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# LEGISLATORS ON EXECUTIVE-BRANCH BOARDS ARE UNCONSTITUTIONAL, PERIOD

Douglas Laycock\*

## INTRODUCTION

A Virginia statute makes legislators categorically “ineligible to serve on boards, commissions, and councils within the executive branch of state government who are responsible for administering programs established by the General Assembly.”<sup>1</sup> But with increasing frequency, the General Assembly has enacted exceptions to this policy. There is a general exception for bodies “engaged solely in policy studies or commemorative activities,”<sup>2</sup> and perhaps such bodies need not be in the executive branch at all. But the Assembly has also enacted exceptions for twenty-one specific boards and commissions, many of which clearly have executive authority.<sup>3</sup> This list of exceptions is a miscellany with no obvious pattern, but it includes six educational boards, one of which is a Board of Visitors.<sup>4</sup> The legislation creating the Board of Visitors of the Virginia School for the Deaf and Blind explicitly acknowledges that it is in the executive branch,<sup>5</sup> and it requires that four legislators serve on the eleven-member board.<sup>6</sup> There are rumors in Richmond that some legislators would like to put legislators on the Boards of Visitors of other public universities in the Commonwealth.

Such appointments violate the separation of powers and are unconstitutional. I reach this conclusion on the basis of the clear text of the Virginia Constitution, on

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An earlier version of this Article circulated anonymously. I wrote anonymously because my wife was at that time President of the University of Virginia. I was unwilling to run the risk that any legislator or government official might blame her or the University for what I wrote, or that any such official might assume that she or the University put me up to writing it. I kept the project entirely secret from her; I wanted her to have not just plausible deniability, but actual, truthful, and absolute deniability. If anyone had asked her about this Article while she was President, she would have had no idea what they were talking about. No one had even brought the underlying issue to her attention during her time in office.

<sup>1</sup> VA. CODE ANN. § 2.2-2101 (Supp. 2019).

<sup>2</sup> *Id.*

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> VA. CODE ANN. § 22.1-346.2(A) (2016).

<sup>6</sup> *Id.* § 22.1-346.2(B).

the decisions of the Virginia Supreme Court, on the practical consequences, and on decisions interpreting separation-of-powers provisions in federal law and in other states. The question is not close. Much of the analysis here would apply to the constitutional law of nearly every state, and to any board or commission in the executive branch, but my focus will be on the Boards of Visitors of Virginia's public universities.

## I. THE SEPARATION OF POWERS CLAUSES

There are two separation-of-powers clauses in the Virginia Constitution. Article I, section 5, titled "Separation of legislative, executive, and judicial departments," requires

[t]hat the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct;<sup>7</sup>

And article III, section 1, titled "Division of Powers," provides,

The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, *nor any person exercise the power of more than one of them at the same time.*<sup>8</sup>

I will refer to these provisions as the Separation of Powers Clauses. Article I of the constitution is the Bill of Rights,<sup>9</sup> and article I, section 5 is derived, with modest changes, from the Declaration of Rights adopted on June 12, 1776.<sup>10</sup> Article III, section 1 was part of the original Virginia Constitution adopted by the same body on June 29, 1776.<sup>11</sup> Beginning with the Constitution of 1851, the Declaration of Rights has been incorporated into the body of the constitution as article I,<sup>12</sup> thus producing two separate but consistent provisions on separation of powers.

The Virginia Supreme Court has enforced these clauses with considerable vigor, but it has not closely parsed the language.<sup>13</sup> In addition to stating the basic principle twice, the text of the article III clause actually states two related and mutually

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<sup>7</sup> VA. CONST. art. I, § 5.

<sup>8</sup> *Id.* art. III, § 1 (emphasis added).

<sup>9</sup> *Id.* art. I.

<sup>10</sup> Compare *id.* § 5, with DECLARATION OF RIGHTS, 1776, § 5, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 49 (William F. Swindler ed. 1979) [hereinafter SWINDLER].

<sup>11</sup> VA. CONST. of 1776, reprinted in SWINDLER, *supra* note 10, at 52. There are no numbered articles or sections in this constitution. The Separation of Powers Clause is the first substantive provision, immediately following a preamble.

<sup>12</sup> VA. CONST. of 1851, art. I, reprinted in SWINDLER, *supra* note 10, at 68–71.

