 4, at 336-37.

13. *See* Orth, *supra* note 1, at 5.

14. The term "officer" is broadly defined and generally refers to one exercising some portion of the sovereign power of the state. *See, e.g.*, Simeon v. Hardin, 339 N.C. 358, 371-72, 451 S.E.2d 858, 867-68 (1994) (holding that district attorneys are constitutional officers); State v. Camacho, 329 N.C. 589, 593, 406 S.E.2d 868, 870 (1991) (holding that district attorneys are "independent constitutional officers"); Smith v. State, 289 N.C. 303, 307-08, 222 S.E.2d 412, 416 (1976) (holding that a superintendent of a state hospital is an employee, not an "officer"); State *ex rel.* McCollough v. Scott, 182 N.C. 865, 870, 109 S.E. 789, 792 (1921) (holding that members of the State Board of Accountancy are "officers"); State *ex rel.* Attorney General v. Knight, 169 N.C. 333, 337-45, 85 S.E. 418, 420-24 (1915) (holding that a notary public is an "officer"); State *ex rel.* Wooten v. Smith, 145 N.C. 476, 477, 59 S.E. 649, 650 (1907) (holding that a public administrator of a county is not an "officer") (In the *Southeastern Reporter*, this case is entitled *State ex rel. Wootton v. Smith.*); State *ex rel.* Wood v. Bellamy, 120 N.C. 212, 224, 27 S.E. 113, 116 (1897) (holding that directors of a state hospital are "officers"); People *ex rel.* Welker v. Bledsoe, 68 N.C. 457, 463-64 (1873) (holding that directors of the state penitentiary are "officers"); People *ex rel.* Nichols v. McKee, 68 N.C. 429, 434-38 (1873) (holding that directors of a state institution are "officers"); State *ex rel.* Clark v. Stanley, 66 N.C. 60, 67 (1872) (holding that state-appointed directors of corporations in which the state is a shareholder are "officers").

governmental bureaucracy. In Part VI, the Article concludes with proposals for further constitutional consolidation of the state's executive power in the governor.

North Carolina adopted a new constitution in 1971 that included provisions vesting the state's executive power in the governor[15] and authorizing gubernatorial appointment of "officers whose appointments are not otherwise provided for."[16] The state still suffers, however, from the governor's sharing of some executive power with other elected officers and from the legislature's potential control over the appointment of other executive officers. To fulfill the state constitution's proclamation of separation of powers, North Carolina needs further constitutional reform to effect a unitary executive. Before proposing some reforms, however, we should first understand the current constitutional provisions and trace their history.

I. HISTORICAL PERSPECTIVE

A. *Independence and the North Carolina Constitution*

The North Carolina Constitution of 1776 provided that "all political power is vested in, and derived from, the people only"[17] and that "the legislative, executive and supreme judicial powers of government, ought to be forever separate and distinct from each other."[18] Nevertheless, the state's first constitution, like other new states' constitutions, limited the executive power because of colonial aversion to the Crown and its magistrates.[19] After the North Carolina

15. *See* N.C. CONST. art. III, § 1.

16. *Id.* art. III, § 5, cl. 8.

17. N.C. CONST. of 1776, Declaration of Rights § 1.

18. *Id.* Declaration of Rights § 4. Prior to ratification of the United States Constitution, the North Carolina Supreme Court recognized the principle of separation of powers in the first reported case that upheld the doctrine of judicial review and the supremacy of the constitution over a statute. *See* Bayard v. Singleton, 1 N.C. (Mart.) 5, 6-7 (1787); *see also* Orth, *supra* note 1, at 7 (discussing the importance of *Bayard*).

19. *See* FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860, at 89-91 (W.W. Norton & Co. 1966) (1930); JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION 3-4 (1993); WILLIAM S. POWELL, NORTH CAROLINA THROUGH FOUR CENTURIES 186-87 (1989); John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1224-35 (1993). Testifying in favor of gubernatorial veto in 1985, Governor James G. Martin said, " 'I understand the eighteenth century concern about Royal Governors.... They are not coming back: We have not had a Royal Governor for 209 years. We won!' " Ran Coble, *Executive-Legislative Relations in North Carolina: Where We Are and Where We Are Headed*, 25 WAKE FOREST L. REV. 673, 674 (1990) (quoting James G. Martin).

Constitution of 1776 was adopted, a delegate to the constitutional convention illustrated this aversion to executive power by "declar[ing] that the power given the governor was 'just enough to sign the receipt for his salary.' "[20]

The early experience in North Carolina and other states " 'evinced a powerful tendency in the legislature to absorb all power into its vortex.' "[21] The legislature not only elected the governor,[22] but also elected a seven-person Council of State to "advise the governor in the execution of his office."[23] Some of the governor's prescribed powers were predicated on the advice of the Council of State.[24] The legislature also appointed the treasurer,[25] attorney general, and judges.[26] The governor's appointment power was limited to filling vacancies during legislative recesses and then only with the advice of the Council of State.[27] Consequently, Madison complained that, despite the proclaimed separation of powers, North Carolina's constitution referred to the legislature the power to appoint the chief executive and the other principal executive officers, as well as all judicial officers.[28]

Madison's concerns over separation of powers are reflected in the United States Constitution.[29] After debates at the Constitutional Convention, Madison's conception of separation of powers and executive independence prevailed, resulting in a single executive elected separately from the Congress.[30] The executive independently executes the laws primarily through appointees, and the executive's appointment power is recognized explicitly.[31] The Appointments Clause provides for presidential appointment of officers of the United States, subject to the Senate's advice and consent, with a provision for appointment of "inferior" officers by the President, the judiciary, or

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20. BENNETT M. RICH, STATE CONSTITUTIONS: THE GOVERNOR 2 (1960) (citing LESLIE LIPSON, THE AMERICAN GOVERNOR FROM FIGUREHEAD TO LEADER 14 (1939)).

21. Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, LAW & CONTEMP. PROBS., Winter 1970, at 108, 113 (quoting James Madison).

22. *See* N.C. CONST. of 1776, § 15 (providing for the governor to serve a one-year term).

23. *Id.* § 16 (providing for each member of the Council of State to serve a one-year term).

24. *See id.* § 19.

25. *See id.* § 22.

26. *See id.* § 13.

27. *See id.* § 20.

28. *See* THE FEDERALIST NO. 47, *supra* note 4, at 336.

29. *See* Sharp, *supra* note 6, at 406-11.

30. *See id.* at 423-24.

31. *See id.* at 425-27.

the heads of executive departments.[32] As later explained by Madison, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."[33]

After ratification of the United States Constitution, the issue of appointment power continued to attract attention in connection with the drafting of some states' constitutions.[34] Thomas Jefferson, who wrote extensively on the subject of separation of powers and drafted the original separation-of-powers provision in Virginia's constitution,[35] wrote, " 'Nomination to office is an executive function. To give it to the legislature, as we do [in Virginia], is a violation of the principles of division of powers.' "[36] At that time in Virginia and in America generally, state legislatures dominated. As Alexis de Tocqueville noted, "The legislative bodies daily encroach upon the authority of the governor and their tendency . . . is to appropriate it entirely to themselves."[37]

North Carolina amended its constitution in 1835 in response to dissatisfaction with the legislative representation system and persistent reform efforts; the changes included a provision for the popular election of the governor for a two-year term.[38] These constitutional amendments represented "a turning point in North Carolina history"[39] and the beginning of the state's modernization.[40] Efforts for additional state reform occurred in the 1850s,[41] but failed before secession from the Union.[42] The Civil War then dominated the state and the nation.[43]

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32. *See* U.S. CONST. art. II, § 2, cl. 2.

33. 1 ANNALS OF CONG. 463 (Joseph Gales ed., 1789) (statement of Rep. Madison).

34. *See* GREEN, *supra* note 19, at 83.

35. *See* THOMAS JEFFERSON, DRAFT OF A CONSTITUTION FOR VIRGINIA (1783), *reprinted in* THE COMPLETE JEFFERSON 111 (Saul K. Padover ed., 1943); Sharp, *supra* note 6, at 396-97, 417.

36. State *ex rel.* Jameson v. Denny, 21 N.E. 252, 254 (Ind. 1889) (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 16, 1816)).

37. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 110-12 (Century Co. ed., 1898), *quoted in* RICH, *supra* note 20, at 3.

38. *See* GREEN, *supra* note 19, at 224-33; HUGH TALMAGE LEFLER & ALBERT RAY NEWSOME, NORTH CAROLINA: THE HISTORY OF A SOUTHERN STATE 332, 337-38 (rev. 1963).

39. LEFLER & NEWSOME, *supra* note 38, at 338.

40. *See* Archie K. Davis, *The Veil of Humility*, 51 N.C. HIST. REV. 201, 209-12 (1974).

41. *See* GREEN, *supra* note 19, at 265-72; Thomas E. Jeffrey, *Beyond "Free Suffrage": North Carolina Parties and the Convention Movement of the 1850s*, 62 N.C. HIST. REV. 387, 400-18 (1985).

42. *See* POWELL, *supra* note 19, at 334-48 (describing the political climate in North Carolina preceding the Civil War).

43. *See generally* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988) (providing a history of the Civil War).

B. *Reconstruction and a New Constitution*

During post-Civil War Reconstruction, the Constitutional Convention of 1868 proposed a new state constitution, which became the first of the state's constitutions ratified by the people.[44] The new Republican Party's members dominated the convention, wrote the new constitution, and advocated its ratification.[45] The Republican Party's members included former Whigs, "carpetbaggers," and newly emancipated and enfranchised black citizens.[46] Although the party's reign was brief, it had long-term effects on the state, both through the reforms in the Constitution of 1868,[47] which had been rejected by both antebellum political parties, and the reactionary repudiation of subsequent reform efforts by the Democratic-Conservatives after the Republicans were ousted from power.[48]

The Constitution of 1868 strengthened the executive by providing for popular election of the governor to a four-year term with expanded powers.[49] It also provided for popular election of the state's lieutenant governor, secretary of state, auditor, treasurer,

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44. *See* LEFLER & NEWSOME, *supra* note 38, at 461; *see also* RICHARD L. ZUBER, NORTH CAROLINA DURING RECONSTRUCTION 14-17 (1975) (discussing changes made by the Constitution of 1868).

45. *See* ZUBER, *supra* note 44, at 12-18.

46. *See* WILLIAM C. HARRIS, WILLIAM WOODS HOLDEN: FIREBRAND OF NORTH CAROLINA POLITICS 219-20 (1987). The Republican Party of North Carolina was founded in 1867 by William W. Holden, the most influential and controversial North Carolinian of the Reconstruction era; James H. Harris, a black Holden supporter; and others. *See id.* at 218-22.

47. While many convention delegates were Whigs prior to the Civil War, "the new constitution was not the handiwork of either of the old parties but was, instead, the product of the recently organized Republican party." Jeffrey, *supra* note 41, at 419. The most detailed account of the Convention of 1868 is said to be J.G. DE ROULHAC HAMILTON, RECONSTRUCTION IN NORTH CAROLINA (1914). *See* Jeffrey, *supra* note 41, at 419 n.73. For a more recent and more sympathetic account, see OTTO H. OLSEN, CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE 93-115 (1965) [hereinafter OLSEN, CARPETBAGGER'S CRUSADE]. One scholar says that Convention delegate David Heaton, a former Ohio state senator who settled in New Bern, "played the major role" in writing the Constitution. HORACE W. RAPER, WILLIAM W. HOLDEN: NORTH CAROLINA'S POLITICAL ENIGMA 289 n.57 (1985). Another scholar notes that Albion W. Tourgée, a former Ohio lawyer who settled in Greensboro, "exerted more influence in open debate" than any other delegate. Otto Olsen, *Albion W. Tourgée: Carpetbagger*, 40 N.C. HIST. REV. 434, 442 (1963) [hereinafter Olsen, *Albion W. Tourgée*]. The drafters of the Constitution of 1868 copied several provisions from Ohio's constitution. *See* LEFLER & NEWSOME, *supra* note 38, at 460-61; *see also* POWELL, *supra* note 19, at 393 (discussing the influence of Ohio's Constitution). Presumably, the drafters were aware that Ohio strictly applied separation-of-powers principles to appointments. *See* State of Ohio *ex rel.* Attorney General v. Kennon, 7 Ohio St. 546, 562-63 (1857).

48. *See* Jeffrey, *supra* note 41, at 419 & n.74.

49. *See* N.C. CONST. of 1868, art. III, §§ 1, 6-10.

superintendent of public works, superintendent of public instruction, and attorney general.[50] The lieutenant governor became president of the senate,[51] and the duties of the other executive officers were "prescribed by law."[52] Five of those officers constituted *"ex officio*, the Council of State, who shall advise the Governor in the execution of his office," and the Attorney General was "*ex officio*, the legal adviser of the Executive Department."[53] The Executive Department consisted of those officers and the governor, who was "vested [with] the Supreme executive power of the State."[54] Significantly, a new appointments clause enhanced the separation of powers by prescribing gubernatorial appointment, with the advice and consent of the Senate, of "all officers whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for."[55]

The first governor to exercise the new executive powers was William W. Holden. President Andrew Johnson had appointed Holden to be the state's provisional governor during Reconstruction, and Holden subsequently was elected under the new Constitution of 1868.[56] Still controversial,[57] Governor Holden declared two counties to be in insurrection, and he empowered state military forces to suppress terrorism by the Ku Klux Klan against newly emancipated and enfranchised black citizens.[58] Holden's actions caused the military arrest of many people and aroused controversy over a writ of

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50. *See id.* art. III, § 1.

51. *See id.* art. III, § 11.

52. *Id.* art. III, § 13.

53. *Id.* art. III, § 14.

54. *Id.* art. III, § 1.

55. *Id.* art. III, § 10. The Constitution of 1868 contained no provision concerning removal power, which continues to be derived from statutory authority today. *See* Thad L. Beyle, *The Powers of the Governor in North Carolina: Where the Weak Grow Strong—Except for the Governor*, N.C. INSIGHT, Mar. 1990, at 27, 34.

56. *See* POWELL, *supra* note 19, at 381-85.

57. *See* William C. Harris, *William Woods Holden: In Search of Vindication*, 59 N.C. HIST. REV. 354, 355 (1982). Through the scholarship of Professor Harris and Professor Raper, Holden has been vindicated. *See generally* HARRIS, *supra* note 46 (providing a biography of Holden); RAPER, *supra* note 47 (providing a biography of Holden). Despite those scholarly vindications, Holden is still best known for his impeachment and conviction. *See, e.g.*, Coble, *supra* note 19, at 675 (discussing Holden's removal from office and quoting Holden's political opponent, former Governor Zebulon B. Vance, who described Holden's impeachment trial as " 'the longest hunt after the poorest hide I ever saw.' ").

58. The two counties, Alamance and Caswell, were the sight of the Ku Klux Klan's most horrific terrorism. *See* ZUBER, *supra* note 44, at 27-28. These counties also "were about the only counties in the state where the Republican party had gained strength in the fall elections of 1868." *Id.*

habeas corpus for their release.[59] Democratic-Conservatives reacted to Holden's actions by impeaching and convicting him—the first impeachment conviction of an American governor.[60] Even before his impeachment,[61] Holden's tenure as governor had been doomed when his political opponents, the antebellum Democratic-Conservatives, took control of the legislature from Holden's Republican Party in the 1870 legislative elections.[62]

C. *An Amended Constitution and Calls for Reform*

Once the Democratic-Conservatives acquired sufficient power, they reacted to Reconstruction and its constitutional reforms by initiating the Constitutional Convention of 1875.[63] The Democratic-Conservatives rallied behind racial politics and their desire to return political control to "the white ruling classes of ante bellum days."[64] Despite their appeals to racial prejudice, the Democratic-Conservatives hardly had a mandate to amend the constitution. The election of convention delegates was closer than any other election in the state's history, with a few more total votes cast for the Republicans.[65] The two parties each sent fifty-eight elected delegates

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59. *See* HARRIS, *supra* note 46, at 295-96; RAPER, *supra* note 47, at 190-96; ZUBER, *supra* note 44, at 28-41. The chief justice of the state supreme court issued a writ of habeas corpus and ordered its enforcement, but declined to have a sheriff serve it upon the military commander holding the prisoners. The chief justice concluded that Governor Holden had the authority to declare martial law in the two counties, but that he did not have the power to suspend the writ of habeas corpus. *See Ex parte* Adolphus G. Moore, 64 N.C. 802, 808-11 (1870). A federal district court issued and enforced a writ pursuant to the Habeas Corpus Act of 1867 and the Due Process Clause of the Fourteenth Amendment. *See* RAPER, *supra* note 47, at 191; ZUBER, *supra* note 44, at 39-40. One scholar has noted the irony that "the state leaders who had so adamantly opposed the adoption of the Fourteenth Amendment and Radical Reconstruction legislation generally were now using both to oppose Governor Holden, the early advocate of each in North Carolina." RAPER, *supra* note 47, at 320 n.119.

60. *See* POWELL, *supra* note 19, at 400.

61. For historical examinations of Governor Holden's impeachment and conviction, see HARRIS, *supra* note 46, at 299-308; RAPER, *supra* note 47, at 199-223.

62. *See* ZUBER, *supra* note 44, at 41.

63. *See* LEFLER & NEWSOME, *supra* note 38, at 470-71; POWELL, *supra* note 19, at 404.

64. William D. Harris, The Movement for Constitutional Change In North Carolina, 1868-1876, at 40 (1932) (unpublished M.A. thesis, University of North Carolina at Chapel Hill) (on file with Davis Library at the University of North Carolina at Chapel Hill).

65. *See* LEFLER & NEWSOME, *supra* note 38, at 471; POWELL, *supra* note 19, at 404; ZUBER, *supra* note 44, at 49; Harris, *supra* note 64, at 49. The Ku Klux Klan undoubtedly contributed to the closeness of the election. It terrorized and murdered blacks and white Republicans. *See* ZUBER, *supra* note 44, at 25-28. However, the Klan's top priority was "weakening the Republican party." *Id.* at 25. The North Carolina Klan "grew in strength as soon as the Republicans came into power and disappeared soon after the Conservatives

to the convention, and three independent delegates attended as well.[66] Had Republicans won a majority of delegates, "they would have adjourned the convention permanently."[67] Because there was such a narrow margin favoring revision, Republicans were able to minimize the reactionary revision of the constitution.[68] Later, in an obvious exaggeration, the state supreme court implied that the narrow margin favoring revision reflected "the dominant sentiment in the State."[69] Nevertheless, even after the 1875 amendments, the Constitution of 1868 remained the basic law of the state, and the amendments' principal effect was to restore much of the former power of the general assembly.[70]

Part of that restoration of pre-1868 power to the General Assembly resulted from the amendment of the appointments clause, which effectively emasculated gubernatorial appointment power. The Democratic-Conservatives' amendment of the 1868 appointments clause was not based upon a principled objection to gubernatorial appointment power. Rather, it reflected a legislative grasp for power that may have reflected racial animus arising from Republican gubernatorial appointment of blacks to some offices.[71] Without official explanation, the 1868 appointments clause was amended by the deletion of a restrictive phrase regarding statutory officers.[72] As a result, the appointments clause only applied to constitutional officers whose appointments were not otherwise provided for; since there were none, the clause was rendered meaningless.[73]

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regained control of the legislature" in 1870. *Id.* at 27.

66. *See* ZUBER, *supra* note 44, at 49.

67. *Id.*

68. *See* Olsen, *Albion W. Tourgée*, *supra* note 47, at 446. One commentator has suggested that the election was marred by fraud, but did not explain the allegations. *See id.* The alleged fraud likely refers to objections to certain delegates being seated. *See* HARRIS, *supra* note 46, at 77 (describing the "numerous objections . . . made to certain delegates being sworn in"). The most significant objection focused on two Conservative delegates representing Robeson County. The two Conservatives had certificates from the sheriff of the county as required by statute, while two Republicans claimed to be the true delegates and presented certified returns of the precinct poll workers. *See id.* The Democratic-Conservatives were seated. *See id.* at 77-78; OLSEN, CARPETBAGGER'S CRUSADE, *supra* note 47, at 199.

69. State *ex rel.* Salisbury v. Croom, 167 N.C. 223, 226, 83 S.E. 354, 355 (1914).

70. *See* LEFLER & NEWSOME, *supra* note 38, at 471; John L. Sanders, *A Brief History of the Constitutions of North Carolina*, *in* NORTH CAROLINA STATE GOVERNMENT 795, 798 (1981). "Some of these amendments clearly increased the power of the legislative branch of government, giving it considerable authority over local affairs and enabling the Democratic party to regain virtual control of the state." POWELL, *supra* note 19, at 405.

71. *See* Harris, *supra* note 64, at 22-23, 44, 46.

72. *See infra* note 317 (noting the deleted phrase).

73. *See* CONSTITUTIONAL CONVENTION OF 1875, AMENDMENTS TO THE

After the 1875 amendments, a generation passed with little interest in further constitutional change.[74] Members of the Democratic-Conservative General Assembly, however, came to view proposals for constitutional revision as further chances to repudiate either Republican Reconstruction or subsequent Republican-Populist Fusion.[75] Moreover, although Republican-Populist Fusion enjoyed success in the 1896 election, the Democrats returned to power after the 1900 elections, and racial politics re-emerged, just as it had done in the Democratic-Conservatives' "redemption" of the state from Republican Reconstruction.[76] The 1900 elections and associated re-emergence of racial politics helped establish Democratic one-party dominance of the state for nearly a century.[77]

The state supreme court decided seven cases dealing with the appointment power between 1868 and 1914. Three cases held that, under the appointments clause in the Constitution of 1868, the appointment power was executive and while the General Assembly could create statutory offices, it could not appoint the officers.[78] In four cases decided after the 1875 amendments to the appointments clause, the court held that, under the amended appointments clause, the General Assembly could create statutory offices and appoint the officers. The governor's residuary appointment power had become limited to constitutional officers—a meaningless provision since all constitutional officers' appointments were provided for in the constitution. Three of those appointment-power cases reflected

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CONSTITUTION OF NORTH CAROLINA 10, 41 (1875); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA, HELD IN 1875, at 123, 155-56, 173, 209 (1875).

74. *See* Sanders, *supra* note 70, at 798.

75. See Jeffrey, *supra* note 41, at 419 n.74; Joseph F. Steelman, *Origins of the Campaign for Constitutional Reform in North Carolina, 1912-1913*, 56 N.C. HIST. REV. 396, 398 (1979).

76. In the ensuing gubernatorial election of 1876, the former Conservatives adopted the national name "Democrat," and their candidate, former Confederate Zebulon B. Vance, narrowly defeated the Republican candidate, Thomas Settle. *See* POWELL, *supra* note 19, at 405. This election signified "the end of effective Republican influence in the state for many years." *Id.* At the time, the Democrats declared that "Vance's election [was] evidence that the state had been 'redeemed' from the evil of Reconstruction." *Id.* at 405-06. On the national level, the 1876 election of Rutherford B. Hayes, a Republican, ended Reconstruction. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1873-1877, at 564-601 (1988).

77. *See* POWELL, *supra* note 19, at 427-39. North Carolina's Democrats believed that "the state now was 'safe for white rule.' " *Id.* at 438.