<sup>13</sup> See *infra* Part III.

reinforcing prohibitions. I will refer to article I, section 5, and to the part of article III, section 1 that I have put in roman type, as the Departmental Separation Clauses. They require that the three “departments,” or branches, be kept separate and distinct.<sup>14</sup> I will refer to the italicized part of article III, section 1 as the Personal Separation Clause; it prohibits any person from exercising the power of two branches at the same time.<sup>15</sup>

Appointing a legislator to a university’s Board of Visitors would legislatively interfere with executive-branch functions, with no necessity for doing so, thus violating the Separation of Powers Clauses as the Supreme Court has interpreted them.<sup>16</sup> Even more clearly, such an appointment would result in the same person exercising both legislative and executive functions at the same time, with no justification whatever, thus violating the Personal Separation Clause.

These restrictions are not mere formalities. They are designed to protect the people by preventing the concentration of power in one or a few individuals, or in any one branch of government. They respond to the insight that power corrupts, and that the greater and more concentrated the power, the greater the tendency to corruption.<sup>17</sup> The generation that wrote the Virginia and federal constitutions followed Montesquieu in believing that “when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.”<sup>18</sup> James Madison, who served in an apparently minor role on the committee that drafted Virginia’s Separation of Powers Clauses,<sup>19</sup> later wrote in *Federalist No. 47* that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>20</sup>

The initial implementation of this insight, in Virginia and elsewhere, overreacted to the abuses of George III, putting too much power in legislators and not enough in the executive.<sup>21</sup> But Americans soon recognized that legislative power was also

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<sup>14</sup> See *supra* notes 7–8 and accompanying text.

<sup>15</sup> See *supra* note 8 and accompanying text.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 134–35 (2d ed. 1998).

<sup>18</sup> CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, reprinted in 38 *GREAT BOOKS OF THE WESTERN WORLD* 70 (Hutchins ed., 1952)); see also WOOD, *supra* note 17, at 150–51 (surveying revolutionary fears of concentrated power); Edward H. Levi, *Some Aspects of Separation of Powers*, 76 *COLUM. L. REV.* 372, 373–74 (1976) (describing the founding generation’s reliance on Montesquieu).

<sup>19</sup> See JEFF BROADWATER, *JAMES MADISON: A SON OF VIRGINIA & A FOUNDER OF THE NATION* 8 (2012) (noting that “Madison served in Williamsburg on a committee appointed to draft a new constitution and a bill of rights for Virginia,” but that “George Mason did most of the work”). Madison’s principal interest and contribution, not surprisingly, was on the religious-liberty provision. *Id.* at 8–9.

<sup>20</sup> *THE FEDERALIST NO. 47*, at 249 (James Madison) (George W. Carey & James McClellan eds., 2001).

<sup>21</sup> See WOOD, *supra* note 17, at 135–43; Levi, *supra* note 18, at 374.

prone to abuse;<sup>22</sup> both Madison and Jefferson soon complained that Virginia had failed to adequately implement its commitment to separation of powers and that the legislature had too much control over, and too often interfered with, the other branches.<sup>23</sup> A wave of constitutional reform beginning in the 1780s brought the implementation of separation of powers more fully into conformity with the stated principle, separating and limiting the power of each of the three branches, legislatures included, more explicitly and in greater detail.<sup>24</sup> These reforms did not take hold in Virginia until a good bit later—most obviously, the legislature elected the governor until the Constitution of 1851—but they did take hold.<sup>25</sup>

Even at the height of the over-empowered legislatures and under-powered executives, there seems to have been consensus that separation of powers at least meant that no person could hold two offices simultaneously.<sup>26</sup> Virginia's Personal Separation Clause states the part of that prohibition rooted in separation of powers.<sup>27</sup> It does not explicitly prohibit a person from simultaneously holding two offices in the same branch, but it does explicitly prohibit any person from simultaneously holding offices in two different branches.<sup>28</sup>

Separation of powers protects the independence of each branch of government from interference by the others. These principles have many important applications, but none more important than to the Commonwealth's public universities. Universities are places where students and faculty experiment with ideas, pursue ideas both old and new, and sometimes pursue an idea too far or into a dead end. Faculty research drives new technological developments, new policy solutions, and new economic progress. New ideas and serious research depend on academic freedom and individual initiative. Some of these ideas, and some of this research, will be controversial. The best faculty, and the best students, are always free to go elsewhere, to private universities or to public universities in states that are more supportive or less prone to interfere. Direct political interference, especially when motivated by short-term political goals or issues, can do serious damage.