78. *See* People *ex rel.* Welker v. Bledsoe, 68 N.C. 457, 460-64 (1873); People *ex rel.* Nichols v. McKee, 68 N.C. 429, 432-33, 438-39 (1873); State *ex rel.* Clark v. Stanley, 66 N.C. 60, 63-67 (1872).

legislative-executive differences over appointments.[79] The fourth, decided in 1914, resolved a dispute between appointees of one governor and his successor.[80]

Beginning only one year after the court decided the last of these appointments clause cases, five consecutive governors recommended reform. In 1915 Governor Locke Craig asserted that the governor should have appointment power for all statutory officers; he argued that the governor's responsibility for his administration required him to have the power to select his subordinates.[81] Governor Bickett, in his inaugural address in 1917, urged enactment of a law providing that all state administrative officers other than the elected Council of State officers be appointed by the governor.[82] Governor Cameron Morrison also advocated such a change and emphasized its importance for gubernatorial accountability.[83] In 1925, his successor, Governor McLean, added, " 'An impression exists in some quarters that the Governor controls the administration of State government, but ... this idea is erroneous.... [T]he whole effort seems to have been to create diffusion and lack of responsibility, rather than executive authority and accountability.' "[84] To enhance executive authority and accountability, Governor O. Max Gardner initiated a proposed "short ballot" constitutional amendment. Under his short ballot proposal, fewer executive officers would be elected.[85] The 1929 General Assembly rejected the proposal, preferring to maintain the status quo of electing eight executive officers other than the governor and lieutenant governor.[86]

Faced with the Great Depression and the cry to reduce state taxes, Governor Gardner authorized investigations of state government, including a major study by the Brookings Institution. In the Brookings Institution report, Governor Gardner noted "the

79. *See* State *ex rel.* Cherry v. Burns, 124 N.C. 761, 765, 33 S.E. 136, 137 (1899); Cunningham v. Sprinkle, 124 N.C. 638, 641-43, 33 S.E. 138, 138-39 (1899); State Prison v. Day, 124 N.C. 362, 366-67, 32 S.E. 748, 749 (1899).

80. *See* State *ex rel.* Salisbury v. Croom, 167 N.C. 223, 227-29, 83 S.E. 354, 355-56 (1914).

81. *See* BROOKINGS INST., REPORT ON A SURVEY OF THE ORGANIZATION AND ADMINISTRATION OF THE STATE GOVERNMENT OF NORTH CAROLINA iii (1930). Governor Craig's remarks did not extend to the elected Council of State members. During this period, however, some prominent and influential citizens actively advocated they be appointed rather than elected. *See* Steelman, *supra* note 75, at 412.

82. *See* BROOKINGS INST., *supra* note 81, at iii.

83. *See id.*

84. *Id.* at iv (quoting Governor A.W. McLean).

85. *See* LEFLER & NEWSOME, *supra* note 38, at 571.

86. *See id.*

diffusion of authority and responsibility in the administration of state government."[87] As Governor Gardner himself explained, the central theme of the Brookings Institution report was "unification ... of control for the purpose of developing flexible responsiveness of all departments and divisions to intelligent direction."[88]

To end that diffusion of authority and responsibility and to effect unification, the report recommended adoption of Governor Gardner's proposed short ballot constitutional amendment. Governor Gardner resubmitted that proposal to the General Assembly in 1931, but the legislature again rejected the short ballot.[89] Nevertheless, much of Governor Gardner's legislative program succeeded,[90] and the Brookings Institution report was an important step toward some state-government reorganization and subsequent revision of the constitution.[91]

Concerning executive power, the report concluded that "the State Government is characterized by an extreme diffusion of responsibility"; the governor's "authority is so limited that it is impossible for him to exercise general control over most of the state agencies"; the governor should be "the real, as well as the nominal, head of the administration"; and for the governor to be effective he should have the power of appointment and removal over "all of the heads of the administrative departments."[92] Thus, the report recommended the creation of an executive department headed by the governor with six bureaus, including the office of governor. The governor would appoint the head of each bureau.[93]

During this period of reform efforts, the General Assembly created many administrative agencies, beginning with the early occupational licensing boards.[94] Most of the enabling statutes for these agencies provided for gubernatorial appointment of the members of the agencies, thus beginning a trend toward gubernatorial appointments.[95] The trend continued with the creation of the

87. BROOKINGS INST., *supra* note 81, at iv.

88. *Id.* at v.

89. *See* LEFLER & NEWSOME, *supra* note 38, at 573.

90. *See id.* at 573-74.

91. *See* POWELL, *supra* note 19, at 482-84 (discussing the impact of the Brookings Institution's report).

92. BROOKINGS INST., *supra* note 81, at xxi-xxiv.

93. *See id.* at xxx-xxxi.

94. *See* Frank Hanft & J. Nathaniel Hamrick, *Haphazard Regimentation under Licensing Statutes*, 17 N.C. L. REV. 1, 1-2 (1939) (discussing the licensing boards).

95. *See* Act of Mar. 27, 1933, ch. 179, § 13, 1933 N.C. Pub. Laws 197, 199 (codified as amended at N.C. GEN. STAT. § 88B-3 (1999)) (creating State Board of Cosmetic Art Examiners); Act of Mar. 19, 1929, ch. 119, § 6, 1929 N.C. Pub. Laws 110, 112 (codified as

Industrial Commission in 1929 and with the General Assembly's provision for gubernatorial appointment of its members.[96] In 1931, when the state began to expand economic regulation through administrative agencies by creating the Banking Commission,[97] the General Assembly provided for gubernatorial appointment of the commissioner of banks and the members of the Commission, with the advice and consent of the Senate originally required only for the commissioner's appointment.[98] The statute creating the North

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amended at N.C. GEN. STAT. § 86A-4 (1996)) (creating State Board of Barber Examiners); Act of Mar. 19, 1925, ch. 318, § 2, 1925 N.C. Pub. Laws 591, 591 (codified as amended at N.C. GEN. STAT. § 87-2 (1999)) (creating State Licensing Board for General Contractors); Act of Mar. 10, 1925, ch. 261, § 11, 1925 N.C. Pub. Laws 503, 506 (codified as amended at N.C. GEN. STAT. § 93-12 (1997 & Supp. 1998)) (creating State Board of Certified Public Accountant Examiners); Act of Feb. 25, 1921, ch. 1, § 3, 1921 N.C. Pub. Laws 47, 47-48 (codified as amended at N.C. GEN. STAT. § 89C-4 (1996 & 1998 Supp.)) (creating Board for Engineers and Land Surveyors); Act of Feb. 25, 1919, ch. 78, § 3, 1919 N.C. Pub. Laws 104, 105 (codified as amended at N.C. GEN. STAT. § 90-202.4 (1997)) (creating Board of Podiatry Examiners) (The original law provided for state appointment; examiners are now appointed by governor.); Act of Feb. 26, 1917, ch. 73, §§ 1-2, 1917 N.C. Pub. Laws 129, 129 (codified as amended at N.C. GEN. STAT. § 90-139 (1997)) (creating State Board of Chiropractic Examiners); Act of Mar. 9, 1915, ch. 270, § 1, 1915 N.C. Pub. Laws 341, 341-42 (codified as amended at N.C. GEN. STAT. § 83A-2 (1995)) (creating Board of Architecture); Act of Mar. 9, 1915, ch. 178, § 1, 1915 N.C. Pub. Laws 252, 252 (codified as amended at N.C. GEN. STAT. § 90-22 (1997)) (creating the State Board of Dental Examiners, with members elected by the state association and only commissioned by the governor); Act of Mar. 4, 1909, ch. 444, § 3, 1909 N.C. Pub. Laws 761, 761-62 (codified as amended at N.C. GEN. STAT. § 90-116 (1997)) (creating State Board of Examiners of Optometry); Act of Mar. 8, 1907, ch. 764, § 1, 1907 N.C. Pub. Laws, 1089, 1089-90 (codified as amended at N.C. GEN. STAT. § 90-130 (1997)) (creating State Board of Osteopathic Examination and Registration); Act of Feb. 4, 1905, ch. 108, §§ 5-7, 1905 N.C. Pub. Laws 118, 120 (codified as amended at N.C. GEN. STAT. § 90-85.7 (1997)) (creating Board of Pharmacy); Act of Mar. 6, 1903, ch. 503, § 2, 1903 N.C. Pub. Laws 861, 861-62 (codified as amended at N.C. GEN. STAT. § 90-182 (1997)) (creating Veterinary Medical Board); Act of Mar. 4, 1901, ch. 338, § 1, 1901 N.C. Pub. Laws 490, 490 (codified as amended at N.C. GEN. STAT. § 90-210.18 (1997)) (creating what is now known as the Board of Mortuary Science) (The original statute called the State Board of Health to appoint, but the governor now appoints).

96. *See* Act of March 11, 1929, ch. 120, § 51, 1929 N.C. Pub. Laws 117, 136 (codified as amended at N.C. GEN. STAT. § 97-77 (1991 & Supp. 1998)).

97. *See* Pue v. Hood, 222 N.C. 310, 314-15, 22 S.E.2d 896, 899-900 (1942) (holding that the legislature may create an administrative, investigatory, fact-finding agency, such as the Commissioner of Banks, and delegate regulatory power to it); *see also* Cox v. City of Kinston, 217 N.C. 391, 394-98, 8 S.E.2d 252, 256-58 (1940) (involving a grant of quasi-judicial powers to an administrative housing authority agency). Since 1962, the North Carolina Constitution has provided for vesting quasi-judicial powers in administrative agencies. *See* N.C. CONST. art. IV, § 3; State *ex rel.* Lanier v. Vines, 274 N.C. 486, 496-97, 164 S.E.2d 161, 167 (1968).

98. *See* Act of Apr. 2, 1931, ch. 243, § 1, 1931 N.C. Pub. Laws 299, 299-300 (codified as amended at N.C. GEN. STAT. § 53-92 (1994 & Supp. 1998)). The General Assembly now confirms the commissioner's appointment by joint resolution, while two commission members are appointed by the General Assembly and twelve by the governor. *See* N.C.

Carolina Utilities Commission also provided for gubernatorial appointment subject to legislative confirmation.[99] Although North Carolina had fewer than one hundred administrative agencies in this era, its administrative bureaucracy expanded, and the number of agencies doubled within four decades.[100] During that period the Great Depression occurred, and expanded administrative bureaucracies acquired adjudicatory and rule-making functions.[101]

A constitutional commission proposed general revision of the North Carolina Constitution between 1931 and 1933. The General Assembly approved the proposed revision, but an election-law technicality prevented the issue from reaching the voters for their approval.[102] The general appointments provision, although changed editorially, would have remained essentially the same.[103] Some

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GEN. STAT. § 53-92 (1994 & Supp. 1998).

99. *See* Act of March 8, 1941, ch. 97, § 2, 1941 N.C. Pub. Laws, 151, 151 (codified as N.C. GEN. STAT. § 62-10 (1989 & Supp. 1998)).

100. *See* LEFLER & NEWSOME, *supra* note 38, at 573; *see also* REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION 51-52 (1968) (discussing the need to reduce the number of agencies overseen by the governor) [hereinafter 1968 REPORT].

101. For a discussion of the Great Depression in North Carolina, see generally POWELL, *supra* note 19, at 474-95. During the Depression, much of the state government was reorganized, and many new state government agencies were created. *See id.* at 483-84. Nationally, President Franklin D. Roosevelt and Congress responded to the Great Depression with numerous New Deal programs administered by new agencies, which have become known as the "fourth branch" of government. *Cf.* DANIEL YERGIN & JOSEPH STANISLAW, COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD 54-55 (1998) (discussing James Landis's work in building the federal government's "fourth branch" and his philosophy of regulation as enunciated in JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938)). For discussions of the many constitutional confrontations that occurred during this momentous period in the nation's constitutional history, see generally WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995). For discussions of the separation-of-powers implications of the expanded role of agencies, see generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Symposium, *Administering the Administrative State*, 57 U. CHI. L. REV. 331 (1990); *A Symposium on Administrative Law: "The Uneasy Constitutional Status of Administrative Agencies"*, 36 AM. U. L. REV. 277 (1987).

102. *See* Sanders, *supra* note 70, at 798; *see also In re* Opinions of the Justices, 207 N.C. 879, 880, 181 S.E. 557, 557-58 (1933) (stating that the constitutionally-mandated "next general election" for submission of proposed constitutional amendments to the voters had occurred before the statutorily-prescribed submission date of the 1933 proposal).

103. *Compare* THE REPORT OF THE NORTH CAROLINA CONSTITUTIONAL COMMISSION 23 (1932) (authorizing the governor to "appoint all officers whose offices are established by this Constitution and for whose appointment provision is not otherwise made"), *with* N.C. CONST. of 1868, art. III, § 10 (authorizing the governor to "appoint all officers, whose offices are established by this Constitution and whose appointments are

proposals of the Constitutional Commission of 1932 were later adopted, but these amendments did not change the general appointment power.[104]

Constitutional reform efforts abated during World War II, but resumed in the 1950s. At the request of Governor Luther H. Hodges, a constitutional commission was authorized in 1957. The commission proposed rewriting the constitution, but the General Assembly did not approve submission of the proposal to the voters.[105] Like the proposal in the early 1930s, this proposal included only minor editorial changes to the appointments clause.[106] Nevertheless, recommendations for reform continued, coming not only from Governor Hodges, but also from his successor, Terry Sanford.

While both Governors Hodges and Sanford advocated adopting a short ballot constitutional amendment,[107] Sanford separately addressed the importance of gubernatorial appointment power in the context of non-elective agencies, boards, and commissions.[108] In the 1960s, Governor Sanford recommended expanding the governor's appointment power to enhance his executive authority.[109] At the time, North Carolina had 317 independent state government entities.[110] As a result, the state experienced "fragmentation, service duplication, and program inefficiency within the executive branch," and some of its leaders recognized the need for reorganization.[111]

By the 1960s, national proponents of state constitutional revision for executive and administrative reorganization uniformly advocated the short ballot.[112] Public administration theory in the 1960s favored gubernatorial appointment of the heads of executive departments and

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not otherwise provided for"). *See generally* Dillard S. Gardner, *The Proposed Constitution for North Carolina: A Comparative Study*, POPULAR GOV'T, June 1934, at 1 (providing a summary comparison of the provisions).

104. *See* Sanders, *supra* note 70, at 799-801.

105. *See id.*

106. *See* REPORT OF THE NORTH CAROLINA CONSTITUTIONAL COMMISSION 15 (1959).

107. *See* LUTHER H. HODGES, BUSINESSMAN IN THE STATEHOUSE 303 (1962); TERRY SANFORD, STORM OVER THE STATES 29 (1967).

108. *See* SANFORD, *supra* note 107, at 187, 195-97.

109. *See* Thad L. Beyle & Robert Dalton, *Appointment Power: Does It Belong to the Governor?*, 54 ST. GOV'T 2, 3 (1981).

110. *See* Jim Bryan & Ran Coble, *The Organization of Boards and the Powers that Drive Them*, *in* NORTH CAROLINA CENTER FOR PUBLIC POLICY RESEARCH, BOARDS, COMMISSIONS, AND COUNCILS IN THE EXECUTIVE BRANCH OF NORTH CAROLINA STATE GOVERNMENT 77 (1984).

111. *Id.*

112. *See, e.g.*, Bennett M. Rich, *The Governor as Administrative Head*, *in* SALIENT ISSUES OF CONSTITUTIONAL REVISION 104-05 (John P. Wheeler, Jr. ed., 1961).

their direct responsibility to the governor.[113] To achieve executive unity, the reformers advocated "the governor's power to appoint his principal assistants."[114] During this period, the nation experienced unprecedented "state constitutional revision and reform."[115]

Part of that 1960s movement included revision of the Model State Constitution. Its revisers recognized that "[a]ll authorities on executive organization agree with the position embraced by the Model State Constitution for more than 40 years that administrative power and responsibility should be concentrated in a single popularly elected chief executive."[116] Accordingly, under the Model State Constitution, all executive power would be vested in the governor, and all executive and administrative offices of state government would be allocated among no more than twenty principal departments.[117] The general appointments clause provided for gubernatorial appointment and removal of the heads of all administrative departments.[118] As the revisers recognized, department heads are policy makers and should be responsible to the governor.[119]

Throughout the 1960s, reformers recommended broad constitutional revision based on the argument that "governors can realize their full potential only when the entire constitutional framework within which they operate has been remodeled."[120] As a leading proponent of reform explained, "For over half a century a major reform advocated by most students of government has been the strengthening of the governor. While progress toward this goal has been made in several states, in most the governor remains chief executive more in name than in fact."[121]

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113. *See* Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 964 (1968).

114. Rich, *supra* note 112, at 107; *see also* RICH, *supra* note 20, at 31 (noting that in the 1960s, there was general agreement upon the objective of executive unity, ideally achieved by the short ballot and "increasing the governor's appointment and removal powers.").

115. Grad, *supra* note 113, at 928.

116. NATIONAL MUN. LEAGUE, MODEL STATE CONSTITUTION 65 (6th ed. 1968).

117. *See id.* at 65-72.

118. *See id.* at 72.

119. *See id.*

120. RICH, *supra* note 20, at 33.

121. *Id.* at iv. There had been three earlier periods of state reorganization efforts. The first included the initial publication of the Model State Constitution in 1921; the second followed President Roosevelt's appointment of a federal commission in 1937; and the third included "little Hoover Commissions" modeled after federal executive branch studies commissioned by Presidents Truman and Eisenhower. *See* SANFORD, *supra* note 107, at 42-43.

D. Constitution of 1971

As part of a "national phenomenon" of state constitutional revision, a new North Carolina Constitution Study Commission "brought into clear focus the Governor's role as chief executive."[122] Following the recommendation of Governor Dan K. Moore, the Constitution Study Commission of 1968 was created.[123] The Study Commission considered proposed constitutional amendments and characterized them as either "non-controversial" or "controversial" changes.[124] In its published report, the Commission referred to the dichotomy as "modest amendments" and "more substantial changes."[125] Within that dichotomy, the Commission's recommendations included three amendments of immediate interest.

First, the Commission recommended a "noncontroversial" general constitutional "revision and amendment."[126] The Commission recommended a rewritten constitution said to contain "few substantive changes of note" regarding the executive;[127] this proposal

122. John L. Sanders, *State Constitutional Revision*, POPULAR GOV'T, Sep. 1969, at 86, 92. That focus included the distribution to commission members of copies of a series of newspaper articles addressing the fragmentation of executive power and discussing books by former Governors Hodges and Sanford recommending unification of executive power in the governor. *See* Record on Appeal, Tr. 40-44, State *ex rel.* Martin v. Melott, 320 N.C. 518, 359 S.E.2d 783 (1987) (No. 61PA87) (discussing Plaintiff's Exhibit 7, a series of articles by David Cooper written in the *Winston-Salem Journal*, which had been distributed to members of the Commission); *see also supra* note 107 and accompanying text (discussing the former Governors' support of the short ballot). The Commission also discussed Bennett Rich's *State Constitution: The Governor*. *See* Record on Appeal, Tr. 43-44, *Melott* (No. 61PA87) (referencing Plaintiff's Exhibit 7B); *see also supra* notes 20, 37, 114, 120-21 and accompanying text (citing Rich's book). The Commission's Subcommittee on the Executive Department was chaired by former Governor Hodges, and it recommended a short ballot amendment, administrative reorganization, and gubernatorial appointment "under general constitutional authority" of "[a]ll other heads of administrative departments and agencies." FIRST REPORT OF THE SUBCOMMITTEE OF THE EXECUTIVE DEPARTMENT TO THE COMMITTEE ON THE STRUCTURE, ORGANIZATION, AND POWERS OF STATE GOVERNMENT iv, 1 (June 26, 1963). The Commission's Committee on State Government followed those recommendations as "Second Priority Amendments." *See* REPORT OF THE COMMITTEE ON STRUCTURE, ORGANIZATION, AND POWERS OF STATE GOVERNMENT TO THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION 9 (Aug. 1, 1968). The Commission approved the short ballot proposal and part of the administrative-reorganization proposal, but referred the appointment-power proposal to its Editorial Committee. *See* NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION, MINUTES OF MEETING OF OCT. 11, 1968, at 2.

123. *See* 1968 REPORT, *supra* note 100, at 2.

124. *See* Sanders, *supra* note 122, at 90.

125. 1968 REPORT, *supra* note 100, at 29.

126. *Id.* at 4, 9-26.

127. *Id.* at 31.

contained a revised and amended appointments clause.[128] In the Commission's focus on the governor's role as chief executive, it proposed vesting in him not merely " 'the Supreme executive power of the State' " as then provided, but rather " 'the executive power of the State.' "[129]

In a separate "controversial" amendment, the Commission proposed a short ballot whereby the number of elected executive officers, other than the governor and lieutenant governor, would be reduced from eight[130] to three.[131] The auditor, treasurer, and attorney general would continue to be elected, while other department heads would be appointed.[132] Under a separate proposal to revise the appointments clause, those officers would be appointed by the governor without Senate advice and consent.[133]

The Commission also recommended a separate "controversial" amendment to reorganize the state's 200 administrative agencies into no more than twenty-five departments.[134] The Commission noted that no governor could effectively oversee the large and complex bureaucracy that then existed.[135]

The General Assembly considered the Commission's recommendations in 1970. It ratified the proposed rewritten constitution and the proposed executive reorganization amendment.[136] Those two proposals were said to promise North Carolina "a thoroughly renovated Constitution and, insofar as the realities of current legislative politics will allow, a modern Constitution."[137] The General Assembly, however, did not ratify Commission proposals concerning gubernatorial succession, veto power, or the short ballot, each of which would have greatly strengthened the governor's office.[138] Gubernatorial succession and veto power were eventually implemented when political dynamics changed in the 1970s and 1990s, but the short ballot has yet to be adopted.[139]

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128. *See id.* at 14, 73; *infra* text accompanying notes 306-16.

129. Sanders, *supra* note 122, at 92 (quoting N.C. CONST. of 1868, art. III, § 1; 1968 REPORT, *supra* note 100, at 13).

130. *See* N.C. CONST. art. III, § 2(1); *id.* art III, § 7(1).

131. *See* 1968 REPORT, *supra* note 100, at 47-49.

132. *See id.* at 47.

133. *See id.* at 47-49.

134. *See id.* at 51.

135. *See* Sanders, *supra* note 122, at 95.

136. *See id.* at 96-97.

137. *Id.* at 99.

138. *See id.* at 97.

139. *See* Ferrel Guillory, *The Council of State and North Carolina's Long Ballot: A*

Upon ratification, the proposed rewritten constitution and the proposed executive reorganization amendment became parts of the new Constitution of 1971.[140] Arguably, the 1971 amendments centered the state's executive power in its governor, subordinated the executive roles of the other members of the Council of State, and established the governor's power to appoint statutory officers serving as subordinates in the executive department. As discussed in Part IV, however, a unitary executive still eludes the state. The other elected members of the Council of State still can act independently of the governor on executive matters, and the new gubernatorial appointments clause has been emasculated, allowing the General Assembly to control appointment of some executive officers. While subsequent amendments have permitted gubernatorial succession[141] and veto,[142] the governor still shares some executive power with the other elected Council of State members. Until a short ballot amendment eliminates that fragmentation, and until the governor is empowered to appoint statutory officers serving as subordinates in the executive department, North Carolina will not have a unitary executive. Meanwhile, the North Carolina Constitution's proclamation of separation of powers will continue to exaggerate its actual application.

Tradition Hard To Change, N.C. INSIGHT, June 1988, at 40, 44. For articles outlining the debate over the veto power, see generally J. Allen Adams & Abraham Holtzman, *CON: North Carolina Should Not Adopt a Gubernatorial Veto*, N.C. INSIGHT, Mar. 1990, at 21; Jack Betts, *The Veto: After Half a Century of Debate, Still on the Public Calendar*, N.C. INSIGHT, Mar. 1990, at 2; Ran Coble, *PRO: North Carolina Should Adopt a Gubernatorial Veto*, N.C. INSIGHT, Mar. 1990, at 13.

140. In *North Carolina State Bar v. DuMont*, 304 N.C. 627, 639, 286 S.E.2d 89, 96 (1982), the court erroneously suggested in dictum that the Constitution of 1971 made no substantive changes. *DuMont* held that the right to trial by jury was not substantively changed. *See id.* at 639-40, 286 S.E.2d at 96-97. The opinion exceeded that holding with sweeping statements about the entire new constitution. It began correctly by recognizing that some of the changes were substantive, although non-controversial; it ended by incorrectly equating substantive with fundamental and controversial, saying that there had been no such changes. *See id.* at 635-39, 286 S.E.2d at 94-96; *see also* Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 612-17, 264 S.E.2d 106, 110-12 (1980) (holding that the meaning of "free public schools" in article IX of the constitution was not changed). Nevertheless, the Constitution of 1971 made some substantive changes, however non-controversial they may have been at the time. *See, e.g.*, Advisory Opinion *in re* Separation of Powers, 305 N.C. 767, 295 S.E.2d 589 (1982) (involving administration of budget under article III of the constitution); Smith v. State, 289 N.C. 303, 324-25, 222 S.E.2d 412, 425-26 (1976) (involving the supreme court's original jurisdiction under article IV of the constitution).

141. *See* N.C. CONST. art. III, § 2(2).

142. *See id.* art. II, § 22.

II. SEPARATION OF POWERS

A. *Leading Cases from Other Jurisdictions*

Although this Article emphasizes the appointment and removal of executive officers in North Carolina, the North Carolina cases are better understood when considered in light of cases from other jurisdictions. Generally, American courts have recognized that the power of appointment is an executive function and that legislative attempts to usurp that power violate the separation-of-powers doctrine.[143]

The Supreme Court first directly addressed the issue of the appointment and removal of federal officers in *Myers v. United States*,[144] a 1926 decision involving President Woodrow Wilson's removal of a postmaster. President Wilson had appointed the postmaster, but later removed him from office before his four-year term had expired. Although a statute provided that postmasters of his level could be removed only with the Senate's advice and consent, the President removed the postmaster without the Senate's imprimatur.[145] A divided Court declared the statute unconstitutional as a violation of the separation of powers.[146]

In reaching its decision, the Court's six-member majority analyzed the historical, legislative, and judicial implications of the separation of powers, relying greatly on Madison's writings.[147] Regarding the executive, the Court stated through Chief Justice Taft, himself a former President, that "[t]he vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws."[148] Accordingly, the Court reasoned that "[h]e must execute them by the assistance of subordinates ... [and] as part of his executive power he should select those who were to act for him under his direction in the execution of the laws."[149] The Court concluded by quoting Madison's explanation of the balance of power between the

143. *See, e.g.*, Tucker v. State, 35 N.E.2d 270, 292-93 (Ind. 1941); State of Ohio *ex rel.* Attorney General v. Kennon, 7 Ohio St. 546, 562-63 (1857). *See generally* John Murdoch Dawley, *The Governor's Constitutional Powers of Appointment and Removal*, 22 MINN. L. REV. 451 (1938) (providing an early analysis of separation of powers and the appointment power); Devlin, *supra* note 19 (providing a more recent analysis).

144. 272 U.S. 52 (1926).

145. *See id.* at 107.

146. *See id.* at 161.

147. *See id.* at 115-18.

148. *Id.* at 117.

149. *Id.*

legislative and executive branches with respect to appointment of officers: " 'The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature.' "[150]

Despite three dissenting opinions in *Myers*[151] and criticism of the Court's holding from across the political spectrum,[152] President Franklin D. Roosevelt relied upon the case when he removed a conservative and contentious Federal Trade Commission member whom had been appointed by President Calvin Coolidge.[153] In *Humphrey's Executor v. United States*,[154] a setback for the President and the New Deal,[155] the Supreme Court unanimously held that the President had exceeded his authority in removing the Commissioner and had violated congressional for-cause limitations on commissioners' removal.[156] Although reaffirming the *Myers* principle that congressional participation in the removal of purely executive officers is unconstitutional, *Humphrey's Executor* held that, at least regarding quasi-legislative and quasi-judicial agencies such as the Federal Trade Commission, Congress can attempt to create some agency independence from executive control by limiting removal of the agency officials under standards of good cause.[157]

Although the decision "stunned the Roosevelt administration,"[158] *Humphrey's Executor* pleased advocates of the independence of administrative agencies from political control and supporters of civil service protection for agency administrators.[159] Later, the Court held in *Wiener v. United States*[160] that the President could not remove a

150. *Id.* at 128 (quoting 1 ANNALS OF CONG., *supra* note 33, at 582 (statement of Rep. Madison)).

151. Justices Holmes, McReynolds, and Brandeis wrote dissenting opinions. *See id.* at 177 (Holmes, J., dissenting), 178 (McReynolds, J., dissenting), 240 (Brandeis, J., dissenting).

152. *See* LEUCHTENBURG, *supra* note 101, at 67-68.

153. *See id.* at 52-64, 68-69.

154. 295 U.S. 602 (1935).

155. Two other setbacks for the New Deal were decided the same day. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935) (invalidating legislative delegation under the National Industrial Recovery Act); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935) (invalidating farm-mortgage foreclosure moratoria under the Frazier-Lemke Act).

156. *See Humphrey's Ex'r*, 295 U.S. at 631-32.

157. *See id.*

158. LEUCHTENBURG, *supra* note 101, at 78.

159. *See id.* at 75.

160. 357 U.S. 349 (1958).

member of the War Claims Commission, an independent adjudicatory agency, merely to replace the member with his own appointee.[161] Thus, although *Myers* rejected congressional limitations on presidential removal of purely executive officers, *Humphrey's Executor* and *Wiener* validated congressional for-cause limitations on Presidential removal of members of independent agencies.

The Court reached a more *Myers*-like result in *Buckley v. Valeo*,[162] in which it held that Congress cannot reserve for itself the power to appoint members of the Federal Election Commission because they are charged with responsibility for execution of the laws.[163] More recently, in *Bowsher v. Synar*,[164] the Court held unconstitutional a statutory provision that the comptroller general could be removed only at the initiative of Congress.[165] The Court's opinion in *Bowsher* echoed Madison in reasoning that "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."[166]

The Supreme Court's most recent application of the doctrine of separation of powers in an appointment-and-removal case, *Morrison v. Olson*,[167] resulted in re-interpretation of prior opinions.[168] The Court held that, because an independent counsel was an "inferior" officer under the appointments clause, Congress could vest appointment power in a court.[169] The Court also held that congressional good-cause restrictions on removal of an appointed independent counsel did not violate the principle of separation of powers. The Court cited *Humphrey's Executor* and *Wiener* but did not rely on the quasi-legislative and quasi-judicial characterizations of the officials involved in those cases to distinguish them from *Myers*; instead, the Court re-characterized *Myers* as turning on something other than whether the official in question is "purely executive."[170] Rather, the *Morrison* opinion said, "the real question is whether the

161. *See id.* at 356.
162. 424 U.S. 1 (1976).
163. *See id.* at 109, 126-27, 132-33.
164. 478 U.S. 714 (1986).
165. *See id.* at 726-27.
166. *Id.* at 733-34.
167. 487 U.S. 654 (1988).
168. *See* Miller, *supra* note 101, at 90-96 (discussing prior interpretations).
169. *See Morrison*, 487 U.S. at 670-73; *see also* Edmond v. United States, 520 U.S. 651, 666 (1997) (holding that judges of the United States Coast Guard Civilian Court of Criminal Appeals are "inferior officers" subject to appointment by the department secretary).
170. *Morrison*, 487 U.S. at 686-89.

removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."[171] Then, taking the Independent Counsel Act as a whole, the Court held that appointment of an independent counsel by a court "does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch."[172]

Morrison discussed *Myers* and *Humphrey's Executor* as being on opposite ends of "the spectrum."[173] The sole dissenter in *Morrison v. Olson* said that the Court had "replaced the clear constitutional prescription that the executive power belongs to the President with a 'balancing test,' "[174] while sweeping *Humphrey's Executor* "into the dustbin of repudiated constitutional principles"[175] and declaring "open season upon the President's removal power for all executive officers, with not even the superficially principled restriction of *Humphrey's Executor* as cover."[176]

Amid much commentary,[177] *Morrison v. Olson* and other recent separation-of-powers opinions by the Court[178] have fueled an academic debate over the federal executive power.[179] Despite their

171. *Id.* at 691.
172. *Id.* at 697.
173. *Id.* at 690.
174. *Id.* at 711 (Scalia, J., dissenting).
175. *Id.* at 725 (Scalia, J., dissenting).
176. *Id.* at 727 (Scalia, J., dissenting).
177. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1519 (1991) (citing *Morrison v. Olson* as a representative example of the Supreme Court's view of the separation of powers); Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison *and Administrative Government*, 57 U. CHI. L. REV. 357, 358-64 (1990) (analyzing the Supreme Court's reasoning in *Morrison* and that case's impact on separation of powers); Richard J. Pierce, Jr., Morrison v. Olson, *Separation of Powers, and the Structure of Government*, 1988 SUP. CT. REV. 1, 1-41 (analyzing the effects of *Morrison* on separation of powers); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 488-552 (1987) (exploring separation of powers pre-*Morrison*); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 312, 326-40 (1989) (commenting on the Court's analysis in *Morrison*); *A Symposium on* Morrison v. Olson: *Addressing the Constitutionality of the Independent Counsel Statute*, 38 AM. U. L. REV. 255, 255-393 (1989).
178. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (holding that Congress may not give away Article III judicial power to an Article I judge); INS v. Chadha, 462 U.S. 919, 923-1016 (1983) (dealing with separation-of-powers issues within the context of the legislative veto); Clinton v. City of New York, 118 S. Ct. 2091, 2094-131 (1998) (dealing with separation-of-powers issues within the context of the line-item veto).
179. *See generally*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (arguing for a unitary executive); Steven G.

apparent setback in the limited and unusual circumstances of *Morrison v. Olson*, the academic advocates of a unitary executive seem since to have persuaded a majority of the Court generally to that view.[180] Moreover, in the recent public debate over the office of independent counsel, appointment and removal were central concerns,[181] and the *Morrison v. Olson* dissenting opinion is widely regarded as the correct one.[182]

Beyond the special circumstance of *Morrison v. Olson*, an earlier Supreme Court decision, *Springer v. Philippine Islands*,[183] provides significant appointment-power precedent for other courts. Applying Philippine separation-of-powers provisions, the Court struck down an act of the Philippine legislature vesting appointment of the directors of a national coal company and a national bank in the legislature.[184] The Court unequivocally established that the appointment power is executive, stating that "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."[185]

Despite a dissenter's criticism that the distinction between

Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (arguing for a unitary executive); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (arguing against a unitary executive); Michael A. Fritts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legislative Leadership*, 144 U. PA. L. REV. 827 (1996) (analyzing the debate over the executive power); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (arguing against a unitary executive); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627 (1989) (arguing against a unitary executive); Strauss, *supra* note 177, at 517-22 (arguing for an in-between approach to the executive power, or "functionalism").

180. *See* Printz v. United States, 521 U.S. 898, 922-23 (1997) (5-4 decision) ("The insistence of the Framers upon unity in the Federal Executive . . . is well known.") (citing Calabresi & Prakash, *supra* note 179). *See also* Steven G. Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997, at A14 (commenting on the significance of *Printz*).

181. *See, e.g.*, Archibald Cox & Phillip B. Heymann, Editorial, *After the Counsel Law*, N.Y. TIMES, Mar. 10, 1999, at A19.

182. *See, e.g.*, Paul T. Cappuccio, *Scalia Was Right About the Independent Counsel Law*, WALL ST. J., June 29, 1998, at A19. The Independent Counsel Act exprired June 30, 1999. *See* David Johnston, *Attorney General Taking Control As Independent Counsel Law Dies*, N.Y. TIMES, June 30, 1999, at A1.

183. 277 U.S. 189 (1928).

184. *See id.* at 198, 203.

185. *Id.* at 202. *Springer* cited favorably two North Carolina Supreme Court cases decided under the Constitution of 1868, State *ex rel.* Clark v. Stanley, 66 N.C. 60 (1872), and State *ex rel.* Howerton v. Tate, 68 N.C. 546 (1873). *See Springer*, 277 U.S. at 204. See *infra* note 196 and accompanying text for a discussion on *Clark* and *Howerton*.

legislative and executive action may not always be done "with mathematical precision" or the branches divided "into watertight compartments,"[186] other courts have found *Springer* to be persuasive precedent. For instance, the Ninth Circuit followed *Springer* in holding that a commonwealth constitution's provision for separation of powers was violated by a statute permitting appointment by the legislature of members of a civil service commission.[187] Additionally, a state supreme court followed *Springer* in voiding a statutory provision for legislative appointments to the state board of education as violating the separation of powers.[188] Other state courts have reached similar results.[189] Of course, some divergence exists among the cases, some of which are distinguishable because of particular state constitutional provisions.[190] Generally, however, the importance and force of the separation-of-powers doctrine has been consistently recognized,[191] and decisions by the Supreme Court and other courts have influenced North Carolina Supreme Court separation-of-powers decisions.[192]

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186. *Springer*, 277 U.S. at 211 (Holmes, J., dissenting).

187. *See* Camacho v. Civil Serv. Comm'n, 666 F.2d 1257, 1263-64 (9th Cir. 1982), *abandoned on other grounds in In re* McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984).

188. *See* Rampton v. Barlow, 464 P.2d 378, 381-83 (Utah 1970).

189. *See, e.g.*, Spradlin v. Arkansas Ethics Comm'n, 858 S.W.2d 684, 688 (Ark. 1993) (holding that designating the chief justice of the state supreme court to appoint a member of the state ethics commission violated the state's separation-of-powers doctrine); Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 924 (Ky. 1984) (holding that statutorily creating an independent legislative commission to carry out functions of the state general assembly is a violation of separation of powers); Opinion of the Justices, 309 N.E.2d 476, 480-82 (Mass. 1974) (holding that a legislative-created administrative commission would violate the state's constitutional separation-of-powers provision); Tucker v. State, 35 N.E.2d 270, 304-05 (Ind. 1941) (holding that a legislative act affecting the terms and tenure of administrative agency employees was a usurpation of executive power and, thus, a violation of the state's separation-of-powers doctrine). *See also* Sheryl G. Synder & Robert M. Ireland, *The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and Historical Analysis of* L.R.C. v. Brown, 73 KY. L.J. 165, 167-233 (1984-85) (providing a legal and historical analysis of *Brown*).

190. *Compare* State *ex rel.* Schneider v. Bennett, 547 P.2d 786, 799-800 (Kan. 1976) (holding that members of the state legislature may serve on administrations or commissions created by legislative enactments without violating the separation-of-powers doctrine but only where such service results in no actual usurpation of powers of another branch of government), *with Brown*, 664 S.W.2d 907, 914 (holding that the state's separation-of-powers doctrine must be strictly construed, and that a legislatively-created, independent agency acting on behalf of the legislature was an unconstitutional usurpation of executive power). *See* Devlin, *supra* note 19, at 1136-44.

191. *See, e.g.*, State *ex rel.* Young v. Brill, 111 N.W. 639, 644-49 (Minn. 1907) (discussing numerous separation-of-powers cases in different states).

192. *See* State *ex rel.* Wallace v. Bone, 304 N.C. 591, 601-06, 286 S.E.2d 79, 84-87 (1982) (noting various Supreme Court and other state decisions regarding separation of powers in support of North Carolina's application of the doctrine). Problems can arise in applying

B. North Carolina Cases

Among other North Carolina separation-of-powers cases,[193] appointment-and-removal[194] cases first arose after adoption of the

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federal and other jurisdictions' separation-of-powers decisions to a particular state constitutional provision. *See* Devlin, *supra* note 19, at 1219-24 (commenting on the limits of applying federal precedent to state separation-of-powers issues).

193. *See, e.g.*, Adams v. North Carolina Dep't of Natural and Econ. Resources, 295 N.C. 683, 702, 249 S.E.2d 402, 413 (1978) (holding that delegation of power to regulatory commission did not violate separation of powers); Person v. Watts, 184 N.C. 499, 502, 115 S.E. 336, 339 (1922) (involving executive independence); Long v. Watts, 183 N.C. 99, 105-06, 110 S.E. 765, 767-68 (1922) (involving judicial independence); Herndon v. The Imperial Fire Ins. Co., 111 N.C. 384, 385-86, 16 S.E. 465, 465 (1892) (stating that the court's powers, duties, and rules are free from legislative interference); Horton v. Green, 104 N.C. 400, 401, 10 S.E. 470, 470 (1889) (stating the same); State *ex rel.* Scarborough v. Robinson, 81 N.C. 409, 425-26, 429 (1879) (stating that "the judicial power cannot be exercised in aid of" another branch's function). *See also* Wake County Hosp. Sys., Inc. v. Rules Review Comm'n of the N.C. Gen. Assembly, No. 97 CVS 1426, General Court of Justice, Superior Court Division, Wake County, North Carolina (voluntary dismissals filed June 18, 1997, and October 15, 1997) (involving separation-of-powers challenges to review of administrative agency rules by rules review commission). Through 1995 amendments to the Administrative Procedures Act, *see* ch. 507, § 27.8(e)-(f), 1995 N.C. Sess. Laws 1525, 1723-29 (codified as amended at N.C. GEN. STAT. §§ 150B-21.3(b), -21.8(c), -21.9, -21.10 (1995)), the Rules Review Commission, controlled by the General Assembly, may prevent an administrative agency in the executive branch from implementing a rule that is not approved by the commission. Actions of the commission have created controversy. *See, e.g.*, Michael Lowrey & John Hood, *Regulation in North Carolina: A Primer*, JOHN LOCKE FOUND., Mar. 1997, at 12-17 (analyzing the function and impact of the Rules Review Commission and proposing regulation reform). As challenges have occurred in other states to such rules-review provisions, it is reasonable to expect further challenge to these North Carolina provisions. *See* Missouri Coalition for the Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 133 & n.17 (Mo. 1997) (holding that a statutory provision suspending promulgation of rules unconstitutionally interferes with the executive branch, but upholding a legislative committee review of executive regulatory actions) (citing Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus*, 57 MO. L. REV. 1157, 1216 (1992) ("At some point the right case will arise challenging the powers of the JCAR. It should come as no surprise to anyone when those powers are ruled unconstitutional.")).

194. The North Carolina Supreme Court recognized the principle of separation of powers in refusing to interfere with the governor's removal of an administrative officer. *See* State *ex rel.* Caldwell v. Wilson, 121 N.C. 425, 472, 28 S.E. 554, 562-63 (1897). With a rhetorical flourish, the *Caldwell* court explained its role in separation-of-powers disputes:

> We realize the responsibilities of this Court in settling the line of demarkation between the legislative, executive and supreme judicial powers, which, by constitutional obligation, must be kept forever separate and distinct. This vital line must be drawn by us alone, and we will endeavor to draw it with a firm and even hand, free alike from the palsied touch of interest and subserviency and the itching grasp of power. Should the legislative or executive departments of the State cross that line we will put them back where they belong; but upon us rests the equal obligation of keeping upon our own side. This is a question not of discretion, but of law; a matter not of expediency, but of right.

Id. at 471, 28 S.E. at 562. *See also* Person v. Watts, 184 N.C. 499, 502, 115 S.E. 336, 339 (1922) (holding that the court will not compel administrative officer to act). "As to the

Constitution of 1868 and its new appointments clause.[195] As early as 1872, the North Carolina Supreme Court held that the general appointment power was vested exclusively in the governor and that a statute depriving him of that power for a particular statutory office and placing it in the legislature was unconstitutional.[196] That precedent controlled in two subsequent decisions.[197] After the 1875 amendments to the appointments clause, however, the court held that those cases no longer controlled and that the legislature could provide for appointment of statutory officers.[198] Separation-of-powers arguments could not overcome the effect of the 1875 amendments.[199]

After North Carolina adopted the Constitution of 1971, but before its new appointments clause became an issue for the North Carolina Supreme Court, the court decided a significant separation-of-powers case, *Wallace v. Bone*,[200] and rendered a significant advisory opinion, *In re Separation of Powers*.[201] The court's emphatic language about strict application of the doctrine stirred academic commentary.[202] *In re Separation of Powers* advised that, under the

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wisdom of this [separation-of-powers] provision there is practically no divergence of opinion—it is the rock upon which rests the fabric of our government." *Id.* at 502, 115 S.E. at 339.

195. N.C. CONST. of 1868, art. III, § 10.

196. *See* State *ex rel.* Clark v. Stanley, 66 N.C. 60, 66-67 (1872) (invalidating a statute that authorized the president of the senate and the speaker of the house to appoint directors for the state to all corporations in which the state was a stockholder). *See also* State *ex rel.* Howerton v. Tate, 68 N.C. 546, 551-53 (1873) (holding that the governor's appointees to the board of directors of a railroad corporation in which the state was a stockholder could not be displaced by proxies acting under statute controverting gubernatorial appointment).

197. *See* People *ex rel.* Nichols v. McKee, 68 N.C. 429, 435-39 (1873) (involving appointments to the board of a state institution); People *ex rel.* Welker v. Bledsoe, 68 N.C. 457, 458-59 (1873) (involving appointments to the board of directors of the state penitentiary).

198. *See* State *ex rel.* Cherry v. Burns, 124 N.C. 761, 765, 33 S.E. 136, 137 (1899) (applying an act that created office of keeper of the capitol and provided that legislature could fill it); Cunningham v. Sprinkle, 124 N.C. 638, 642-43, 33 S.E. 138, 139 (1899) (involving appointment of members of the Board of Agriculture pursuant to an 1875 state constitutional amendment directing establishment of the department); State Prison v. Day, 124 N.C. 362, 366, 32 S.E. 748, 749 (1899) (involving the superintendent of state prison); State *ex rel.* Ewart v. Jones, 116 N.C. 570, 571-74, 21 S.E. 787, 787-88 (1895) (applying an act that created a judgeship and provided that the legislature should fill the vacancy declared to be caused upon ratification of the act).

199. *See Cunningham*, 124 N.C. at 642-43, 33 S.E. at 139.

200. State *ex rel.* Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

201. Advisory Opinion *in re* Separation of Powers, 305 N.C. 767, 295 S.E.2d 589 (1982).

202. *See generally* LEGISLATIVE RESEARCH COMMISSION, SEPARATION OF POWERS, REPORT TO THE 1983 GENERAL ASSEMBLY OF NORTH CAROLINA (1983) (assessing the impact of *Wallace v. Bone* on North Carolina agencies); Milton S. Heath, Jr., *The Separation of Powers in North Carolina*, POPULAR GOV'T, Fall 1982, at 19; Orth, *supra*

specific constitutional provision for administration of the state budget by the governor and the general provision for separation of powers, the governor, not the General Assembly, controlled transfers within the budget and disbursement of federal block grants to the state.[203] *Wallace v. Bone* held that, as a matter of separation of powers, legislators could not serve as members of a statutorily created agency within the executive branch.[204] As explained by the court, the legislature cannot create an executive agency to implement legislation and effect some control over the agency by appointing legislators to the agency.[205]

That principle could mean that the legislature cannot constitutionally create an executive agency and then exercise some control over it indirectly by providing for non-executive appointment to the agency. But that issue was not presented in *Wallace v. Bone* or *In re Separation of Powers*, and, as one scholar noted, it was among important unanswered questions concerning the appointment power awaiting authoritative interpretation of the appointments clause of the Constitution of 1971.[206]

Such an opportunity arose in *Martin v. Melott*.[207] For the first time under the Constitution of 1971 and for the first time in nearly a century, *Martin v. Melott* presented a constitutional confrontation concerning the governor's power to appoint state officers whose offices are created by statute.[208] In *Melott*, the Governor challenged statutory appointment provisions in the 1985 amendments to the state Administrative Procedure Act ("APA") creating an Office of Administrative Hearings and its director.[209] Although another

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note 1; John V. Orth, *Separation of Powers: An Old Doctrine Triggers a New Crisis*, N.C. INSIGHT, May 1982, at 36.