Public universities require a delicate balancing of the need for public accountability and some level of government control with the preservation of institutional independence and academic control of academic matters. Virginia, and most other

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<sup>22</sup> See WOOD, *supra* note 17, at 403–13.

<sup>23</sup> See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120–21 (1787); WOOD, *supra* note 17, at 451 (quoting a James Madison statement from 1784).

<sup>24</sup> See WOOD, *supra* note 17, at 446–53; Levi, *supra* note 18, at 374–78.

<sup>25</sup> Compare VA. CONST. of 1851, art. V, § 2, *reprinted in* SWINDLER, *supra* note 10, at 82 (“governor shall be elected by the voters”), with VA. CONST. of 1830, art. IV, § 1, *reprinted in* SWINDLER, *supra* note 10, at 64 (“governor, to be elected by the joint vote of the two houses of the general assembly”), and VA. CONST. of 1776, *reprinted in* SWINDLER, *supra* note 10, at 53 (“[g]overnor, or chief magistrate, shall be chosen annually by joint ballot of both Houses”).

<sup>26</sup> See WOOD, *supra* note 17, at 156.

<sup>27</sup> VA. CONST. art. III, § 1.

<sup>28</sup> See *id.*

states, have attempted to achieve that balance by vesting responsibility in boards that are largely independent once elected or appointed, and that under normal conditions will be sympathetic to the university's mission and respectful of the difference between broad policy decisions to be made at board level and academic matters best left to the faculty and to academic administrators. The greater the intrusion of partisan politics, the greater the threat to institutional independence and to academic excellence.

Few measures would be more calculated to introduce partisan politics than the appointment of a legislator to a university's Board of Visitors. Legislators must run for re-election at frequent intervals. They owe duties to their political party and to their separate branch of government. Each legislator shares in the awesome power to make laws for the entire Commonwealth, including for its universities. No legislator may augment that power by also sharing in the executive-branch power to administer those universities.

## II. THE BOARDS OF VISITORS

The Boards of Visitors of Virginia's public universities are plainly state agencies in the executive branch, and courts have treated this fact as obvious, both in Virginia<sup>29</sup> and elsewhere.<sup>30</sup> The General Assembly's Joint Legislative Audit and Review Commission has also recognized that these boards are part of the executive branch.<sup>31</sup> The Governor appoints persons to the Boards of Visitors,<sup>32</sup> and the Governor can remove Visitors for "malfeasance, misfeasance, incompetence, or gross neglect of duty."<sup>33</sup> This gubernatorial appointment and removal power plainly locates these boards in the executive branch.

These boards exercise executive authority and perform executive functions. They supervise and administer large institutions with substantial assets, many employees, and many students, and in some cases, hospitals and medical practices.<sup>34</sup> They are statutorily authorized to manage their institution's funds, appoint its

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<sup>29</sup> See *George Mason Univ. v. Floyd*, 654 S.E.2d 556, 558 (Va. 2008) (explaining why "[i]t is clear that GMU qualifies as an agency of the Commonwealth"); *James v. Jane*, 282 S.E.2d 864, 865 (Va. 1980) (describing Rector and Visitors of University of Virginia as "an agency of the Commonwealth"); see also *Collin v. Rector & Bd. of Visitors of the Univ. of Va.*, 873 F. Supp. 1008, 1013 (W.D. Va. 1995) ("The Board's status under Virginia law is the same as any other state agency.").

<sup>30</sup> See, e.g., *Galer v. Bd. of Regents*, 236 S.E.2d 617, 618 (Ga. 1977); *Att'y Gen. ex rel. Cook v. Burhans*, 7 N.W.2d 370, 371 (Mich. 1942).

<sup>31</sup> JOINT LEGIS. AUDIT & REVIEW COMM'N, ORGANIZATION OF THE EXECUTIVE BRANCH IN VIRGINIA: A SUMMARY REPORT, H. DOC. NO. 44, at 1–4, 35–36 (1984), <http://jlarc.virginia.gov/pdfs/reports/Rpt61.pdf> [<https://perma.cc/SA84-Y464>].

<sup>32</sup> See, e.g., VA. CODE ANN. § 23.1-2201(A) (2016) (University of Virginia).

<sup>33</sup> *Id.* § 23.1-1300(C) (Supp. 2019).

<sup>34</sup> See, e.g., *id.* § 23.1-2212 (2016) (describing the operations of the Medical Center of the University of Virginia).