203. *See In re Separation of Powers*, 305 N.C. at 775-77, 295 S.E.2d at 593-94.

204. *See Wallace*, 304 N.C. at 608-09, 286 S.E.2d at 88-89.

205. *See id.* at 608, 286 S.E.2d at 88.

206. Orth, *supra* note 1, at 2, 25-26.

207. State *ex rel.* Martin v. Melott, 320 N.C. 518, 359 S.E.2d 783 (1987) (plurality opinion). *See* Charles Herman Winfree, Note, State *ex rel.* Martin v. Melott: *The Separation of Powers and the Power to Appoint*, 66 N.C. L. REV. 1109, 1109-22 (1988) (examining the separation-of-powers doctrine and its incorporation into the federal and North Carolina constitutions); Devlin, *supra* note 19, at 1246 & nn.141-44 (criticizing North Carolina's approach to separation-of-powers cases as analyzed in *Martin v. Melott*).

208. *See* State *ex rel.* Salisbury v. Croom, 167 N.C. 223, 226-29, 83 S.E. 354, 354-56 (1914) (upholding legislative appointment of the director of the State Hospital, an office not provided for in the state constitution).

209. Act of July 12, 1985, ch. 746, § 2, 1985 N.C. Sess. Laws 987, 1012 (codified as amended at N.C. GEN. STAT. §§ 7A-750 to -752 (1995 & Cum. Supp. 1998)); Act of July 15, 1986, ch. 1022, §§ 3-4, 1985 N.C. Sess. Laws 602, 605 (codified as amended at N.C. GEN. STAT. §§ 7A-752 to -753 (1995)) (Regular Session, 1986).

legislator had proposed that the director be appointed by the governor, after the election of Governor James G. Martin in 1984, the legislative sponsor of the amendments changed the proposal to appointment by the General Assembly.[210] He later abandoned that legislative-appointment proposal as being too controversial.[211] The enacted amendments instead provided for the appointment of the officer by the chief justice of the North Carolina Supreme Court or, in the event the supreme court issues an opinion that the appointment by the chief justice is unconstitutional, by the attorney general.[212]

The amendments to the APA reflected perceived abuses by executive departments and agencies and created the Office of Administrative Hearings to address the abuses.[213] Underlying those perceptions and enactments, however, philosophical and partisan political considerations were manifest. The APA always had legislative-versus-executive power implications. Now, however, it had partisan political-party implications—a Democrat-controlled legislature amended the APA, arguably to curb a newly elected Republican Governor.[214] Nevertheless, after Governor Martin

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210. BILL FINGER, ET AL., ASSESSING THE ADMINISTRATIVE PROCEDURE ACT 11 (1985).

211. *See id.*

212. *See* Act of July 12, 1985, ch. 746, § 2, 1985 N.C. Sess. Laws 987, 1012 (codified as amended at N.C. GEN. STAT. §§ 7A-750 to -752 (1995 & Cum. Supp. 1998)); Act of July 15, 1986, ch. 1022, §§ 3-4, 1985 N.C. Sess. Laws 602, 605 (codified as amended at N.C. GEN. STAT. §§ 7A-752 to -753 (1995)) (Regular Session, 1986). The supreme court declined to issue an advisory opinion. *See In re* Response to Request for Advisory Opinion, 314 N.C. 679, 682, 335 S.E.2d 890, 892 (1985).

213. Chapter 746 of the 1985 North Carolina Session Laws created the Office of Administrative Hearings as "an independent, quasi-judicial agency under Article III, Sec. 11 of the Constitution . . . [with] such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which it was created." *See* N.C. GEN. STAT. § 7A-750 (1995 & Cum. Supp. 1998). One purpose was "to provide a source of independent hearing officers to preside in administrative cases and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process." *Id.* In his challenge to the appointment provisions pertaining to the Office, Governor Martin noted, but did not assert, arguments that other parts of the act creating the Office are unconstitutional, "especially on grounds that they established an unauthorized court and delegate to an administrative agency excessive judicial powers." Brief for Appellant at 13-14 & nn.3-5, State *ex rel.* Martin v. Melott, 320 N.C. 518, 359 S.E.2d 783 (1987) (No. 61PA87). Controversies continue about agencies' actions and the role of the Office of Administrative Hearings. *See* James Eli Shiffer, *'Law Judges' Debate Heats Up*, NEWS & OBSERVER (Raleigh, N.C.), June 10, 1999, at 1A (discussing N.C. House Bill 968, 1999 Session, An Act to Modify the Procedures Concerning Final Administrative Decisions in Contested Cases Heard by the Office of Administrative Hearings).

214. The act had long

> been a political football . . . straining such close Democratic friendships as that between [then] former Gov. James B. Hunt [sic] Jr. and current [1985] Lt. Gov. Robert B. Jordan III. . . .

challenged the appointment provisions, the person appointed by the chief justice to the office of director proclaimed that the controversy was "not a question of this governor vs. this General Assembly .... It's a question of executive power vs. legislative power."[215]

Governor Martin challenged the appointment provisions of the APA amendments as violations of the doctrine of separation of powers without success, garnering only one limited dissenting opinion on that basis.[216] The Governor's separate challenge under the appointments clause also failed, as discussed below.[217] The only authoritative result of that challenge was its rebuff. The seven-member supreme court split: After the chief justice recused himself,[218] three justices joined in a plurality on certain grounds,[219] two concurred in the result on other grounds,[220] and one dissented on limited separation-of-powers grounds only involving the independence of the judiciary.[221]

The plurality in *Melott* rejected the Governor's argument that the principle of *Wallace v. Bone*—that the General Assembly cannot constitutionally create an agency of the executive branch and retain some control over it by appointing legislators to the agency's governing body—should prevent legislative control over an executive officer by providing for the officer's appointment by someone other than the governor. Without elaboration, the plurality simply said, "*Wallace* is not authority for this case."[222] Ignoring the clear statutory

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....

> With Gov. James G. Martin, a Republican, taking over control over the executive branch, the political stew [was] thickened. The central APA issue—legislative-versus-executive control over the mechanisms of government—now has become part of the larger struggle of partisan politics.

FINGER, *supra* note 210, at 3-4. At that time, the General Assembly was controlled by Democrats and dominated by a small group of powerful leaders. *See The Democratic Dictatorship ... and Other Legislative Skirmishes*, THE INDEPENDENT, July 18-Aug. 14, 1986, at 1.

215. Steve Riley, *Judge Decides Chief Justice to Appoint Hearings Chief*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 2, 1986, at 1-2C (quoting Robert A. Melott, director of the Office of Administrative Hearings).

216. *See Melott*, 320 N.C. at 528, 359 S.E.2d at 789 (Martin, J., dissenting).

217. *See infra* text accompanying notes 300-27.

218. *See Melott*, 320 N.C. at 524, 359 S.E.2d at 787 (plurality opinion).

219. *See id.* at 520, 359 S.E.2d at 785 (plurality opinion). Justice Webb wrote the opinion and was joined by Justices Frye and Mitchell. *See id.* at 518, 520, 359 S.E.2d at 784-95.

220. *See id.* at 524, 528, 359 S.E.2d at 787, 789 (Meyer, J., concurring in result). Justice Whichard joined the opinion. *See id.* at 518, 359 S.E.2d at 784.

221. *See id.* at 528, 359 S.E.2d at 789 (Martin, J., dissenting).

222. *Id.* at 523, 359 S.E.2d at 786 (plurality opinion).

provision that the new agency is part of the executive branch,[223] the plurality deemed it unnecessary to decide whether the director is in the executive branch. Assuming that the director is in the executive branch, the plurality formulated the issue as functional: Whether the appointment of the director is the exercise of executive power.[224] The plurality then held that the appointment of the director "is not an exercise of the executive power."[225] Citing only *Advisory Opinion in re Separation of Powers*, the plurality simply equated executive power with executing the law.[226] Reasoning that the appointment of someone to execute the laws does not require the appointing party to execute the laws, the plurality concluded that "the appointment power is not the same as taking care that the laws are executed."[227] Thus, the plurality concluded that the chief justice's appointment of the executive branch agency's director did not violate the constitutional provision for separation of powers.[228]

The concurring opinion found the plurality's analysis to be "flawed,"[229] reasoning that the separation-of-powers issue turns instead on the nature of the powers and the duties exercised by the appointed officer.[230] The concurrence then concluded that the director's statutory powers and duties are primarily judicial.[231] Thus, it too concluded that the chief justice could constitutionally appoint the director.[232]

The lone dissenter in *Melott* acknowledged that some of the director's powers and duties may be described as "quasi-judicial," but concluded that they are mostly "purely administrative in character."[233] The dissent correctly noted that the office of director is within the executive branch.[234] Nevertheless, the dissent concluded, without explanation, that the governor has no authority to appoint the director, unless such power be granted by the General Assembly, and that the General Assembly "can delegate the appointment . . . to

223. *See* N.C. GEN. STAT. § 7A-750 (1995) (providing that it is "an independent, quasi-judicial agency under Article III, Sec. 11 of the Constitution").
224. *Melott*, 320 N.C. at 523, 359 S.E.2d at 787 (plurality opinion).
225. *Id.* (plurality opinion).
226. *Id.* (plurality opinion).
227. *Id.* at 523-24, 359 S.E.2d at 787 (plurality opinion).
228. *See id.* at 524, 359 S.E.2d at 787 (plurality opinion).
229. *Id.* at 525, 359 S.E.2d at 787 (Meyer, J., concurring in result).
230. *Id.* at 525, 359 S.E.2d at 788 (Meyer, J., concurring in result).
231. *Id.* at 526, 359 S.E.2d at 788 (Meyer, J., concurring in result).
232. *See id.* at 528, 359 S.E.2d at 789 (Meyer, J., concurring in result).
233. *Id.* at 530-31, 359 S.E.2d at 790-91 (Martin, J., dissenting).
234. *See id.* at 531-32, 359 S.E.2d at 791 (Martin, J., dissenting).

another official."[235] Under the dissent's separation-of-powers analysis, however, the other official cannot constitutionally be the chief justice. With a rhetorical flourish, the dissent complained that by placing this appointment with the chief justice, "the judicial branch has been cast adrift upon uncharted waters amid the rocky shoals of political influence. The genius of the doctrine of separation of powers is to prevent such result."[236]

All three *Melott* opinions clearly retreated from the rhetoric and principle of *Wallace v. Bone* and ignored other leading separation-of-powers cases.[237] Nevertheless, two of the opinions hinted that the separation-of-powers provision would be applied more strictly in other circumstances. The dissent in *Melott* speculated that the court would not approve the General Assembly's delegating to the chief justice the appointment of members of other executive agencies.[238] The concurring opinion in *Melott* interjected that it did "not mean to say that, under different circumstances, the principles of separation of powers would not render similar legislation unconstitutional."[239] The retreat from *Wallace v. Bone* and the vague suggestion about other potential applications of the principles of separation of powers may be a result of changes in court membership occurring between *Wallace v. Bone* and *Martin v. Melott*.[240] Moreover, the politics of the

235. *Id.* at 533, 359 S.E.2d at 792 (Martin, J., dissenting).

236. *Id.* (Martin, J., dissenting). Other jurisdictions that adhere to the separation-of-powers doctrine and have considered the issue of judicial appointment of non-judicial officers have held that the appointments are unconstitutional. *See, e.g.*, Spradlin v. Arkansas Ethics Comm'n, 858 S.W.2d 684, 688 (Ark. 1993) (holding that state chief justice cannot constitutionally appoint one member of commission); State *ex rel.* White v. Barker, 89 N.W. 204, 209-10 (Iowa 1902) (holding that judges cannot constitutionally appoint board members); Opinion of the Justices, 309 N.E.2d 476, 479-80 (Mass. 1974) (holding that state chief justice cannot constitutionally appoint non-judicial officers or board members); State *ex rel.* Young v. Brill, 111 N.W. 639, 651 (Minn. 1907) (holding that district judges cannot constitutionally appoint board members); Application of O'Sullivan, 158 P.2d 306, 309-10 (Mont. 1945) (holding that judicial appointment of city attorney is unconstitutional).

237. *See, e.g.*, Springer v. Phillipine Islands, 277 U.S. 189, 197-212 (1928) (regarding an act by the Phillipine legislature that vested executive appointment power in the legislature); Myers v. United States, 272 U.S. 52, 106-295 (1926) (regarding the power of the President to remove a postmaster from his appointed position). *See also supra* notes 144-52 and accompanying text (discussing *Myers*); *supra* notes 183-88 and accompanying text (discussing *Springer*).

238. *See Melott*, 320 N.C. at 531, 359 S.E.2d at 791 (Martin, J., dissenting).

239. *Id.* at 527, 359 S.E.2d at 789 (Meyer, J., concurring in result).

240. Justice Britt, who wrote for the court in *Wallace v. Bone*, and Chief Justice Branch, sitting at that time, both retired before *Melott* was decided. *See* 320 N.C. at vii (noting that Chief Justice Branch and Justice Britt were both retired in 1987, when *Melott* was decided); 304 N.C. at v (noting that Chief Justice Branch and Justice Britt were sitting in 1981, when *Wallace v. Bone* was decided).

state and the political party affiliation of the governor had also changed.[241]

III. THE EXECUTIVE POWER AND THE APPOINTMENT POWER IN NORTH CAROLINA

A. *Constitutional and Statutory Provisions*

The Constitution of 1971 vests the "executive power of the State . . . in the Governor."[242] It provides for the governor's election to a four-year term and qualifications,[243] other attributes of office,[244] and for the governor's "oath or affirmation that he will support the Constitution and laws of the United States and of the State of North Carolina, and that he will faithfully perform the duties pertaining to the office of Governor."[245]

The Constitution of 1971 enumerates ten specific duties of the governor, three of which are emphasized here:

> *Budget.* The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor.
>
> . . . .
>
> *Execution of laws.* The Governor shall take care that the

241. *See* Coble, *supra* note 19, at 686-88 (noting that separation-of-powers disputes at the time of *Wallace v. Bone* were between a Democratic governor, Governor Hunt, and Democratic majority leaders in the General Assembly, and that the dispute in *Melott* was between a Republican governor and Democratic majority leaders in the General Assembly). *See also Republican Majority on High Court*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 2, 1999, at 3A (noting that for the first time since early this century the state supreme court has a majority of Republican justices).

242. N.C. CONST. art. III, § 1. Judicial interpretation of the meaning of "executive power" is sparse in North Carolina. *See Melott*, 320 N.C. at 523, 359 S.E.2d at 787 (plurality opinion) ("We believe it means 'the power of executing laws.' "). North Carolina courts have explicitly recognized that the governor has standing in a declaratory judgment action regarding the interpretation of statues administered by another constitutional executive officer, *see* State *ex rel.* Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 280-81, 275 S.E.2d 399, 400-01 (1981), and implicitly that the governor may make a legal determination that a statute is unconstitutional and direct the attorney general to commence an action challenging its constitutionality, *see* State *ex rel.* Attorney General v. Knight, 169 N.C. 333, 334-63, 85 S.E. 418, 419-32 (1915) (testing a woman's right to be a notary public in light of a gubernatorial power to appoint women as such).

243. *See* N.C. CONST. art. III, § 2.

244. *See id.* § 3.

245. *Id.* § 4.

laws be faithfully executed.

. . . .

Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.[246]

The Constitution of 1971 provides for the election of a lieutenant governor, who presides over the Senate and who "shall perform such additional duties as the General Assembly or the Governor may assign to him."[247] It also provides for the election of eight other constitutional officers—a secretary of state, an auditor, a treasurer, an attorney general, a superintendent of public instruction, and commissioners of agriculture, labor, and insurance[248]—whose "respective duties shall be prescribed by law."[249] Those eight officers, together with the governor and the lieutenant governor, as the ten constitutional officers whose offices are established by the executive article of the constitution, comprise the Council of State, with no collective powers or duties constitutionally prescribed.[250]

In re-allocating an earlier array of two hundred state agencies under not more than twenty-five principal administrative departments, the drafters of the constitutional reorganization amendment contemplated that the governor would "be enabled to manage the business of the State more effectively."[251] But because of the failure of the short ballot proposal, eight of the heads of those principal administrative departments remained independently elected constitutional officers, with duties "prescribed by law,"[252] while the other department heads were dependent upon statutory authorization and prescription of duties. Accordingly, the General Assembly enacted executive organization acts in 1971[253] and 1973.[254] Those Acts recognized the constitutional concept that the governor was the chief executive officer of the state,[255] but vested executive and

246. *Id.* § 5.
247. *Id.* § 6.
248. *See id.* § 7(1).
249. *Id.* at § 7(2).
250. *See id.* at § 8.
251. 1968 REPORT, *supra* note 100, at 51-52.
252. N.C. CONST. art. III, § 7(2).
253. *See* Act of July 14, 1971, ch. 864, 1971 N.C. Sess. Laws 1266 (codified at N.C. GEN. STAT. §§ 143A-1, -245 (1994)).
254. *See* Act of May 14, 1973, ch. 476, 1973 N.C. Sess. Laws 576 (codified at N.C. GEN. STAT. §§ 143B-1, -324.3 (1997)).
255. *See* N.C. GEN. STAT. §§ 143A-4 (1994), 143B-4 (1997).

administrative powers, duties, and functions in separate principal offices or departments.[256] These offices and departments included the Office of the Governor, eight departments separately headed by other elected constitutional officers, and the other statutory departments, which soon numbered nine.[257] Except for the eight functional departments headed by elected constitutional officers, the heads of the other nine functional departments are "appointed by the Governor and serve at his pleasure."[258]

Soon after adoption of the Constitution of 1971 and those initial executive organization acts, the General Assembly began asserting oversight of the executive branch during the term of Governor James E. Holshouser, Jr., a Republican elected in 1972.[259] That legislative oversight continued into the succeeding two terms of Governor James B. Hunt, Jr., a Democrat first elected in 1976.[260] Some of that legislative oversight violated the doctrine of separation of powers, as established in *Wallace v. Bone*[261] and *Advisory Opinion in re Separation of Powers.*[262] Under those opinions, both written during Governor Hunt's tenure, the General Assembly cannot constitutionally encroach upon the governor's duty to prepare and recommend a budget for legislative enactment.[263] Moreover, as the constitution provides, the "budget as enacted by the General Assembly shall be administered by the Governor."[264]

Stronger challenges to the governor's executive power and tougher tests of the separation-of-powers doctrine awaited the

256. *See id.* §§ 143A-11 (Cum. Supp. 1998), 143B-6 (1997).

257. *See id.* §§ 143A-11 (Cum. Supp. 1998), 143B-6 (1997).

258. *Id.* § 143B-9 (1997).

259. *See* RAN COBLE, SPECIAL PROVISIONS IN BUDGET BILLS: A PANDORA'S BOX FOR NORTH CAROLINA CITIZENS 3, 5 (1986); Jack Betts, *The Coming of Age of the N.C. General Assembly*, 4 N.C. INSIGHT, Dec. 1981, at 13, 15-16; Heath, *supra* note 202, at 19-23.

260. *See* COBLE, *supra* note 259, at 5; Betts, *supra* note 259, at 15-16; Heath, *supra* note 202, at 19-23.

261. *See supra* notes 204-05 and accompanying text.

262. *See supra* note 203 and accompanying text.

263. The General Assembly created the Advisory Budget Commission in 1925. *See* N.C. GEN. STAT. § 143-1 (1999). Separation-of-powers questions about the commission's functions, with its members including those of the General Assembly, were raised in 1980, at which time it continued to take direct action on budget requests; beginning in 1982, the commission began to make recommendations to the governor regarding budget requests. *See* Orth, *supra* note 202, at 38-43. *See also* MERCER DOTY, THE ADVISORY BUDGET COMMISSION: NOT AS SIMPLE AS ABC, 44-47 (1980) (discussing the constitutional issues surrounding the commission).

264. N.C. CONST. art. III, § 5(3); *Advisory Opinion in re Separation of Powers*, 305 N.C. at 776, 295 S.E.2d at 594.

election of Governor Hunt's successor, Governor Martin, a Republican first elected in 1984. During his two terms, Governor Martin was involved in several significant cases.[265] The first of two such cases discussed in this Part, *Martin v. Thornburg*,[266] involved a conflict between the Governor and the Attorney General over the action of one of the Governor's appointed department heads. The second, *Martin v. Melott*, summarized above,[267] addressed the governor's power to appoint statutory officers. A third case, *Stott v. Martin*,[268] addressing the governor's ability to discharge certain state employees and replace them, is discussed in Part V.[269]

As Governor Hunt explained in the context of *Stott v. Martin*, the governor's ability to effect any of his agenda depends largely on his ability to appoint and remove key subordinates: "When a governor first comes in, he's got to put his team into place quickly in order to get control of the government and be able to carry out the mandate that the people have given to do their will."[270] Because a newly elected governor takes office in January, just before the General Assembly convenes, he must promptly prepare a budget, which may differ from the preceding governor's proposed budget, for proposal to the General Assembly.[271]As Governor Hunt added, "[Y]ou've really got to get in and hit the ground running . . . [and] put your team in immediately."[272] The governor's team must loyally represent him not only with the public, but also with members of the General Assembly and other government personnel.[273] Thus, to implement policies through the large state-government bureaucracy, the governor needs a level of employees exempt from civil service protection.[274] It was "essential," in Governor Hunt's view, to have

265. *See* Coble, *supra* note 19, at 687-88.

266. 320 N.C. 533, 359 S.E.2d 472 (1987).

267. *See supra* text accompanying notes 207-41.

268. 725 F. Supp. 1365 (E.D.N.C. 1989) ("Stott I"), *rev'd sub nom.* Stott v. Haworth, 916 F.2d 134 (4th Cir. 1990) ("Stott II"), *on remand*, Stott v. Martin, 783 F. Supp. 970 (E.D.N.C. 1992) ("Stott III").

269. *See infra* notes 328-62 and accompanying text.

270. Deposition of James B. Hunt, Jr., at 23-24, *Stott I*, 725 F. Supp. 1365 (No. 85-818-CIV-5). The district court paraphrased Governor Hunt's testimony as follows: "[T]here are at least four qualifications those key people must have. They must be *loyal* to the governor, *responsive* to his suggestions, *effective* in carrying out their duties, and *committed* to his program." *Stott I*, 725 F. Supp. at 1385.

271. Deposition of James B. Hunt, Jr., *supra* note 270, at 23.

272. *Id.* at 23-24.

273. *Id.* at 75, 82.

274. *Id.* at 78-81. At the time of Governor Hunt's testimony, the state had approximately 46,000 rank-and-file employees, and he had concluded that approximately 1500 should be designated as exempt. *See id.*

subordinates exempt from civil service protection, "so that the policy-making done by those exempt employees would be effective in guiding and leading the rank and file state employees who were not exempt."[275] To be an effective governor, Governor Hunt advised that the governor "bring in new people that you know are loyal or determine that others who may be in are loyal. You have to be absolutely satisfied that you've got a team in there to do the job."[276]

B. The Governor, the Attorney General, and the Council of State

In 1985, Governor Hunt's newly elected successor, Governor Martin, and his appointee to head the Department of Administration proposed an administrative action requiring approval of the Council of State. The Governor soon confronted opposition by the Attorney General and the other elected members of the Council of State, resulting in *Martin v. Thornburg*.[277] In *Thornburg*, the Governor and his appointee commenced a declaratory judgment action against the Attorney General and other members of the Council of State to determine their respective rights and duties in connection with civil actions against the state and regarding the administrative action at issue, which involved leases executed on behalf of the state.[278] A state agency had leased certain office space, and, upon expiration of that lease, the Department of Administration, statutorily responsible for state leases subject to approval "of the Governor and Council of State,"[279] recommended leasing other office space for the agency.[280] At a meeting of the Council, the Attorney General moved for, and the Council, in the absence of the Governor, unanimously approved the state's renegotiating a proposed lease for the former office space.[281] At a subsequent meeting of the Council, the Governor asserted that under the applicable statutes the Council was to approve or disapprove the Department's lease recommendation.[282] In the Governor's opinion, the Council could not initiate a new lease transaction or direct the Department to undertake one, and both the Governor and the Council must approve a department lease recommendation.[283] The Governor also announced that he did not

275. *Id.*
276. *Id.* at 80, 82, 87. *See* Beyle, *supra* note 55, at 33-37.
277. 320 N.C. 533, 359 S.E.2d 472 (1987).
278. *See id.* at 535, 359 S.E.2d at 473.
279. N.C. GEN. STAT. §§ 143-341(4)(d) (1999), 146-22 (Cum. Supp. 1998).
280. *See Thornburg*, 320 N.C. at 536, 359 S.E.2d at 473.
281. *See id.* at 536, 359 S.E.2d at 473.
282. *See id.* at 537, 359 S.E.2d at 475.
283. *See id.*

approve the proposal for the former office space or any negotiation for its lease.[284] Before the Governor and the Council could resolve their differences, the owner of the former office space commenced a civil action against the state alleging award of a contract for the office space; the Attorney General unilaterally appeared for the state in that action.[285] The Governor and his appointee then commenced their separate declaratory judgment action, resolved on appeal to the North Carolina Supreme Court in *Martin v. Thornburg*.[286] The appeal presented nine issues, but the court decided only three, declining to decide the others it described as "grave constitutional and statutory questions which may arise in the event of continued differences between the various executive officers of the State."[287]

First, based on statutory interpretation and analogous authority, *Thornburg* held that no statute authorized the Council of State to require the Department of Administration to negotiate and enter into any lease other than the lease proposed by the Department to the Council for statutory approval.[288] Second, the court held that because the Department had presented the "lowest rental proposed" under the applicable statutory criteria, the Council's authority was limited to either approving or disapproving that proposal and that the Council's "further action" of directing the Department to negotiate and enter into a lease for the former office space "was therefore without statutory authorization."[289] Third, also on statutory grounds only, the court held that the Governor, represented by private counsel in the action, need not have the prior advice of the Attorney General to employ special counsel to represent the state and that the applicable statute "gives the Governor the unrestricted right to 'employ such special counsel as he may deem proper or necessary.' "[290]

Yielding only unsurprising statutory interpretations, *Thornburg* left open underlying constitutional questions about the Council collectively[291] and the Attorney General individually. Because of the

284. *See id.* at 537, 359 S.E.2d at 474-75.
285. *See id.* at 538, 359 S.E.2d at 475.
286. *See id.* at 535, 359 S.E.2d at 473.
287. *Id.* at 548, 359 S.E.2d at 480-81.
288. *Id.* at 541, 359 S.E.2d at 476-77.
289. *Id.* at 545, 359 S.E.2d at 479. *But cf.* Frye Reg. Med. Ctr., Inc. v. Hunt, 350 N.C. 39, 46-47, 510 S.E.2d 159, 164 (1999) (holding that the governor's statutory power to approve an agency's statutorily mandated plan includes the power to amend the plan).
290. *Thornburg*, 320 N.C. at 548, 359 S.E.2d at 480 (quoting N.C. GEN. STAT. § 147-17(a) (1993)).
291. *See id.* at 548, 359 S.E.2d at 480-81 (noting the *Thornburg* court's declination to address the underlying constitutional questions in the case).

Governor's statutory right to employ special counsel to represent the state, the supreme court did not consider the Governor's argument that such authority arises constitutionally from the executive power.[292] It did, however, consider whether the Attorney General's statutory duty to appear for the state in any proceeding in which it is a party violates the constitutional provision that "the executive power of the State shall be vested in the Governor."[293] The court noted that the constitution does not prescribe the duties of the attorney general and that the statutorily prescribed duties include appearing for the state in actions and the common law power to prosecute actions for the state.[294] Although it either ignored or overlooked its earlier precedent for the attorney general's commencing an action based upon a legal determination by the governor,[295] the court did cite a then-recent court of appeals case illustrating the potential for conflict between the governor and the attorney general.[296] The underlying

292. *Id.* at 548, 359 S.E.2d at 480.

293. N.C. CONST. art. III, § 1.

294. *See Thornburg*, 320 N.C. at 545, 359 S.E.2d at 479.

295. *See* State *ex rel.* Attorney General v. Knight, 169 N.C. 333, 85 S.E. 418 (1915). In *Knight*, decided prior to women's suffrage, the Governor had appointed a woman to be a notary public pursuant to a 1915 act authorizing him to appoint women as well as men to be notaries and declaring the position of notary not to be an "office"; he declined to appoint more than one woman until the courts determined the validity of the act. *See id.* at 334, 85 S.E. at 418-19. The Governor apparently determined that the act was unconstitutional and had the attorney general challenge it. The court agreed, holding that the position was an "office" and that, because the appointed woman could not vote, she could not hold the office. *See id.* at 353-54, 85 S.E. at 428. Of course, more recent precedent establishes that the governor himself has standing in a declaratory judgment action regarding statutes. *See* State *ex rel.* Hunt v. North Carolina Reinsurance Facility, 302 N.C. 274, 280-81, 275 S.E.2d 399, 400-01 (1981) (where both the Governor and commissioner of insurance were represented by the attorney general).

296. *See Thornburg*, 320 N.C. at 546, 359 S.E.2d at 480, citing Tice v. Department of Transp., 67 N.C. App. 48, 312 S.E.2d 241 (1984). In *Tice*, a case in which the attorney general was defending the department of transportation, the court of appeals held that the attorney general could not enter into a consent judgment with the plaintiff without the approval of the executive-department client. *See id.* at 49, 312 S.E.2d at 242. While recognizing that the attorney general has control in actions and appeals prosecuted for the state by him, citing State v. Thompson, 10 N.C. (3 Hawks) 613 (1825), the court concluded that when the attorney general was defending a state executive department headed by an appointee of the governor, the traditional attorney-client rule applied and that the client controlled the attorney general's action. *See Tice*, 67 N.C. App. at 51, 53-55, 312 S.E.2d at 243, 244-45. In supporting its conclusion, the court stated:

> The Governor is a constitutional officer elected by the qualified voters of the State. The executive power of the State is vested in him; and he has the duty to supervise the official conduct of all executive officers. The Attorney General is a constitutional officer elected independently of the Governor; is the head of the Department of Justice; and has the duty to supervise that Department's activities. The constitutional independence of these offices, and their differing functions and duties, create clear potential for conflict between their respective

issue is, of course, whether the governor or the attorney general determines the state's policy position in civil actions.[297] In *Thornburg*, the court stated without further explanation: "The independent executive offices of Governor and Attorney General with their differing functions and duties under the constitution create a clear potential for conflict."[298] In that case, however, the court found no such conflict because "the duty of the Attorney General to appear for and defend the State or its agencies in actions in which the State may be a party or interested is not in derogation of or inconsistent with the executive power vested by the constitution in the Governor."[299] Whatever the potential meaning of those statements, their immediate import is clear: The court will resolve such conflicts on a case-by-case basis.

C. *The Governor's Power to Appoint Officers*

Such a "potential for conflict" as recognized in *Thornburg*[300] had also arisen in *Martin v. Melott*,[301] decided the same day as *Thornburg*. In *Melott*, the Attorney General opposed the Governor's contentions that certain statutory appointment provisions were unconstitutional.[302] The Attorney General prevailed, and Governor Martin's challenge under the constitutional appointments clause of statutory provisions for non-gubernatorial appointment of a statutory officer received no judicial support. The *Melott* three-justice plurality

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> holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers.

Tice, 67 N.C. App. at 55, 312 S.E.2d at 245 (Whichard, J.) (citations omitted). Judge Whichard later became a North Carolina Supreme Court justice.

297. *See, e.g.*, Republican Party of N.C. v. Martin, 980 F.2d 943, 946-47 (4th Cir.), *cert. denied*, 510 U.S. 828 (1993), *on remand*, 841 F. Supp. 722 (E.D.N.C. 1994), *aff'd*, 27 F.3d 563 (4th Cir. 1994) (unpublished opinion) (involving constitutional challenge to statewide election of superior court judges). For a recent example of potential conflict between the governor and the attorney general, see HOUSE SELECT COMMITTEE FOR PERSONNEL REVIEW REPORT, 1998 Sess. (N.C. 1998). That legislative committee found that the Governor's office entered into a $100,000 settlement-payment agreement with a state employee "with virtually no oversight by the Attorney General's office." *Id.* at 3-4. The committee recommended that the Governor's office not involve itself in legal settlements with any state employee not employed in the Governor's office absent a request from the attorney general. *Id.* at 8.

298. *Thornburg*, 320 N.C. at 546, 359 S.E.2d at 480.

299. *Id.*

300. *Id.*

301. 320 N.C. 518, 359 S.E.2d 783 (1987) (plurality opinion).

302. *See id.* at 519-20, 359 S.E.2d at 785 (plurality opinion).

opinion,[303] the two-justice concurring opinion,[304] and the single-justice dissenting opinion all rejected the Governor's appointments clause challenge.[305]

The 1971 appointments clause provides, "The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for."[306] Each word and phrase in the clause had settled judicial construction,[307] and the phrase "not otherwise provided for" always "meant unless provided for by the Constitution itself."[308] The original 1868 clause redundantly added after "all officers" two phrases, "whose offices are established by this Constitution, or which shall be created by law."[309] The 1875 amendments, discussed above,[310] had eliminated the phrase "or which shall be created by law," or statutory officers, restricting "all officers" subject to the clause to those "whose offices are established by this Constitution," or constitutional officers.[311] Under the 1875 amendments to the appointments clause, the legislature again constitutionally controlled the filling of offices created by statute, as it had done before 1868. As explained by the supreme court in its last appointments case under that clause before adoption of the Constitution of 1971, all statutory officers were to be appointed as provided by the legislature.[312] The drafters of the 1971 appointments clause realized that the prior clause had been emasculated by the 1875 amendments and had become meaningless because no constitutional officers existed whose

303. *See id.* at 520, 359 S.E.2d at 785 (plurality opinion). Justice Webb wrote the opinion and was joined by Justices Frye and Mitchell. *See id.* at 518, 520, 359 S.E.2d at 784-85.

304. *See id.* at 524, 359 S.E.2d at 787 (Meyer, J., concurring in result). Justice Whichard joined in the opinion. *See id.* at 518, 359 S.E.2d at 784.

305. *See id.* at 528, 359 S.E.2d at 789 (Martin, J., dissenting).

306. N.C. CONST. art. III, § 5(8).

307. *See Melott*, 320 N.C. at 520-21, 359 S.E.2d at 785 (plurality opinion) (citing State *ex rel.* Salisbury v. Croom, 167 N.C. 223, 83 S.E. 354 (1914); Ewart v. Jones, 116 N.C. 570, 21 S.E. 787 (1895); and People *ex rel.* Cloud v. Wilson, 72 N.C. 155 (1875)). The *Melott* plurality did not find those prior interpretations binding. *See Melott*, 320 N.C. at 521, 359 S.E.2d at 785 (plurality opinion).

308. *Croom*, 167 N.C. at 226, 83 S.E. at 355. The *Melott* plurality did not find that prior interpretation binding. *See Melott*, 320 N.C. at 521, 359 S.E.2d at 785 (plurality opinion).

309. *See id.* at 521, 359 S.E.2d at 786 (plurality opinion).

310. *See supra* text accompanying notes 63-70.

311. *Melott*, 320 N.C. at 521-22, 359 S.E.2d at 785-86 (plurality opinion).

312. *Croom*, 167 N.C. at 226, 83 S.E. at 355 (involving directorates of central state hospital; dispute between an appointee of a former governor and an appointee of a successor governor) (quoting State *ex. rel.* Cherry v. Burns, 124 N.C. 761, 761, 33 S.E. 136, 136 (1899)).

appointments were not otherwise provided for in the constitution.[313] In their drafting, the authors first deleted the prior meaningless clause altogether, but then redrafted it by simply striking the phrase that formerly restricted "all officers" to constitutional officers.[314]

Based on that history and precedents for constitutional interpretation, Governor Martin contended that the new 1971 appointments clause applied to the appointment of statutory officers whose appointments are not otherwise provided for in the constitution.[315] He argued that only the governor, with the advice and consent of the Senate under the appointments clause, could appoint the new director of the new statutorily created state agency.[316]

The three-justice plurality glossed over the clause's convoluted history[317] and dismissed prior judicial construction of the controlling phrase "whose appointments are not otherwise provided for" as dictum or distinguishable.[318] The plurality ignored the early explanation of a justice who had been a delegate to the constitutional convention that first applied the language in North Carolina and who was an authority on the constitution: "To read the words as applying to the act of Assembly creating the office, would make them useless."[319] Instead, the plurality concluded, "We cannot say that the

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313. *See* Record on Appeal, Tr. 149-54, 168-71, *Melott* (No. 61PA87) (discussing Plaintiff's Exhibits 26, 28, and 29A).

314. *See* Record on Appeal, Tr. 92-113, *Melott* (No. 61PA87) (discussing Plaintiff's Exhibits 26, 28, 30, 31 and 38).

315. *See Melott*, 320 N.C. at 520-21, 359 S.E.2d at 77-85 (plurality opinion).

316. *See id.* at 520-21, 359 S.E.2d at 785 (plurality opinion).

317. A composite history of the appointments clause is described below. The full text of the original clause in the Constitution of 1868, article III, section 10, is shown. Brackets set out the text deleted by the 1875 amendments. Parentheses set out the text deleted by the 1971 "revision and amendment." The italicized text is the resulting Constitution of 1971, article III, section 5(8):

> *Appointments. The Governor shall nominate* (,) *and by and with the advice and consent of a majority of the Senators* (elect,) *appoint* [,] *all officers* (whose offices are established by this Constitution,) [or which shall be created by law,] (and) *whose appointments are not otherwise provided for* [, and no such officer shall be appointed or elected by the General Assembly].

N.C. CONST. of 1971, art. III, § 5(8); N.C. CONST. of 1868, art. III, § 10 (amended 1875); N.C. CONST. of 1868, art. III, § 10.

318. *See Melott*, 320 N.C. at 520-21, 359 S.E.2d at 785 (plurality opinion). The plurality acknowledged that "[t]here is language to this effect in these cases," *id.* (plurality opinion) (referring to cases cited in *supra* note 307), but said "the language is not necessary to the holding in any of them." *Id.* at 20, 359 S.E.2d at 785 (plurality opinion).

319. Railroad v. Holden, 63 N.C. 410, 423 (1869) (Rodman, J.). *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA AT ITS SESSION 1868, 483-84 (1868) (noting Justice Rodman's address to the North Carolina Constitutional Convention of 1868 on the subject of the changes to the executive power). The phrase "not otherwise provided for," used in the North Carolina Constitution of 1868,

phrase 'whose appointments are not otherwise provided for' has such a well settled judicial construction that we must use it in this case."[320] Thus, under the plurality opinion, the General Assembly could provide otherwise by statute for the appointment of the statutory officer at issue.[321]

The plurality correctly noted that the revisers of the constitution could have proposed adding to the phrase "otherwise provided for" the restrictive phrase "in the Constitution." The plurality concluded that because the revisers made no such proposal "it is only reasonable to conclude they intended to increase the Governor's power from making appointments of constitutional officers to all officers whose appointments are not otherwise provided for."[322] Obviously confusing or obfuscating, that statement ignores the effect of the plurality's illogical interpretation of the appointments clause, expressed as the following fallacious syllogism: *A*, the 1875 appointments clause was meaningless; *B*, the revisers deleted the meaningless clause in their draft and then re-drafted it into a new clause; therefore *C*, the new amended clause as adopted is virtually

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was used earlier by Madison, when it clearly meant "not otherwise provided for" in the Federal Constitution. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 45-48, 120, 310 (Ohio U. Press ed. 1966). *People ex rel. Nichols v. McKee* reviewed the officers whose appointments were "otherwise provided for" in the constitution of 1868. 68 N.C. at 430-38. "The true test is, Where does the Constitution lodge the power of electing the various public agents of the government?" Trustees of the Univ. of N.C. v. McIver, 72 N.C 76, 85 (1875) (addressing the election of university trustees by the General Assembly pursuant to 1873 constitutional amendment). Under the Constitution of 1971, appointments "otherwise provided for" are: members of the State Board of Education (Art. IX, § 4(1): "members appointed by the Governor, subject to confirmation by the General Assembly in joint session") (*see also* N.C. GEN. STAT. § 115C-10 (1997) (describing appointment of the Board)); magistrates (Art. IV, § 10: appointed by senior regular resident superior court judge from nomination submitted by clerk of court); trustees of the University of North Carolina and other institutions of higher education (Art. IX, § 8: the General Assembly shall provide for their selection); officers of the Senate (Art. II, § 14(1): the Senate elects); officers of the House (Art. II, § 15: the House elects); officers of counties, cities, and towns (Art. VII, § 1: the General Assembly shall provide). Elected officers are the governor (Art. III, § 2(1)), lieutenant governor (*id.*), secretary of state (Art. III, § 7(1)), auditor (*id.*), treasurer (*id.*), superintendent of public instruction (*id.*), attorney general (*id.*), commissioner of agriculture (*id.*), commissioner of labor (*id.*), commissioner of insurance (*id.*), justices of the supreme court (Art. IV, § 16), judges of the court of appeals (*id.*), regular judges of superior court (*id.*), clerk of superior court (Art. IV, § 9(3)), district attorneys (Art. IV, § 18(1)), and sheriffs (Art. VII, § 2).

320. *Melott*, 320 N.C. at 521, 359 S.E.2d at 785 (plurality opinion) (quoting N.C. CONST. art. III, § 5(8)).

321. *See id.* at 521-22, 359 S.E.2d at 785-86.

322. *Id.* at 522, 359 S.E.2d at 785.

meaningless.[323]

The two-justice concurring opinion inexplicably failed to interpret the appointments clause, but implicitly agreed with the plurality's interpretation of it.[324] The lone dissenter, on the separation-of-powers grounds discussed above, agreed with the plurality regarding the appointments clause, but without elaboration. On the meaning of the appointments clause, the dissenter was satisfied with "a few preliminary observations," including a simple formulation and a summary conclusion.[325]

Thus, six justices interpreted the appointments clause to mean, in effect, that without an explicit constitutional provision to the contrary, the General Assembly may provide for the appointment of statutory officers, and only if it makes no statutory provision for the appointment of a statutory officer does the governor's appointment power under the appointments clause become effective.[326] Perhaps of limited precedential effect, the *Martin v. Melott* opinions may be

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323. *See* Record on Appeal, Tr. 92, 149-50, 168-70, *Melott* (No. 61PA87) (referencing Plaintiff's Exhibit 26). A basic editorial rule of the Constitution Study Commission of 1968 was to omit "provisions that we deemed to be legislative in nature and therefore inappropriate to the constitution." 1968 REPORT, *supra* note 100, at 29; *see also Sanders*, *supra* note 122, at 91 (noting that the Commission omitted legislative provisions); Record on Appeal, Tr. 125-27, *Melott* (No. 61PA87) (same). Contradicting those earlier writings, their author later proffered an explanation that the new appointments clause "provided a means for the filling of offices constitutionally or statutorily created for which no other provision was made by Constitution or statute to fill." Record on Appeal, Tr. 153, *Melott* (No. 61PA87) (stating the testimony of John L. Sanders). Of course, there are no such constitutional offices, and should there be any such statutory offices, the new appointments clause would be rendered merely "legislative in nature." Mr. Sanders had apparently never considered the appointments clause to be noteworthy; in his articles on constitutional history, he did not note it at all and apparently saw no significance in the adoption of the clause in 1868 or in its amendment in 1875. *See Sanders*, *supra* note 70 (making no mention of the significance of the appointments clause); *Sanders*, *supra* note 122 (same); Record on Appeal, Tr. 161-62, *Melott* (No. 61PA87) (same). He apparently once thought that after the 1875 amendments the appointments clause "was left substantially intact." *Sanders*, *supra* note 70, at 796-97; REPORT, *supra* note 100, at 106 (noting that John L. Sanders thought the appointments clause was left intact after the 1875 amendments). At an early stage in the Constitution Study Commission's work in 1968, when Mr. Sanders was assisting its subcommittee on the executive, Mr. Sanders recommended no change in the former clause although that subcommittee's substantive proposal was inconsistent with it and although Mr. Sanders says that he then knew that the former clause was meaningless. *See* Record on Appeal, Tr. 150, 167-68, *Melott* (No. 61PA87) (referencing Plaintiff's Exhibit 18). In fairness to Mr. Sanders, it is noted that only one earlier historian of the era of adoption of the original appointments clause noted the clause, and he noted only that "[a]ll nominations of the governor had to be confirmed by the Senate." HAMILTON, *supra* note 47, at 249 (1906).

324. *See Melott*, 320 N.C. at 524, 359 S.E.2d at 787 (Meyer, J., concurring in result).

325. *See id.* at 528-29, 533, 359 S.E.2d at 789, 792 (Martin, J., dissenting).

326. *See supra* note 323.

distinguished or disowned should another appointment challenge arise under different circumstances and confront the court with a new opportunity to give the appointments clause its plain meaning.[327] As a result of *Martin v. Melott*, however, the appointments clause now lies dormant, virtually meaningless, and the General Assembly, not the governor, constitutionally controls the appointment of state statutory officers.

IV. EXECUTIVE HIRING AND FIRING OF EMPLOYEES

A. *The Governor's Selection of Other Subordinates*

As the Governor was losing the state battle for the power to appoint executive officers at the top of the state bureaucracy, three former state employees challenged, on federal constitutional grounds in federal district court, the governor's ability to influence the bureaucracy at lower levels. The three former employees had been exempt from protection under the State Personnel Act as holders of "policymaking positions" as designated earlier by Governor Hunt and, thus, were employees at will.[328] They were dismissed early after Governor Martin's 1985 incumbency, and they each filed civil actions against the Governor and the appointed department heads who had dismissed them.[329] In *Stott v. Martin* the three actions were consolidated, six other department heads appointed by the Governor were joined as defendants, and the proceedings were certified as a class action on behalf of approximately 130 other former employees dismissed in the Martin administration.[330] The class action became a political *cause celebre*.[331]

The former employees alleged that they were discharged because of their political party affiliation and political activities, in violation of

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327. *See* Coble, *supra* note 19, at 687 (noting that "*Melott*'s importance may be diminished somewhat, since it is only a plurality decision and it has been criticized as inconsistent with previous separation of powers decisions"); *see also* Winfree, *supra* note 207, at 1117 (criticizing *Melott*); Devlin, *supra* note 19, at 1246 & nn.141-44 (criticizing *Melott*).

328. N.C. GEN. STAT. §§ 126-1, 126-5 (1999).

329. *See* Stott v. Martin, No. 85-818-CIV-5 (E.D.N.C. 1985); Register v. Martin, No. 86-650-CIV-5 (E.D.N.C. 1986); Cayton v. Martin, No. 86-683-CIV-5 (E.D.N.C. 1986).