President and its faculty, fix salaries and tuition, and buy and sell real estate.<sup>35</sup> They are authorized to regulate parking and traffic, the hiring and firing of employees, and the admission, discipline, and expulsion of students.<sup>36</sup> They are instructed to manage their institution's endowment<sup>37</sup> and are given many powers necessary for the management of medical centers.<sup>38</sup> They have law enforcement responsibilities; they are authorized to establish a campus police department<sup>39</sup> or, at the Board's election, require a contiguous local government to provide police protection on campus.<sup>40</sup> As clearly as the governor's appointment power, these executive powers and functions mark them as agencies in the executive branch.

### III. DECISIONS OF THE VIRGINIA SUPREME COURT

The Virginia Supreme Court has repeatedly recognized that some degree of “incidental encroachment” between the functions of coordinate branches of government is “necessary and permitted.”<sup>41</sup> Any system of checks and balances requires some intersection of the powers of the separate branches. The legislature may delegate some of its authority to the executive branch if it provides appropriate standards, and many of the court's separation-of-powers decisions are about the sufficiency of the standards accompanying such delegations.<sup>42</sup> But the question here is not about one branch voluntarily delegating some of its powers to another; it is the far more troubling issue of one branch interfering with, or taking over, the functions of another.

The Virginia Supreme Court has often said that the separation of powers is violated “when one branch exercises the ‘whole power’ of another.”<sup>43</sup> This “whole power” language appears to have originated in Madison's effort to defend the federal Constitution against the anti-federalist charge that its various checks and balances violated the separation of powers.<sup>44</sup> He contrasted one branch exercising the whole power of another with no branch having any partial agency, however limited, in the work of any other—omitting the obvious and more relevant intermediate possibilities of partial overlaps or checks of greater or lesser degree.<sup>45</sup> Not surprisingly, this “whole

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<sup>35</sup> *Id.* § 23.1-1301 (Supp. 2019).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* § 23.1-2210 (2016).

<sup>38</sup> *Id.* §§ 23.1-2212 to -2213.

<sup>39</sup> *Id.* § 23.1-809.

<sup>40</sup> *Id.* § 23.1-1301(B)(11) (Supp. 2019).

<sup>41</sup> *Taylor v. Worrell Enters., Inc.*, 409 S.E.2d 136, 138 (Va. 1991) (plurality opinion).

<sup>42</sup> *See, e.g., Elizabeth River Crossings OpCo, LLC v. Meeks*, 749 S.E.2d 176 (Va. 2013) (upholding creation of agency to contract for construction of tunnel and to negotiate tolls, and holding that tolls were user fees and that legislature had not improperly delegated its power to tax).

<sup>43</sup> 2016 OP. VA. ATT'Y GEN. 16-013, at 4, [https://www.oag.state.va.us/files/Opinions/2016/McAuliffe\\_Opinion\\_28No\\_\\_16-01329.pdf](https://www.oag.state.va.us/files/Opinions/2016/McAuliffe_Opinion_28No__16-01329.pdf) [<https://perma.cc/Z7NJ-E7SA>] (quoting *Winchester & Strasburg R.R. v. Commonwealth*, 55 S.E. 692, 693 (Va. 1906)).

<sup>44</sup> THE FEDERALIST NO. 47, *supra* note 20, at 250–52.

<sup>45</sup> *See id.*

power” language is misleading if taken literally. Significant exercises of the powers of one branch by members of another are prohibited, even though the invasion of the other branch is far less than total. In practice, the Virginia Supreme Court has struck down any undue or unjustified interference with one branch by another.<sup>46</sup>

Thus the legislature cannot require that certain ordinances enacted by a county board of supervisors be reviewed by a judge to determine, after a judicial hearing, that the ordinance was necessary.<sup>47</sup> This requirement obviously did not transfer the whole power of the board of supervisors to the judge. The judge could not initiate legislation; he could review only what had been legislatively enacted, and only with respect to certain ordinances. But with respect to those ordinances, a significant part of the legislative function—the power to finally determine what new laws were necessary—was unconstitutionally transferred to a judge.