330. *See Stott I*, 725 F. Supp. 1365, 1380-81 (E.D.N.C 1989); *see also* Martin H. Brinkley, Note, *Despoiling the Spoils*: Rutan v. Republican Party of Illinois, 69 N.C. L. REV. 719, 737-39 (1991) (discussing *Stott I*).,

331. *See* Beyle, *supra* note 55, at 34 (noting that the *Stott I* was "a pivotal case with considerable national interest because it is the first case to directly challenge a governor's power of removal").

their First Amendment rights, and premised their claims on the United States Supreme Court's *Elrod v. Burns*[332] and *Branti v. Finkel*[333] decisions. *Elrod* repudiated patronage-style discharges based solely on political party affiliation of certain lower-level public employees, concluding that the employees were protected from such discharges by the First Amendment.[334] The Court recognized, however, that for a state government to be responsive to the needs of the people, the elected officials and their higher-level appointees must have some subordinates also responsive to their political mandates and, therefore, not constitutionally protected from discharge because of political affiliation.[335] For such unprotected subordinates, *Elrod* stated the determinative standards to be the confidential or policy-making nature of the subordinates' positions, but *Branti* subsequently expounded a justification of political affiliation for such subordinates where "party affiliation is an appropriate requirement for the effective performance of the public office involved."[336] Under those "skeletal teachings," a considerable body of case law had been decided.[337]

The district court in *Stott v. Martin*, after class certification, ruled on motions for summary judgment and (1) dismissed the claims of fifty-five class members, (2) left sixty-three pending of which it concluded forty-six were protected from discharge for political reasons, and (3) deferred ruling on others.[338] On interlocutory appeal, the Fourth Circuit invalidated the class certification,[339] and on remand the district court dismissed the three initial claims on the merits, thereby ending the proceedings.[340]

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332. 427 U.S. 347 (1976) (plurality opinion) (holding it unconstitutional to discharge deputy sheriffs because of their political party affiliation).

333. 445 U.S. 507 (1980) (holding it unconstitutional to discharge assistant public defenders because of their political party affiliation). For a survey of subsequent lower-court cases, see generally Susan Lorde Martin, *A Decade of* Branti *Decisions: A Government Official's Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11 (1989). For subsequent Supreme Court *Elrod-Branti* political affiliation decisions, see generally Rutan v. Republican Party of Ill., 497 U.S. 62 (1990) (extending the *Elrod-Branti* principles from discharge cases to hiring and promotion cases), and O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) (extending the *Elrod-Branti* principles from employees to independent contractors).

334. *See Elrod*, 427 U.S. at 350-51, 372-73.

335. *See id.* at 367-68, 372.

336. *Branti*, 445 U.S. at 518.

337. Jimenez Fuentes v. Torres Gatzambide, 807 F.2d 236, 240 (1st Cir. 1986) (en banc).

338. *Stott I*, 725 F. Supp. 1365, 1387-1437 (E.D.N.C. 1989).

339. *Stott II*, 916 F.2d 134, 143-46 (4th Cir. 1990).

340. *Stott III*, 783 F. Supp. 970, 993 (E.D.N.C. 1992).

Although the issues in *Stott* were matters of federal law, the claims arose from state action under the State Personnel Act.[341] The Act permitted the Governor to designate as exempt from civil service protection employees within his office and a limited number of employees in each of the nine departments headed by his appointees.[342] Governor Hunt had designated approximately 1500 state employees as exempt under the Act.[343] His successor, Governor Martin, established a primary goal of reducing the number of exempt positions.[344]

Nevertheless, Governor Martin was a Republican following a Democrat, and department secretaries appointed by Governor Martin discharged some exempt employees left over from the Hunt administration. The district court had "found that the central issue in this case was whether the Martin administration engaged in a policy and practice of firing state government employees solely because of their political affiliation or activities."[345] The Fourth Circuit concluded, however, that in *Elrod-Branti* claims the "mere allegation of political patronage dismissal falls short of stating a cause of action capable of class treatment. The inquiry must focus on the claim of the individual."[346]

For an *Elrod-Branti* inquiry, which requires difficult scrutiny,[347] the Fourth Circuit adopted a two-part test formulated by the First Circuit in its numerous decisions arising from the 1984 elections. The initial inquiry, derived from *Branti*, examines "whether the position at issue, no matter how policy-influencing or confidential it may be, relates to 'partisan political interests . . . [or] concerns.' "[348] Then, if

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341. *See Stott I*, 725 F. Supp. at 1380 (noting North Carolina's Personnel Act); *see also* Jenkins v. Medford, 119 F.3d 1156, 1162-64 (4th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 881 (1998) (noting that the statutory provisions mirror the constitutional standards).

342. *See Stott II*, 916 F.2d at 136-37, 142-43.

343. *Id.* at 137 n.2.

344. *See id.* at 138-39. The Fourth Circuit noted:

> Before us is a situation where Governor Martin was attempting to bring the North Carolina employment scheme into conformity with the civil employee statute by cutting down on the number of exempt positions extant in North Carolina. Unfortunately, Governor Martin was faced with the task of trimming exempt positions that under the statute most likely should never have been so designated. This we find to be bipartisan decision and not a decision based on the governor's affiliation to the Republican party.

Id. at 142 n.11.

345. *Id.* at 138.

346. *Id.* at 141.

347. *See id.*

348. *Id.* at 141-42 (quoting Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 241-42 (1st Cir. 1986) (en banc)).

partisan political interests are implicated by the position, the court must examine the position's particular responsibilities "to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement."[349] The Fourth Circuit reviewed numerous cases holding that employees in certain positions, such as a confidential secretary or attorney, are subject to removal based on political affiliation, as well as other cases holding that certain employees, such as road graders and bookkeepers, are not.[350] Those cases set the parameters for the district court in its individual inquiries on remand.[351]

In reaching its decision, the Fourth Circuit recognized the importance of "political patronage as an accepted and necessary practice in democratic governance."[352] Agreeing that there can be " 'a rational connection between shared ideology and job performance,' " which " 'would exempt from protection most policymaking, and confidential employees,' "[353] the Fourth Circuit concluded that the Supreme Court had affirmed, in its subsequent *Rutan* decision, "the *Elrod-Branti* principle that 'a government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high level employees on the basis of their political views.' "[354] Concluding that *Stott* exemplified that interpretation, the Fourth Circuit found in the statutory provisions for exemption from civil service protection presumptions of exceptions from *Elrod-Branti* protection and a rationale for allowing "the governor to employ top level state employees on an at-will basis, and to reposition these employees as he felt necessary in order to further the agenda of the administration."[355] For the Fourth Circuit, an *Elrod-Branti* determination "is whether a particular position is one that requires, as a qualification for its performance, political affiliation. If it does, then dismissal or demotion is within the bounds of the Constitution."[356]

Stott remains controlling authority in the Fourth Circuit, as

349. *Id.* at 142 (quoting *Jimenez Fuentes*, 807 F.2d at 240).
350. *See id.* at 144-45.
351. *See Stott III*, 783 F. Supp. 970, 993 (E.D.N.C. 1992).
352. *Stott II*, 916 F.2d at 141 (citing Ecker v. Cohalan, 542 F. Supp. 896, 903 (E.D.N.Y. 1982)).
353. *Id.* at 142 (quoting Savage v. Gorski, 850 F.2d 64, 68 (2d Cir. 1988)).
354. *Id.* at 142 (quoting Rutan v. Republican Party of Ill., 497 U.S. 62, 74 (1990)).
355. *Id.* at 142.
356. *Id.* at 143.

emphasized recently in *Jenkins v. Medford*.[357] Although *Jenkins* did not involve gubernatorial patronage, the court's decision that a newly elected sheriff may lawfully dismiss deputy sheriffs who supported his opponent in the election emphasized electoral politics. As the *Jenkins* court explained, "[T]he triumph of one candidate indicates voter approval of the candidate's espoused platform and general agreement with the candidate's 'expressed political agenda.' "[358] In such situations, certainly applicable in gubernatorial elections, party affiliation or campaign activity "serves as a proxy for loyalty."[359] Noting that *Branti* itself recognized that party affiliation may be a proxy for loyalty and stating that *Stott* refined the *Elrod-Branti* inquiry, the Fourth Circuit observed that a governor may appropriately conclude that assistants such as speechwriters and communicators with the press and legislature should share his political beliefs and party affiliation.[360] Thus, in Fourth Circuit patronage cases, courts are to apply a *Stott*-type analysis to the specific position at issue to determine whether loyalty or its proxy, political party affiliation, "is an appropriate requirement for the job."[361] As *Branti* cautioned, however, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[362]

B. The Governor's Selection of Subordinates and the Courts

As *Stott v. Martin* illustrates, the governor's selection of subordinates, as well as state personnel policies and practices, are affected by certain federal laws, including the civil rights act prohibiting deprivation of citizens' rights under color of state law.[363] That act applies to the governor and other state executive officers, and they may be subject to prospective injunctive relief against violating those laws in appropriate circumstances.[364] Federal civil

357. 119 F.3d 1156 (4th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 881 (1998).

358. *Id.* at 1162 (quoting Upton v. Thompson, 930 F.2d 1209, 1215 (7th Cir. 1991)).

359. *Id.* at 1164 & n.62.

360. *See id.* at 1164 n.62 (quoting Branti v. Finkel, 445 U.S. 507, 518 (1980)).

361. *Id.* at 1164.

362. O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 719 (1996) (quoting *Branti*, 445 U.S. at 518).

363. *See* Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, 13-15 (1887) (codified at 42 U.S.C. § 1983 (1994)).

364. *See* Kentucky v. Graham, 473 U.S. 159, 161-71 (1985) (involving a civil suit against a state official in his personal capacity stemming from a warrantless search); *Ex Parte*

rights claims can subject the governor to discovery, potential personal liability for damages, and prospective injunctive relief in his official capacity. As a result, the governor's hiring and firing of subordinates may be subject to scrutiny and control by federal courts.

In *Stott*, the district court subjected Governor Martin's personnel policies and practices to discovery, and the Governor was deposed before the district judge pursuant to a protective order.[365] Amid some controversy, other discovery occurred in the case but with no formal delineation of the scope of potential discovery of the state's executive.[366] Subsequently, in *Republican Party of North Carolina v. Martin*,[367] the district court established that potential discovery of the governor is indeed broad.[368] *Republican Party* involved a challenge to the constitutionality of a statute[369] that Governor Martin had advocated amending.[370] Although the Governor was only a nominal party in the action,[371] another party served him with a subpoena that commanded him to appear at a deposition and to bring all documents related to the statute and to the plaintiffs' contention that it was unconstitutional.[372] Governor Martin moved to quash the subpoena and sought a protective order.[373] Although recognizing that a governor should not be compelled to testify at a deposition absent a clear showing that the discovery is essential to prevent prejudice or injustice to the party requesting it, the court found that "[f]airness dictates that [the other party] be allowed to depose Governor Martin with regard to his prospective testimony."[374] Thus, the court denied

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Young, 209 U.S. 123, 126-204 (1908) (addressing the Attorney General's being held in contempt for violating state laws); *see also* Corum v. University of N.C., 330 N.C. 761, 789, 413 S.E.2d 276, 293-94 (1992) (barring claims against state officials in their personal capacity when only monetary damages are sought).

365. *See Stott I*, 725 F. Supp. 1365 (E.D.N.C. 1989) (order dated May 14, 1987).

366. *See id.*

367. 136 F.R.D. 421 (E.D.N.C. 1991), *decided on appeal on other grounds*, 980 F.2d 943 (4th Cir. 1992).

368. *See Republican Party of N.C.*, No. 88-263-CIV-5-F, at 23 (E.D.N.C. Jan. 18, 1991) (order demanding compliance with subpoena); *Republican Party of N.C.*, No. 88-263-CIV-5-F, at 4-5 (E.D.N.C. Nov. 1990) (order denying a motion for protective order and holding in abeyance a motion to quash subpoena).

369. *See Republican Party of N.C.*, 980 F.2d at 946-48.

370. *See* I ADDRESSES AND PUBLIC PAPERS OF GOVERNOR JAMES G. MARTIN 35-36 (1992).

371. *See Republican Party of N.C.*, 980 F.2d at 946 n.2.

372. *See* Subpoena Duces Tecum, *Republican Party of N.C.*, No. 88-263-CIV-5-F (E.D.N.C. Mar. 14, 1990).

373. *See* Motion to Quash Subpoena Pursuant to Rule 45(b) and for Protective Order Pursuant to Rule 26(c) at 4-5, *Republican Party of N.C.*, No. 88-263-CIV-5 (E.D.N.C. Mar. 14, 1990).

374. *Republican Party of N.C.*, No. 88-263-CIV-5-F, at 3-4 (E.D.N.C. Nov. 1990) (order

the motion for a protective order and allowed the deposition, subject to specified procedures, including that it be held before the presiding district judge.[375] The court ordered that the motion to quash be held in abeyance pending examination of the documents in camera. It ordered that the documents be delivered to the court under seal, along with briefs discussing the privilege being claimed.[376] The Governor complied, waiving any claim of executive privilege, but continuing to claim that some documents were protected by the attorney-client privilege and the work-product doctrine. After in camera examination, the court disposed of the remaining claims.[377]

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denying a motion for protective order and holding in abeyance a motion to quash subpoena). The court cited only one case, Monti v. State, 563 A.2d 629, 631 (Vt. 1989), for the proposition. *See Republican Party of N.C.*, 88-263-CIV-5-F, at 3; *see also* United States v. Morgan, 313 U.S. 409, 421-22 (1941) (protecting the Secretary of Agriculture from testifying about his exercise of discretion); Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir. 1982) (upholding the district court's requirement that the discovering party show "specific need" for a deposition of a state governor); Halperin v. Kissinger, 606 F.2d 1192, 1209-10 n.120 (D.C. Cir. 1979) (stating that where a showing of need prevails over a broad claim of privilege, the district court might require that discovery first be made of subordinates before sanctioning discovery that imposes on the time of high-level officials such as the secretary of state), *aff'd*, 452 U.S. 713 (1981). As the Supreme Court recently noted in denying temporary immunity for the President in a civil action arising out of alleged unofficial acts while he was a state governor prior to his presidency, "[s]itting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty." Clinton v. Jones, 520 U.S. 681, 704-05 (1997) (describing presidential responses by written interrogatories, tapes, depositions, and videotaped testimony). The district court has "broad discretion," and "potential burdens ... are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Id.* at 706-07.

375. *See Republican Party of N.C.*, No. 88-263-CIV-5, at 4-5 (E.D.N.C. Nov. 7, 1990) (order denying a motion for protective order and holding in abeyance a motion to quash subpoena).

376. *See id.* at 5-6. The court added: "As to those documents for which executive privilege is claimed, the executive decision to which they relate and the date thereof shall specifically be identified." *Id.* at 5.

377. *See* Memorandum in Response to Order, *Republican Party of N.C.*, No. 88-263-CIV-5 (E.D.N.C. May 14, 1990); *Republican Party of N.C.*, No. 88-263-CIV-5, at 2-3 (E.D.N.C. Nov. 7, 1990) (order denying a motion for protective order and holding in abeyance a motion to quash subpoena). The court examined a 32-page list and 369 documents. *See Republican Party of N.C.*, No. 88-263-CIV-5-F, at 2 (E.D.N.C. Jan. 18, 1991) (order demanding compliance with subpoena). In its analysis, the court applied the attorney-client privilege and the work-product doctrine "strictly" and "narrowly." *Id.* at 8, 16. The court cited *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and lower-court cases for the attorney-client privilege, *see Republican Party of N.C.*, No. 88-263-CIV-5-F, at 8-14 (E.D.N.C. Jan. 18, 1991) (order demanding compliance with subpoena), and it recognized the *Hickman v. Taylor*, 329 U.S. 495 (1947), origins and lower-court applications of the work-product doctrine, *see Republican Party of N.C.*, No. 88-263-CIV-

The doctrine of executive privilege, which Governor Martin asserted and then waived,[378] has a long history and became widely known when the Supreme Court rejected President Nixon's claim of protection from subpoena of the infamous White House tape recordings of his conversations with his aides concerning the Watergate scandal.[379] Although most executive-privilege cases involve claims by the president or other federal officers, variations of the doctrine also apply to state officers.[380] While the doctrine continues to evolve at the presidential level amid some assertions and waivers of it in independent counsel investigations,[381] its application to the governor of North Carolina awaits future developments.[382]

5-F, at 15-20 (E.D.N.C. Jan. 18, 1991) (order demanding compliance with subpoena). The court did not discuss the status of the Governor's counsel as state employees, and thus its order did not presage the recent rulings that a federal independent counsel may discover federally employed attorneys regarding discussions at the White House. *See infra* note 381.

378. *See* Reply of Governor James G. Martin to Plaintiffs' and Intervenor's Responses at 6-7, *Republican Party of N.C.*, No. 88-263-CIV-5 (E.D.N.C. June 15, 1990) (asserting executive privilege); Memorandum in Support of Motion to Quash Subpoena Pursuant to Rule 45(b) and for Protective Order Pursuant to Rule 26(c) at 3, *Republican Party of N.C.*, No. 88-263-CIV-5, (E.D.N.C. May 14, 1990) (same).

379. *See* United States v. Nixon, 418 U.S. 683, 713 (1974).

380. *See* Centifanti v. Nix, 865 F.2d 1422, 1432 (3d Cir. 1989) (denying discovery of a state-agency letter reflecting "the deliberative process of government policymakers" as "protected by the predecisional governmental privilege").

381. *See In re* Bruce R. Lindsey (Grand Jury Testimony), 158 F.3d 1263, 1277-78 (D.C. Cir. 1998) (affirming, in the absence of an appeal on the issue of executive privilege, the district court's denial of a claim of governmental attorney-client privilege made by Deputy White House Counsel and Assistant to the President who were subject to subpoena to testify about possible criminal conduct by government officials and others); *In re* Sealed Case, 121 F.3d 729, 757-62 (D.C. Cir. 1997) (holding that executive privilege was insufficient to stymie production of documents of White House Counsel pertaining to an internal investigation of allegations against former Secretary of Agriculture Mike Espy when the Office of Independent Counsel had made a "sufficient showing of need"); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d. 910, 914, 924-26 (8th Cir. 1997) (holding, after a waiver of executive privilege, that attorney-client privilege and work-product doctrine did not protect documents of attorneys from the Office of Counsel to the President pertaining to meetings attended by them with the First Lady from discovery by the Office of Independent Counsel); *see also* REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, § 595(c), *reprinted in* THE STARR REPORT, THE FINDINGS OF INDEPENDENT COUNSEL KENNETH W. STARR ON PRESIDENT CLINTON AND THE LEWINSKY AFFAIR, at 206-09 (Public Affairs ed. 1998) (discussing President Clinton's assertions of executive privilege during the Monica Lewinsky investigation). For another case not involving executive privilege but rejecting an assertion of protective-function privilege, see *In re* Sealed Case, 148 F.3d 1073, 1079 (D.C. Cir. 1998).

382. In a recent legislative investigation of a personnel action by the governor's office, evidence was given by the governor's office, apparently without assertion of executive privilege. *See* HOUSE SELECT COMMITTEE FOR PERSONNEL REVIEW REPORT, *supra* note 297, at 3-4.

Distinguished from executive privilege is executive immunity from damages liability.[383] The state, along with its governor and its other executive officers in their official capacities, are absolutely immune from federal liability for damages allegedly arising from any official acts.[384] Damage claims can be asserted against the governor and other executive officers in their individual capacities, however, for alleged deprivations of federal rights under color of state law. The executive officers are protected individually against such claims only by qualified immunity.[385] The Supreme Court has articulated executive officials' qualified immunity as "an *immunity from suit* rather than a mere defense to liability" that applies "in cases where the legal norms the officials are alleged to have violated were not clearly established at the time."[386]

Application of the qualified immunity standard can be problematic in the context of the governor's hiring and firing of subordinates. In the early stages of the *Stott* litigation, the district court denied the protection of qualified immunity to the Governor and three department heads in connection with the discharges of the

383. The President has absolute immunity from damages liability predicated on his official acts, *see* Nixon v. Fitzgerald, 457 U.S. 731, 753-54 (1982), but not his unofficial acts occurring prior to incumbency, s*ee* Clinton v. Jones, 520 U.S. 681, 684 (1997).

384. *See* Kentucky v. Graham, 473 U.S. 159, 165-68 (1985); *Ex Parte* Young, 209 U.S. 123, 148-49 (1908); JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 136-52 (1987); *see also* Alden v. Maine, 119 S. Ct. 2240, 2266 (1999) (holding that a state's immunity from suit is a fundamental aspect of sovereignty preceding ratification of the Constitution and the Eleventh Amendment).

385. *See* Scheuer v. Rhodes, 416 U.S. 232, 247-49 (1974); McConnell v. Adams, 829 F.2d 1319, 1324-26 (4th Cir. 1987); Gibbons v. Bond, 523 F. Supp. 843, 853-54 (W.D. Mo. 1981), *aff'd*, 668 F.2d 967 (8th Cir. 1982).

386. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (citing Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982)). *Harlow* is the leading qualified immunity case for executive officers. Although it was an action against former federal officials and not one against state officials, the Court made clear that the same standards of qualified immunity apply in either type of action. *See Harlow*, 457 U.S. at 818 & n.30; *see also* Johnson v. Fankell, 520 U.S. 911, 914 (1997) ("We have recognized a qualified immunity defense for both federal officials sued under the implied cause of action . . . and state officials sued under 42 U.S.C. § 1983."); Behrens v. Pelletier, 516 U.S. 299, 305-06 (1996) (describing the qualified immunity defense); Johnson v. Jones, 515 U.S. 304, 314 (1995) (discussing the assertion of qualified immunity in the context of an appeal). The Court recently stated in another context that "immunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it.' " *Clinton*, 520 U.S. at 695 (quoting Forrester v. White, 484 U.S. 219, 229 (1988)). Before that formulation of qualified immunity, the Court had rejected absolute immunity for a governor and other state officials presumed by the court below to have acted in good faith in ordering the state's national guard to suppress a student uprising on a state university campus. *See Scheuer*, 416 U.S. at 234-35 (1974).

three initial plaintiffs.[387] The Fourth Circuit did not discuss qualified immunity when it reversed the district court's decision regarding class certification, but it vacated all other orders of the district court.[388] On remand, the district court dismissed the claims of the three named plaintiffs on the merits but declined to decide the issue of qualified immunity.[389]

Meanwhile, the First Circuit decided numerous *Elrod-Branti* claims after the 1984 elections and held that the newly-elected officials were "at least reasonable in believing the law was not clearly established [and] that they [were] entitled to qualified immunity from suit" for dismissing employees of the former administration.[390] The First Circuit concluded that, while the application of the *Elrod-Branti* test might be clear in some cases, "in others it will be sufficiently fraught with uncertainty that an official could not be faulted for failing to apprehend."[391]

Similarly, the Fourth Circuit had noted in 1984 that the law with respect to qualified immunity for the hiring decisions of incoming administrations "is still evolving and is by no means yet authoritatively settled in all its critical aspects."[392] In 1987, the circuit

387. *See Stott I*, 725 F. Supp 1365, 1441 (E.D.N.C. 1989) (noting the court's previous order denying qualified immunity to defendants). No immediate appeal was taken from that initial denial of qualified immunity; only later, after lengthy proceedings and extensive discovery had occurred and the other department heads appointed by the governor—joined as defendants in 1987—had claimed qualified immunity, was an assertion made of an interlocutory right of appeal. *See id.* at 1441-45. The First Circuit had held that an interlocutory appeal is proper following a denial of summary judgment of qualified immunity against such a claim. *See* De Abadia v. Izquierdo Mora, 792 F.2d 1187, 1190 (1st Cir. 1986). At this stage, the *Stott I* court recognized qualified immunity for five department heads against eleven class members' claims and dismissed two department heads as defendants, but the court denied qualified immunity against the remaining approximately 120 class members' claims and the three named plaintiffs' claims, leaving the Governor, seven then-present, and six former department heads as defendants. *Stott I*, 725 F. Supp. at 1442-46.

388. *See Stott II*, 916 F.2d at 146; *see also* Jenkins v. Medford, 119 F.3d 1156, 1165 (4th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 881 (1998) (dismissing a § 1983 suit brought against a sheriff by deputies who were fired shortly after the sheriff's election and noting that the dismissal for failure to state a claim "makes it unnecessary for us to consider whether [the sheriff] is entitled to qualified immunity").

389. *See Stott III*, 783 F. Supp. 970, 993 (E.D.N.C. 1992).

390. *De Abadia*, 792 F.2d at 1193.

391. *Id.* For a survey of much of the patronage litigation, see generally Brinkley, *supra* note 330.

392. Jones v. Dodson, 727 F.2d 1329, 1333 (4th Cir. 1984). The *Dodson* holding on the *Elrod-Branti* claim asserted there, protecting a deputy sheriff from discharge, *see id.* at 1337-39, has since been disapproved by the Fourth Circuit, *see* Jenkins v. Medford, 119 F.3d 1156, 1164 (4th Cir. 1997) (en banc).

held that qualified immunity applies in an *Elrod-Branti* case.[393] More recently, the Fourth Circuit has emphasized that "[d]espite the [Supreme] Court's guidance lower courts have issued 'conflicting and confusing' opinions."[394] Thus, the district court's initial rejection of qualified immunity in *Stott v. Martin*, of limited precedential value in any event, should be viewed as clearly erroneous in light of the Fourth Circuit's decisions.[395]

The seven years of litigation, extensive discovery of the Governor and nine principal departments of state government, and considerable expense involved in *Stott* illustrate the potential costs justifying qualified immunity from suit, including "distraction of officials from their official duties, inhibition of discretionary action, and deterrence of able people from government service."[396] Arguably, the same principles that establish qualified immunity from damages claims for governors in their individual capacities extend to qualified immunity in their official capacities from injunction claims, but the courts have not yet recognized such an extension.[397] Absent

393. *See* McConnell v. Adams, 829 F.2d 1319, 1324-26 (4th Cir. 1987). As early as 1981, a district court had held that a Governor and a state department head were immune from damages for discharging an employee because of his political affiliation, since the court could not conclude that they "knew or reasonably should have known" that the discharge violated the employees' federal constitutional rights. *See* Gibbons v. Bond, 523 F. Supp. 843, 854 (W.D. Mo. 1981), *aff'd*, 668 F.2d 967 (8th Cir. 1982).

394. *Jenkins*, 119 F.3d at 1160 (quoting Upton v. Thompson, 930 F.2d 1209, 1212 (7th Cir. 1991)).

395. *See Stott II*, 916 F.2d 134, 146 (4th Cir. 1990) (vacating the district court decision in *Stott I*, 725 F. Supp. 1365 (E.D.N.C. 1989)).

396. Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982).

397. In its leading qualified-immunity case for executive officers, *Mitchell v. Forsyth*, 472 U.S. 511, 515 (1985), the Supreme Court recognized an approach to qualified immunity for government officials under which the "consequences" of standing trial must be considered to avoid

> subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery" in cases where the legal norms the officials are alleged to have violated were not clearly established at the time .... *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is *an immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Id. at 526 (quoting *Harlow*, 457 U.S. at 817-18). As the Fourth Circuit recently noted in an interlocutory appeal from a denial of a motion to dismiss, the defense of qualified immunity "exists to 'give government officials a right, not merely to avoid "standing trial," but also to avoid the burdens of "such pretrial matters as discovery." ' " *Jenkins*, 119 F.3d at 1159 (quoting Behrens v. Pelletier, 516 U.S. 299, 308 (1996) (quoting *Mitchell*, 472 U.S. at 526)). *Elrod-Branti* cases, replete with such burdens and much uncertainty, seemingly provide a perfect opportunity for recognizing qualified immunity from injunction claims.

such an extension of qualified immunity principles, the governor may be subject to prospective injunctive relief in some circumstances regarding the hiring and firing of subordinates. The potential for such relief has significant implications. For instance, a broad injunction, like that sought by the *Stott* plaintiffs, would essentially involve judicial management of the personnel policies and practices of the governor and his appointed department heads.[398] In other circumstances, federal courts have ordered prospective injunctive relief, including on-going judicial supervision, for state-action appointments.[399]

State separation-of-powers principles constrain the authority of state courts over executive actions, and state courts generally will not compel an executive act.[400] Thus, state courts should not interfere with the governor's authorized appointment or removal of an executive officer.[401] Judicial review in state court of executive actions may occur in other circumstances,[402] however, including those affecting state employment, as illustrated by two recent cases deciding whether the Governor had correctly designated state employees as

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Nevertheless, the *Stott* district court rejected an argument for qualified immunity from injunction made by a successor department head not even alleged to have committed any wrongful act. *See Stott I*, 725 F. Supp. 1365, 1380, 1440-41, 1446 (E.D.N.C. 1989); Memorandum in Support of Motion for Summary Judgment filed by Defendant Pope, at 24-28, *Stott I*, 725 F. Supp. 1365 (E.D.N.C. 1989) (Nos. 85-818-CIV-5, 86-650-CIV-5, 86-683-CIV-5).

398. *See Stott II*, 916 F.2d at 137 & n.4 (noting the Governor and individual department heads as named defendants).

399. *See* Mayor of Philadelphia v. Educational Equal. League, 415 U.S. 605, 622-23 (1974) (reversing a court-ordered supervision of a new mayor's appointments where the former mayor had discriminated on the basis of race in making appointments); *see also* McConnell v. Adams, 829 F.2d 1319, 1322 (4th Cir. 1987) (affirming court-ordered reappointment of officials not reappointed solely because of their political party affiliation).

400. *See, e.g.*, Person v. Watts, 184 N.C. 499, 502, 115 S.E. 336, 339 (1922) (dismissing an action for mandamus against the revenue commissioner). Those principles are a matter of state law, and under the "dual sovereignty" of federalism, Printz v. United States, 521 U.S. 898, 918 (1997), the state may distribute its governmental powers among its branches independent of the federal constitutional principle of separation of powers. *See* State *ex rel.* Martin v. Melott, 320 N.C. 518, 524, 359 S.E.2d 783, 787 (1987) (plurality opinion). At the federal level, courts are reluctant to compel the executive, especially the president, to perform a discretionary act. *See* Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992) (plurality opinion).

401. *See* State *ex rel.* Caldwell v. Wilson, 121 N.C. 323, 344, 28 S.E. 554, 556-57 (1897); James v. Hunt, 43 N.C. App. 109, 120-21, 258 S.E.2d 481, 488 (1979).

402. *See* Frye Regional Med. Ctr., Inc. v. Hunt, 350 N.C. 39, 43, 510 S.E.2d 159, 162 (1999) (involving judicial review of the Governor's amendment to the state medical facilities plan and holding that the Governor had statutory authority to amend the plan).

exempt under the State Personnel Act.[403]

Thus, the potential exists for a federal or state court[404] to prevent a governor from firing certain subordinates belonging to an opposing political party, in effect locking political opponents into the bureaucracy. The potential also exists for a court to order a governor to hire a political opponent, in effect giving the opponent the keys to the bureaucracy. Fortunately, however, there is some recognition within the judiciary of the limited role that the courts should play in deciding constitutional claims involving public employment.[405]

C. *The Old Bureaucratic Model and New Dynamics*

Although the Supreme Court rejected the firing of some lower-level public employees on the basis of political-party affiliation in *Elrod*[406] and *Branti*,[407] and then rejected hirings on that basis in *Rutan*,[408] the requirement that states have a republican form of government nevertheless remains.[409] The republican form of government gives voters the right to choose their own officers for

403. *See, e.g.*, Powell v. North Carolina Dep't of Transp., 347 N.C. 614, 625, 499 S.E.2d 180, 186 (1998) (upholding Governor Hunt's designation of the director of the North Carolina Highway Beautification Program as policymaking-exempt under the State Personnel Act); North Carolina Dep't of Transp. v. Hodge, 347 N.C. 602, 607, 499 S.E.2d 187, 190 (1998) (rejecting Governor Hunt's designation of departmental internal auditor as an exempt policymaking position under the State Personnel Act).

404. State courts have concurrent jurisdiction with federal courts over claims for deprivation of rights under color of state law pursuant to 42 U.S.C. § 1983. *See* Crump v. Board of Educ., 326 N.C. 603, 614, 392 S.E.2d 579, 585 (1990).

405. *See, e.g.*, Gregory v. Durham County Bd. of Educ., 591 F. Supp. 145, 156 (M.D.N.C. 1984). The *Gregory* court stated:

> Federal courts do not pass on the wisdom of the personnel actions challenged or even their fundamental fairness. Rather, the need to preserve the independence of public management and scarce judicial resources, among other considerations, restricts the courts' inquiry to whether the personnel actions qualify under stringent tests promulgated by the Supreme Court as constitutional violations.

Id.

406. Elrod v. Burns, 427 U.S. 347, 372-73 (1976).

407. Branti v. Finkel, 445 U.S. 507, 519-20 (1980).

408. Rutan v. Republican Party of Ill., 497 U.S. 62, 65 (1990).

409. *See* U.S. CONST. art. IV, § 4. Questions arising under the Guarantee Clause have been regarded as non-justiciable political questions, their resolution resting instead with Congress. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849). *But cf.* New York v. United States, 505 U.S. 144, 185 (1992) (noting that commentators have "suggested that courts should address the merits of [Guarantee Clause] claims, at least in some circumstances" but stating that it "need not resolve this difficult question today"); Gregory v. Ashcroft, 501 U.S. 452, 463 (1991) (stating that the "authority of the people of the States to determine the qualifications of their government officials is, of course, not without limit" and noting that "our review of citizenship requirements under the political function exception is less exacting, but it is not absent").

state government.[410] In order for such a government to be responsive to the people, the elected officials must have some subordinates who are responsive to their election platforms and political priorities.[411] Governor Hunt has explained that the inability of the executive to select some loyal subordinates would result in "a rigid bureaucracy that would be completely ineffective in letting the people work their will much as you have in totalitarian societies."[412]

As a result, when applying *Elrod-Branti*, the circuit courts of appeals have recognized certain underlying assumptions about the operation of government. First, *Elrod* and *Branti* seek to promote governmental efficiency by permitting decision-makers to mandate policies for implementation by ministerial employees.[413] In such a bureaucracy, an elected official must have loyal policy-making assistants.[414] Second, the courts have acknowledged that "representative government needs a certain amount of leeway for partisan selection of agents in order to work."[415] Accordingly, the *Elrod-Branti* "appropriateness" standard is a corollary to representative government, and a newly elected administration must have "significant facilitators of policy" who have "personal and partisan loyalty."[416] As one court has explained, loyal subordinates promote the goals of representative democracy, while their absence " 'undercuts' such government."[417]

Concerns about governmental efficiency and representative government extend beyond the political affiliation of public employees to their political activities. While political affiliation cases are controlled by *Elrod-Branti* standards, political activity cases are

410. *See In re* Duncan, 139 U.S. 449, 461 (1891).

411. *See* Jenkins v. Medford, 119 F.3d 1156, 1162 (4th Cir. 1997) (quoting Upton v. Thompson, 930 F.2d 1209, 1215 (7th Cir. 1989)).

412. Deposition of James B. Hunt, Jr., at 87, *Stott I*, 725 F. Supp. 1365 (E.D.N.C. 1989) (Nos. 85-818-CIV-5, 86-650-CIV-5, 86-683-CIV-5).

413. *See* Meeks v. Grimes, 779 F.2d 417, 422 (7th Cir. 1985).

414. *See id.* "As we must recognize, however, no structure can approach the old-fashioned textbook ideal in which bureaucrats merely carry out or execute policy directives chosen for them ...." JAMES M. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN 161 (1975). Moreover, "[t]he authors of the United States Constitution ... did not foresee the necessity or need of controlling the growth of self-government .... The system of checks and balances, ultimately derivative from Montesquieu, has rarely been interpreted to have as one of its objectives the limiting of the growth of the government." *Id.* at 162.

415. Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 241 (1st Cir. 1986) (en banc).

416. *Id.*

417. *Id.* (quoting Elrod v. Burns, 427 U.S. 347, 367 (1976)).

controlled by the decisions in *Pickering v. Board of Education*[418] and *Connick v. Meyers*,[419] where the Supreme Court applied a balancing test for determining the permissibility of public employees' political activities.[420] The *Pickering-Connick* test recognizes the need for governmental efficiency by requiring "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."[421] Citing a century-old case recognizing the legitimacy of promoting efficiency, integrity, and discipline in public service,[422] the *Connick* Court declared that " 'the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.' "[423]

Nevertheless, the Court long ago rejected Justice Holmes' famous dictum about a public employee's having "a constitutional right to talk politics," but no constitutional right to be a public employee.[424] Public employees have First Amendment protection under the Court's "modern 'unconstitutional conditions' doctrine."[425] This doctrine protects against dismissal for refusing to take an oath regarding political affiliation,[426] for publicly or privately criticizing a governmental employer's policies,[427] for expressing hostility prominent political figures (certainly including a governor),[428] for

418. 391 U.S. 563 (1968).

419. 461 U.S. 138 (1983).

420. *See id.* at 154 (holding that an assistant district attorney who circulated a questionnaire among other employees after a notice of change in case assignments was lawfully discharged for refusing to accept changes and that her communications concerned matters of private interest, not public concern); *Pickering*, 391 U.S. at 569, 673-75 (holding that a teacher who published criticism of school board policies was wrongfully discharged and that the teacher's interest in public comment must be balanced against the state's interest in promoting efficiency of its employees); *see also* Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 44-50 (1988) (describing the *Pickering-Connick* balancing test).

421. *Connick*, 461 U.S. at 150.

422. *See id.* at 150-51 (quoting *Ex Parte* Curtis, 106 U.S. 371, 373 (1882)).

423. *Id.* at 150 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part and concurring in the result in part)).

424. Board of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (quoting McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892)).

425. *Id.*

426. *See* Keyishian v. Board of Regents, 385 U.S. 589, 608-10 (1967) (holding that a state university could not require a faculty member to certify that he was not a Communist).

427. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. V. Doyle, 429 U.S. 274, 281-87 (1977) (holding that an untenured teacher could not be discharged because he complained to a radio station about school dress and appearance requirements, but that the public employer may offer proof that it would have discharged him in any event because of altercation with another teacher and for making obscene gestures to students).

428. *See* Rankin v. McPherson, 483 U.S. 378, 381, 392 (1987) (holding that the

other expressive activities,[429] and for making or not making political contributions.[430]

Thus, under the *Pickering-Connick* balancing test, if "a matter of public concern was implicated [by an employee's political activities] the court must consider whether the employee's interest in the speech was outweighed by the employer's 'interest in the effective and efficient fulfillment of its responsibilities to the public.' "[431] As the Fifth Circuit concluded, the government has an interest in providing elected officials with "the power to implement policy for which they must answer to the voters. In more familiar language, knowing that the buck stops, and where, is a substantial government interest."[432]

In North Carolina state government, the bureaucratic buck supposedly stops with the governor. Under this bureaucratic model, the governor has much power to implement policies through subordinates, subject to the federal constitutional constraints discussed above and the civil service protection provided state employees under the State Personnel Act.[433] Nevertheless, as state government continues to grow both in budget and bureaucracy,[434] some commentators question the governor's ability to manage this extensive bureaucracy effectively, and they advocate a smaller state government that is more effective and efficient.[435] Several recent

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discharge of a deputy constable who, upon learning of the assassination attempt on President Reagan, remarked to a co-worker, "if they go for him again, I hope they get him," was unconstitutional).

429. *See* United States v. Treasury Employees Union, 513 U.S. 454, 470 (1995) (holding that a law forbidding government employees from accepting honoraria "imposes the kind of burden that abridges speech under the First Amendment").

430. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977) (holding that government employment cannot be conditioned on making or not making financial contributions to particular causes).

431. Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir. 1987) (quoting Connick v. Meyers, 461 U.S. 138, 150 (1983)); *see also* Board of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996) ("The First Amendment's guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern."); Boring v. Buncombe County Bd. of Educ., 136 F.3d. 364, 368 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 47 (1998) (holding that a public school drama teacher had no First Amendment rights in selecting a particular play because such a decision "does not present a matter of public concern and is nothing more than an ordinary employment dispute").

432. Gonzalez v. Benavides, 712 F.2d 142, 148 (5th Cir. 1983).

433. *See* N.C. GEN. STAT. §§ 126-1 to -90 (1999).

434. *See* HARLAN E. BOYLES, KEEPER OF THE PUBLIC PURSE 4-6 (1994); JOHN HOOD & DON CARRINGTON, CHANGING COURSE II: AN ALTERNATIVE BUDGET FOR NORTH CAROLINA 3 (1997); Michael Lowrey, *Feeding at the Trough: Why North Carolina State Taxes and Spending Keep Growing*, CAROLINA J., June/July 1998, at 17.

435. *See, e.g.*, JOHN LOCKE FOUNDATION, BRIEFING PAPER NO. 3, REORGANIZING STATE GOVERNMENT 2 (1996).

events have given momentum to advocates for reduction and reform of government. First, the elected Secretary of State resigned in 1996 following an auditor's report of irregularities and mismanagement in his office.[436] Soon thereafter, another high-level official, the appointed State Motor Vehicles Commissioner, resigned amid charges of irregularities and mismanagement.[437] After the Commissioner's resignation, a legislative committee investigated the Department of Motor Vehicles and the Governor's Office because of a settlement payment by the Governor's Office to a former department employee.[438] In addition, the former division director who resigned has pled guilty to a misdemeanor in connection with an earlier investigation of the employee's activities.[439] Displeased with such incidents, the 1997 session of the General Assembly amended the State Personnel Act.[440]

D. The Bureaucratic Rank and File: Patronage and Personnel Act Reform

The State Personnel Act was enacted in 1949[441] and was amended several times before the 1997 amendments.[442] Its primary purpose

436. *See Twenty Months of Scandal*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 7, 1997, at 25A.

437. *See id.*

438. *See* HOUSE SELECT COMMITTEE FOR PERSONNEL REVIEW REPORT, *supra* note 297, at 3-6.

439. *See Twenty Months of Scandal*, *supra* note 436, at 25A.

440. *See* Act of Aug. 28, 1997, ch. 520, §§ 1-6, 1997 N.C. Sess. Laws 2324, 2324-35 (amending N.C. GEN. STAT. §§ 126-14.2, 126-14.4, 126-5, 126-34.1, 126-84, 126-85); Act of July 21, 1997, ch. 349, §§ 1-4, 1997 N.C. Sess. Laws 858, 858-62 (amending N.C. GEN. STAT. §§ 126-1, 126-3, 126-4).

441. *See* Act of Apr. 1, 1949, ch 718, §§ 1-8, 1949 N.C. Sess. Laws 747, 747-57; *see also* Act of May 20, 1965, ch. 640, §§ 1-4, 1965 N.C. Sess. Laws 708, 708-13 (abolishing the Merit System Council and the State Personnel Council and establishing a State Personnel Board). "During the 20th century, monumental evolutionary changes occurred with respect to personnel management systems affecting North Carolina's State employees. These changes include milestones such as the adoption of the State Personnel Act . . . in 1949, and the 1965 establishment of a unified personnel system and the State Personnel Board." HOUSE SELECT COMMITTEE FOR PERSONNEL REVIEW REPORT, *supra* note 297, at 15. That legislative committee has recommended creation of a Blue Ribbon Advisory Commission on the 21st Century Vision of the State's Workforce to review the state personnel system and to recommend appropriate legislation for reforming it. *See id.* at 15-16. Civil service protection began at the federal level with the Civil Service (Pendleton) Act, ch. 27, 22 Stat. 403, 403-07 (1883). *See generally Developments in the Law: Public Employment*, 97 HARV. L. REV. 1611, 1619-76 (1984) (describing the evolution of public employment statutes).

442. *See, e.g.*, Act of June 18, 1975, ch. 667, §§ 8-9, 1975 N.C. Sess. Laws 809, 810-11 (amending N.C. GEN. STAT. § 126-5); *see also* North Carolina Dep't of Correction v. Hill, 313 N.C. 481, 486, 329 S.E.2d 377, 380 (1985) (noting that before 1975 the Act contained

remains "to establish for the government of the State a system of personnel administration under the Governor, based on accepted principles of personnel administration and applying the best methods as evolved in government and industry."[443] The Act defines career state employees,[444] establishes the State Personnel Commission appointed by the governor,[445] and establishes the Office of State Personnel and a state personnel director who is appointed by the governor and under the supervision of the Commission.[446] Subject to the governor's approval, the Act empowers the Commission to establish policies and rules governing position classification plans, compensation plans, position qualifications, and other employment terms, including "appointment, promotion, transfer, demotion and suspension of employees" and "separation of employees."[447] A major substantive provision protects career state employees under the Act from adverse personnel actions, such as discharge or demotion, without "just cause."[448]

The Act applies to all state employees not "exempt."[449] Except for provisions for equal opportunity[450] and privacy of employee records,[451] the Act explicitly exempts constitutional officers, officers and employees of the judiciary, officers and employees of the General Assembly, non-salaried members of boards, committees commissions, and councils, and numerous others, such as certain state university employees.[452] It similarly exempts employees of the Office of the Governor that the governor designates "in his discretion"[453] and extends similar exemption power to the lieutenant governor.[454] The Act also exempts from the "just cause" limitation one "confidential assistant and two confidential secretaries" for each elected or appointed department head as well as "one confidential secretary" for each chief deputy or chief administrative assistant.[455] Before the

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no provisions exempting policymaking positions from its application).

443. N.C. GEN. STAT. § 126-1 (1999).

444. *See id.* § 126-1.1.

445. *See id.* § 126-2. Since 1976, those appointments are subject to confirmation by the General Assembly. *See id.*

446. *See id.* § 126-3.

447. *Id.* § 126-4.

448. *See id.* § 126-35.

449. *See id.* § 126-5(a)(1).

450. *See id.* §§ 126-16 to 126-19.

451. *See id.* §§ 126-22 to 126-30.

452. *See id.* § 126-5(c1).

453. *See id.* § 126-5(c1)(6).

454. *See id.* § 126-5(c1)(7).

455. *See id.* § 126-5(c)(2).

1997 amendments, the Act separately empowered the governor to designate a limited number of exempt "policymaking positions" within each of the nine departments headed by his appointees.[456] The Act extended similar exemption authority to the eight elected members of the Council of State who head departments.[457]

Before and after the 1997 amendments, the governor and the lieutenant governor can control employment of subordinates in their offices, and the governor and the other Council of State members, now with one exception,[458] can control employment of "policymaking positions" in nine and eight departments respectively. In addition, each of those seventeen department heads can control employment of three "confidential" subordinates, and that control extends to one such subordinate for each department chief deputy and chief administrative assistant.[459] The exempt subordinates and policymakers are not entitled to the "just cause" civil service protection otherwise afforded under the Act.[460] Nor are they subject to the Act's prohibitions of certain political activities by state employees.[461] Thus, not only does the Act allow some patronage, it implicitly allows exempt employees to engage in some political activities and to be solicited for political contributions.[462]

As publicly reported, Governor Hunt utilized a patronage system during his first two terms.[463] When he first took office in 1977, he followed Governor Holshouser, the first Republican governor this century.[464] In the Holshouser administration, there were only sixty-

456. *See* N.C. GEN. STAT. §§ 126-5(d)(1), 126-5(b) (1994) (amended 1997). Section 126-5(b) defines such a position as one "delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division." *Id.* § 126-5(b)(3).

457. *See id.* § 126-5(d)(1) (1994) (amended 1997).

458. Earlier, the superintendent of public instruction, a member of the Council of State, could designate "exempt policymaking positions," *see id.* § 126-5(d)(1) (1994) (amended 1997), but under the 1997 amendments the state Board of Education may designate both new categories of "exempt positions" in the department of public instruction. *See* N.C. GEN. STAT. § 126-5(d)(2) (1999).

459. *See* N.C. GEN. STAT. § 126-5(c)(2) (1999); N.C. GEN. STAT. § 126-5(c)(2) (1994).

460. *See* N.C. GEN. STAT. § 126-35 (1999); N.C. GEN. STAT. § 126.5 (1990).

461. *See* N.C. GEN. STAT. § 126-13(a) (1999); N.C. GEN. STAT. § 126-13(a) (1992).

462. *See* N.C. GEN. STAT. § 126-14.1(a) (1999); N.C. GEN. STAT. § 126-14.1(a) (1992).

463. *See, e.g.*, John Hood, *Hunt Finds Religion on Patronage*, TRIANGLE BUS. J., July 11, 1997, at 63.

464. *See id.*; Heath, *supra* note 202, at 19. During the Republican governor's administration, Democrats dominated the General Assembly, and "there was a great hue and cry that the power and discretion of the governor must be checked with regard to" state employees. Deposition of James B. Hunt, Jr., at 65, *Stott I*, 725 F. Supp. 1365 (E.D.N.C. 1989) (Nos. 85-818-CIV-5, 86-650-CIV-5, 86-683-CIV-5). Major changes in the State Personnel Act resulted. *See* Act of June 18, 1975, ch. 667, §§ 1-13, 1975 N.C. Sess.

eight employees designated as exempt, although other Holshouser supporters attained state employment in positions then covered by the Act.[465] After taking office, Governor Hunt designated 868 positions as exempt and, therefore, held by employees serving at will; as a result, many Holshouser administration employees were discharged by the Hunt administration.[466] There were approximately 1500 exempt positions when Governor Hunt left office in 1985.[467] Consistent with a goal of the Martin administration, that number was reduced,[468] only to increase again in Governor Hunt's next terms beginning in 1993.[469] Some of the Hunt administration's 1993 changes resulted in litigation, recently resolved by the state supreme court.[470] In 1997, apparently responding to some criticisms of his past personnel policies, Governor Hunt reduced the number of exempt positions from 575 to 99.[471] That reduction in exempt positions, and concomitant increase in protected positions, prompted criticism that Governor Hunt was attempting to force hundreds of his political appointees upon his successor through expanded civil service protections.[472] More significantly, however, Governor Hunt endorsed proposals to amend the State Personnel Act and reform the patronage system he once perfected.[473]

The 1997 amendments changed the definitions of exempt positions and reduced their potential number. An "exempt position" now includes an "exempt policymaking position," which retains its earlier definition with the added limitation "that a loyalty to the Governor or other elected department head in their respective offices is reasonably necessary to implement the policies of their offices."[474] The amendments also included a new category of "exempt managerial position[s]," which are defined as posts having such essential "managerial or programmatic responsibility" that the application of just-cause limitations to discharge or demotion "would

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Laws 809-13 (amending N.C. GEN. STAT. §§ 126-2 to 126-5).

465. *See* Hood, *supra* note 463, at 63.

466. *See id.*

467. *See Stott II*, 916 F.2d 134, 137 n.2 (4th Cir. 1990).

468. *See id.* at 142 n.11.

469. *See* Hood, *supra* note 463, at 63.

470. *See supra* note 403 and accompanying text.

471. *See* John Wagner, *House Approves Patronage-Reform Measure*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 28, 1997, at 3A.

472. *See id.*

473. *See* Hood, *supra* note 463, at 63.

474. N.C. GEN. STAT. §§ 126-5(b)(1) to 126-5(b)(3) (1999); *see also* Jones v. Dodson, 727 F.2d 1329, 1334-35 n.6 (4th Cir. 1984) (describing " 'personal political loyalty' situations").

cause undue disruption to the operations of the agency, department, institution, or division."[475] With the definitional change, "exempt policymaking positions" may be designated as exempt under the Act. Exempt employees have limited civil service protection under the Act, such as equal opportunity and privacy of their employee records, and may be discharged or demoted without just cause.[476] The newly defined "exempt managerial positions" also may be designated as exempt under the Act. They are, however, covered by other provisions for employment policies, rules, and plans—not just those for equal opportunity and records privacy.[477] More significantly, as part of a "policy of nonpolitical hiring practices,"[478] the "exempt management positions" are covered by new provisions that bar political hirings and promote open and fair competition for employment.[479] Thus, the holders of "exempt managerial" positions may be discharged or demoted regardless of just cause, but they may be hired only pursuant to the new limitations on political hirings and to requirements for open and fair competition for employment.[480]

Under the new definitions, the governor may now designate "a total of one hundred exempt policymaking positions throughout" the nine departments headed by his appointees.[481] In addition, for the same departments, the governor may designate "exempt managerial positions in a number up to one percent (1%) of the total number of full-time positions in each" such department.[482] The eight elected department heads of the Council of State, with one exception, may also designate "exempt policymaking positions" and "exempt managerial positions" in their respective departments; each category may consist of twenty positions or one percent of the total number of full-time positions in the department, whichever is greater.[483]

The new limitations on political hirings[484] and provisions for open

475. N.C. GEN. STAT. § 126-5(b)(2) (1999).
476. *Id.* § 126-5(c)(3).
477. *Id.* § 126-5(c7).
478. *Id.* § 126-14.3(8).
479. *See id.* § 126-5(c7) (applying sections 126-14.2 (limiting political hirings) and 126-14.3 (requiring open and fair competition)).
480. *See id.* § 126-5(c7) (citing the new provisions of sections 126-14.2 and 126-14.3).
481. *Id.* § 126-5(d)(1).
482. *Id.*
483. *See id.* § 126-5(d)(2). Regarding designations in the Department of Public Instruction after the 1997 amendments, see *supra* note 458. The 1997 amendments also amended provisions for the governor and the others to request that additional positions be designated as "exempt," with prescribed procedures for forwarding such requests to the General Assembly. *See* N.C. GEN. STAT. § 126-5(d)(2a) (1999).
484. *See id.* § 126-14.2.

and fair competition for employment[485] are added to earlier provisions regarding the political activities of state employees.[486] The General Assembly has established state policies of "nonpolitical hiring"[487] and of hiring "from the pool of the most qualified persons."[488] The General Assembly has directed the State Personnel Commission to adopt rules or policies that assure procedures "that encourage open and fair competition" and "nonpolitical hiring practices."[489] The 1997 amendments also include penalties for violating the new limitations on political hiring.[490] Complaints of adverse employment decisions "because of political affiliation or political influence" may be made through the Office of Administrative Hearings, and its investigation, initial determination, and recommended decision precede a final decision by the State Personnel Commission.[491] Complementary amendments were made to the provisions for contested cases under the State Personnel Act.[492]

As a result of its investigation into the controversial settlement payment by the Governor's Office to a former Division of Motor Vehicles employee,[493] the General Assembly expanded its "whistle-blowing"[494] and anti-retaliation[495] protections for state employees to cover "reporting to public bodies about matters of public concern, including offering testimony to or testifying before appropriate legislative panels."[496] In light of revelations that some legislators had intervened with the executive branch on behalf of that employee, the General Assembly also declared it "unethical for a legislator to take, promise, or threaten any legislative action ... for the purpose of influencing or in retaliation for any action regarding State employee hirings, promotions, grievances, or disciplinary actions subject to" the

485. *See id.* § 126-14.3.

486. *See id.* §§ 126-13, 126-14, 126-14.1.

487. *Id.* § 126-14.3(8).

488. *Id.* § 126-14.2(a). The General Assembly has mandated that "[a]ll State departments, agencies, and institutions shall select from the pool of the most qualified persons for State government employment without regard to political affiliation or political influence." *Id.* § 126-14.2(b).

489. *Id.* § 126-14.3(1), (8).

490. *See id.* § 126-14.4.

491. *Id.*

492. *See id.* § 126-34.1.

493. *See* HOUSE SELECT COMMITTEE FOR PERSONNEL REVIEW REPORT, *supra* note 297, at 1.

494. *See* N.C. GEN. STAT. § 126-84 (1999).

495. *See id.* § 126-85.

496. *Id.* § 126-84(b); *see also id.* § 126-85(a1) ("No State employee shall retaliate against another State employee because the employee or a person acting on behalf of the employee reports or is about to report ... any activity described in G.S. 126-84.").

State Personnel Act.[497]

In another set of 1997 amendments to the State Personnel Act, the General Assembly expanded the Act's purpose and embraced the concept of decentralizing its administration.[498] The purpose of establishing "a system of personnel administration under the Governor" remains, but it is now accompanied by the collateral purpose of providing "for a decentralized system of personnel administration."[499] The powers and duties of the State Personnel Commission now include establishing policies and rules for delegation of personnel authority "through decentralization agreements with the heads of State agencies, departments, and institutions."[500] The Office of State Personnel, administered and supervised by an appointee of the governor and also subject to supervision by the Commission, now has expanded and specified responsibilities.[501] Those responsibilities include negotiating the newly authorized decentralization agreements for personnel administration.[502] Such agreements with executive-branch agencies must designate a person in the agency to be accountable for the agency's personnel actions.[503] Absent appropriate decentralization agreements, the Office of State Personnel is responsible for administering "centralized programs."[504] Under either a decentralized or centralized program, the head of the agency, department, or institution is ultimately responsible and accountable for compliance with State Personnel Commission policies and rules for their employees.[505]

Although reflecting legislative disenchantment with some past patronage practices of the governor, the 1997 amendments nevertheless leave the governor with the power to control employment of significant subordinates, including those in his own office[506] and those in at least one hundred "exempt policymaking positions" in the nine departments headed by his appointees.[507] Just as before, the governor has no direct control of employment in the

497. *Id.* § 120-86.1 (1998 Supp.); *see also* HOUSE SELECT COMMITTEE FOR PERSONNEL REVIEW REPORT, *supra* note 297, at 18 (quoting section 120-86.1).

498. *See* Act of July 21, 1997, ch. 349, § 1, 1997 N.C. Sess. Laws 858, 859.

499. N.C. GEN. STAT. § 126-1 (1999).

500. *Id.* § 126-4(18).

501. *See id.* § 126-3(b) (establishing "the State Personnel Commission as the policy and rule-making body").

502. *See id.* § 126-3(b)(4).

503. *See id.* § 126-4(18)a.

504. *See id.* § 126-3(b)(5).

505. *See id.* § 126-1.

506. *See id.* § 126-5(c1)(6).

507. *See id.* § 126-5(d)(1).

eight departments headed by elected members of the Council of State.[508] Furthermore, despite a reported suggestion of depriving the governor of the power to appoint the state personnel director,[509] the 1997 amendments leave the appointment of that position and the appointment of the members of the State Personnel Commission with the governor.[510]

V. THE FUTURE OF THE EXECUTIVE BUREAUCRACY

A. *The Top of the Bureaucracy—The Future of the Appointment Power*

The suggestion that the governor should not appoint the state personnel director illustrates the separation-of-powers problem surviving *State ex rel. Martin v. Melott.* Although the position is clearly in the executive branch,[511] under the *Melott* interpretation of the appointments clause, the General Assembly could constitutionally provide for appointment to the position by someone other than the governor, subject only to whatever separation-of-powers constraints survive *Melott.*[512] That question has been avoided for the time being because the General Assembly continued the statutory provision for appointment of the personnel director by the governor,[513] just as it has continued the provision for appointment by the governor of the heads of the nine departments not controlled by the elected members of the Council of State.[514]

The suggestion of non-gubernatorial appointment of the state personnel director also illustrates the problem with the appointments clause as interpreted in *Melott* and illuminates the need to reconsider that interpretation. As explained above, *Melott* rendered the clause

508. *See id.* § 126-5(d)(2); *infra* notes 512-29 and accompanying text.

509. *See* Wagner, *supra* note 471, at 3A. Although that reported proposal was not adopted, another proposal has been made that membership of the State Personnel Commission be expanded from seven to nine members, including one appointed by the governor on the recommendation of the speaker of the house and one on the recommendation of the president pro tem of the senate. *See* HOUSE SELECT COMMITTEE FOR PERSONNEL REVIEW REPORT, *supra* note 297, at 14.

510. *See* N.C. GEN. STAT. §§ 126-3(a), -2(b) (1999). Since 1976, appointments to the Commission are subject to confirmation by the General Assembly. *See id.*

511. *See id.* § 126-3(a).

512. *See supra* notes 207-41 and accompanying text (discussing *Melott*).

513. *See* N.C. GEN. STAT. § 126-3(a) (1999).

514. *See id.* § 143B-9 (1994).

virtually meaningless.[515] If the separation-of-powers clause is to be more than a mere proclamation, however, the appointments clause should not remain meaningless. Should an appropriate case arise, the state supreme court could give meaning to the clause in a corrective decision.[516] The court could also address the issue in an advisory opinion, if it considers a request for one.[517] Judicial correction may be unlikely, however, and a constitutional amendment may be necessary to give the appointments clause meaningful full effect. Although executive power would be enhanced by restoring the clause to a meaningful provision for gubernatorial appointment, few people are probably concerned enough to advocate a constitutional amendment.[518] Effective advocacy of a corrective amendment would require strong support in the General Assembly, which presumably is not overly concerned about enhancing the power of the governor.[519] Thus, as a discrete issue, amendment of the appointments clause is not likely, and the clause may remain virtually meaningless for the foreseeable future.

B. Unitary Executive Power—The Future of the "Short Ballot"

A meaningless appointments clause is not the state's only separation-of-powers problem, however, and the need for correction

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515. *See supra* note 323 and accompanying text.

516. Prior to *Melott*, the last appointments clause case decided by the supreme court was *State ex rel. Salisbury v. Croom*, 167 N.C. 223, 226, 83 S.E.2d 354, 354-55 (1914). *But cf.* North Carolina State Bar v. Frazier, 62 N.C. App. 172, 176-77, 302 S.E.2d 648, 651-52 (1983) (stating that legislative appointments did not violate separation of powers, but citing no case law for that statement). Should another appointments clause case arise, the supreme court has ample precedent to overrule *Melott*. *See, e.g.*, Mial v. Ellington, 134 N.C. 131, 139, 46 S.E. 961, 963-64 (1903). The *Mial* court recognized its duty to overrule *Hoke v. Henderson*, 15 N.C. (1 Dev.) 1 (1833), which had held that an office was a contract and which the court found "stands without support in reason and is opposed to the uniform, unbroken current of authority in both State and Federal courts," thereby creating a duty to overrule it in order to "place our jurisprudence in line with that of the other States and the Federal Government." *Mial*, 134 N.C. at 139, 156-57, 46 S.E. at 964, 969-70. "The people of the State could not and would not be prohibited and controlled in the management of their own institutions and their public policies by judge-made law, which was denied by all other courts, including the highest at Washington." *Id.* at 167, 46 S.E. at 973 (Clark, C.J., concurring).

517. *See In re* Response To Request for Advisory Opinion, 314 N.C. 679, 680, 335 S.E.2d 890, 891 (1985) (noting that, although the "North Carolina Constitution does not authorize the Supreme Court as a Court to issue advisory opinions," the individual justices will occasionally issue such opinions, which are not binding on the court, but which "may be persuasive authority for the points of law addressed").

518. *See* Beyle & Dalton, *supra* note 109, at 10-11; *cf.* Guillory, *supra* note 139, at 42 (1988) (discussing prospects for the short ballot and quoting John L. Sanders, who said, " '[A] Governor is not likely to tear his shirt over it.' ").

519. *See* Beyle & Dalton, *supra* note 109, at 10-11.

is better understood in the context of the short ballot proposals. As discussed above, the voters have long elected eight members of the Council of State who head departments of the state government.[520] Such a fragmented structure, with the governor appointing nine statutorily authorized department heads and eight others being elected pursuant to the constitution, hardly constitutes a unitary executive.[521] Responsibility and accountability are diffused.[522]

Proposals for a short ballot, eliminating the election of all but a few of those eight Council of State members and having any replacement positions filled by appointment, have abounded throughout the twentieth century.[523] A short ballot amendment should be adopted in order to promote greater responsibility and accountability throughout the executive branch bureaucracy. Where the cut should be made is debatable public policy, and practical

520. *See* N.C. CONST. art. III, § 7(1); N.C. GEN. STAT. § 143A-11 (Supp. 1998); N.C. GEN. STAT. § 143B-6 (1997).

521. *See* Robin Dorff, *Shorten the Ballot: Appointing the Council of State Would Ensure Accountability*, CAROLINA J., Dec. 1992-Jan. 1993, at 12; Guillory, *supra* note 139, at 40.

522. *See* Dorff, *supra* note 521, at 13; Guillory, *supra* note 139, at 40.

523. *See supra* notes 85-91 and 130-33 and accompanying text; *see also* Steelman, *supra* note 75, at 412 (noting support for the short ballot earlier in the century by the influential newspaper editor Josephus Daniels and the reformist historian Joseph G. de Roulhac Hamilton); Record on Appeal, Plaintiff's Exhibit 19, at 10-13, *State ex rel. Martin v. Melott*, 320 N.C. 518, 359 S.E.2d 783 (1987) (No. 61PA87) (consisting of a paper presented to the Constitution Study Commission of 1968 by political scientist Preston W. Edsall advocating a short ballot amendment to the constitution). The Constitution Study Commission of 1968 unsuccessfully proposed a short ballot amendment under which only the auditor, treasurer, and attorney general would be elected constitutional officers and under which the other five positions could be replaced by appointed statutory officers. *See* 1968 REPORT, *supra* note 100, at 47-49. Most recent attention to the subject of a short ballot has been confined to the single office of the superintendent of public instruction, one of the elected members of the Council of State, who also serves as the secretary and chief administrative officer of the State Board of Education created under the constitution. That focus results from the obvious interest in education policy and the concern that the state performs poorly in public education, and the proposals for an appointive position contemplate greater responsibility and accountability in what is a currently a truly Byzantine bureaucracy. *See* Guillory, *supra* note 139, at 41-42 (discussing Governor Martin's support for such a proposal in 1987 following the retirement of a superintendent). Recently, a public-policy foundation proposed a short ballot amendment as well as other executive reorganization permissible without an amendment. *See* JOHN LOCKE FOUNDATION, *supra* note 435, at 3-7. More recently, proposals for gubernatorial appointment have been focused on appellate judges. *See* Act to Amend the Constitution of North Carolina to Provide for Gubernatorial Appointment of Justices of the Supreme Court and Judges of the Court of Appeals and Retention by Vote of the People, S. 12, 1999 Sess. (N.C. 1999). That proposed constitutional amendment failed legislative approval for submission to the voters. *See* Rob Christensen, *Who Killed Merit Plan for Judges?*, NEWS & OBSERVER (Raleigh, N.C.), July 9, 1999, at 3A.

political considerations complicate the matter.[524] A serious study of the issue in 1968 concluded that elective independence was appropriate only for the auditor, treasurer, and attorney general.[525] Although executive officers, those three elected officials are presumably competent professionals performing check-and-balance functions.[526] They are not charged constitutionally with taking "care that the laws be faithfully executed."[527] Only the governor is so charged.[528] For the governor to be responsible and accountable, the governor should appoint the other heads of state government departments.[529]

Whether the governor's appointment of department heads and other state officers should be restricted by a requirement of Senate advice and consent, as contemplated in the current appointments clause,[530] or subject to confirmation by the General Assembly in joint session,[531] is also a debatable issue of public policy.[532] Political considerations complicate the potential resolution.[533] Again, just as on the issue of the short ballot, the 1968 study concluded that the constitution should be amended to provide for gubernatorial appointment of all department heads without any requirement for legislative consent or confirmation.[534] The General Assembly has implicitly agreed by providing for gubernatorial appointment of nine department heads without requiring consent or confirmation.[535] In

524. *See* Guillory, *supra* note 139, at 42 (noting that each elective Council of State member has his own political base and special-interest support, and quoting one member, who said, " 'You take one off the ballot and then the question is which one's next.' ").

525. *See supra* note 130-33 and accompanying text.

526. *See* N.C. CONST. art. III, §§ 7(1)-(2); N.C. GEN. STAT. §§ 143A-25 (prescribing duties of the auditor), -31 (prescribing duties of the treasurer), -49.1 (prescribing duties of the attorney general) (1994).

527. N.C. CONST. art. III, § 5(4).

528. *See id.*

529. *See, e.g.*, NATIONAL MUN. LEAGUE, MODEL STATE CONSTITUTION 72 (6th ed. 1968).

530. *See* N.C. CONST. art. III, § 5(8).

531. *See id.* art. IX, § 4(1) (state board of education).

532. *See* N.C. GEN. STAT. § 143B-9 (1997) (providing for gubernatorial appointment of non-elected department heads, and illustrating another public policy option).

533. The North Carolina Senate and House have had different views on the advisability of changing from elective to appointive offices. *See* Guillory, *supra* note 139, at 42 (noting that in 1987 the Senate passed an amendment calling for the appointment of the superintendent of public instruction while a House committee rejected the proposal); Christensen, *supra* note 523 (noting that in 1999, the Senate passed an amendment calling for the appointment of appellate judges while the House rejected the proposal).

534. *See supra* note 133 and accompanying text.

535. *See* N.C. GEN. STAT. § 143B-9 (1997). The section provides: "The head of each principal State department, except those departments headed by popularly elected

doing so, the General Assembly has provided a statutory model for gubernatorial appointment of the department heads over much of the executive bureaucracy. This model should be extended by constitutional amendment to all of the executive bureaucracy.[536]

V. CONCLUSION

Simple civics lessons provide the model for fulfilling North Carolina's proclaimed separation of powers: With an already powerful legislature to enact the laws and with an independent judiciary to interpret them, the state needs a unitary executive—the governor, often acting through his appointed subordinate officers—to execute them.[537] A unitary executive can be achieved only through a short ballot amendment to the constitution. After nearly a century of unsuccessful advocacy of such reform, perhaps the twenty-first century will bring success. As part of that reform, the governor's power to appoint and remove his subordinate officers should be protected. Such reform would better enable the governor to "take care that the laws be faithfully executed."[538] Then, the powers that the people have delegated to their state government will truly "be forever separate and distinct from each other."[539]

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officers, shall be appointed by the Governor and serve at his pleasure." *Id.* Even if the appointments clause of the North Carolina Constitution of 1971, *see* N.C. CONST. art. III, § 5(8), were given the interpretation argued by Governor Martin and rejected by the court in *Martin v. Melott*, *see supra* notes 216-28 and accompanying text, the General Assembly can dispense with the necessity of Senate consent to gubernatorial appointments. *See* State *ex rel.* Howerton v. Tate, 68 N.C. 546, 551 (1873). *But cf.* State *ex rel.* Salisbury v. Croom, 167 N.C. 223, 227, 83 S.E. 354, 355 (1914) (emphasizing the Senate's role in the appointment process); University R.R. Co. v. Holden, 63 N.C. 410, 423-24 (1869) (Rodman, J., concurring) (finding no dispensation of consent).

536. Based upon N.C. GEN. STAT. § 143B-9, *see supra* note 535, the constitutional provision for administrative departments within the executive branch, *see* N.C. CONST. art. III, § 11, and the history of the appointments clause, *see* note 317, a proposed amendment would read as follows:

> The head of each principal administrative department, except those departments headed by popularly elected officers [*e.g.*, the auditor, treasurer, and attorney general], shall be appointed by the Governor and serve at his pleasure, as shall all subordinate officers of such appointed heads of department. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers who are members of regulatory, quasi-judicial, and temporary agencies and all officers whose appointments are not otherwise provided for in this Constitution, and such officers shall serve at the Governor's pleasure [*or, to authorize for-cause limitations on removal of such officers*, may be removed by the Governor as by law is provided].

537. *See* Calabresi & Prakash, *supra* note 179, at 544.

538. N.C. CONST. art. III, § 5(4).

539. *Id.* art. I, § 6.