Conversely, the legislature cannot exercise or interfere with the judicial power. Thus the legislature cannot restrict the judicial power to hold in contempt a litigant who lied to the court about a scheduling matter.<sup>48</sup> It did not matter that the contempt power is only one small part of the judicial power, or that the legislature had not interfered with most of the cases in which judges hold litigants in contempt. Similarly, the legislature cannot authorize or require the reopening of a final judgment previously rendered by a court.<sup>49</sup> And this was so even though the reopening of judgments applied to only some cases and to only a single issue within each case, and even though the original power to decide the cases remained with the courts. It was enough that an exercise of a significant part of the judicial function—to decide when and whether to reopen final judgments—had been directed by the legislature.<sup>50</sup>

The Virginia Supreme Court’s most recent and most extensive decision on legislative interference with the executive branch is the plurality opinion in *Taylor v. Worrell Enterprises*.<sup>51</sup> The court explained that “the proper inquiry focuses on the extent to which [the challenged law] prevents the Executive Branch from accomplishing its constitutionally assigned functions.”<sup>52</sup> “[W]here the potential for disruption is present,” the court must “then determine whether that impact is justified by

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<sup>46</sup> See *infra* notes 47–56 and accompanying text.

<sup>47</sup> *Gandy v. Elizabeth City Cty.*, 19 S.E.2d 97, 99–100 (Va. 1942); see also *Bd. of Supervisors v. Allman*, 211 S.E.2d 48, 55–56 (Va. 1975) (holding that the court could invalidate discriminatory zoning, but could not itself rezone the property, because zoning is a legislative function).

<sup>48</sup> See *Carter v. Commonwealth*, 32 S.E. 780 (Va. 1899).

<sup>49</sup> *Ratcliffe v. Anderson*, 72 Va. (31 Gratt.) 105, 106–11 (1878).

<sup>50</sup> *Id.*

<sup>51</sup> 409 S.E.2d 136 (Va. 1991). This opinion was a plurality because the other justices thought that the constitutional issue had not been preserved. *Id.* at 140 (Carrico, C.J., concurring in result); *id.* at 140–44 (Hassell, J., dissenting). No justice dissented on the merits of the separation-of-powers holding.

<sup>52</sup> *Id.* at 139 (plurality opinion) (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).



an *overriding need* to promote objectives within the constitutional authority” of the legislature.<sup>53</sup>

On the facts in *Taylor*, the court found that requiring the Governor to make records of his long-distance phone calls available under the Freedom of Information Act would violate the separation of powers.<sup>54</sup> The compelled disclosure of the data “could provide a basis for public speculation” that would have a “chilling effect on the Governor’s use of the telephone for conducting the Commonwealth’s business” and thus impair his ability to perform his duties.<sup>55</sup> It was enough that disclosure “impairs, though it does not completely destroy, the ability of the executive to perform his constitutionally required duties.”<sup>56</sup> *Taylor* did not repeat the “whole power” language from earlier cases.

No decision of the Virginia Supreme Court directly addresses the appointment of legislators to executive-branch boards or offices. But it is obvious that a legislator appointed to a Board of Visitors would quite literally exercise the whole power of a Visitor. And far from there being any “overriding need” for such appointments, there is no need whatever. It would not be a statutory regulation of the board or of the university, passed by both houses and signed by the governor. It would not be any recognized form of check or balance. It would be a legislator entirely taking over a position of authority in the executive branch. Appointing legislators to Boards of Visitors would be a wholly gratuitous and unjustified violation of the separation of powers.

A legislator serving on an executive-branch board would interfere with the executive far more directly than in *Taylor v. Worrell Enterprises*. Such a legislator would inherently be exercising executive functions. And he would be a constant presence in the executive deliberations of all other members of the Board. He would not just arouse curiosity about what they discussed on the telephone—the facts of *Taylor*. He could carry the substance of every discussion back to the legislature. This would include discussions in executive sessions exempt from the Freedom of Information Act—discussions of personnel, litigation, and other confidential matters.<sup>57</sup> He could express legislative disapproval, or threaten legislative retaliation, with respect to any matter at any time. He could influence the Board’s discussions and debates on every issue before it. The intrusion into the functions of a separate branch would be deep, persistent, and continuous. As courts elsewhere have said, the only purpose of putting him there would be to legislatively interfere with the functions of the executive branch.<sup>58</sup>

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<sup>53</sup> *Id.* (quoting *Nixon*, 433 U.S. at 443) (emphasis added).

<sup>54</sup> *Id.* at 137–39.

<sup>55</sup> *Id.* at 138.

<sup>56</sup> *Id.* at 139.

<sup>57</sup> See generally VA. CODE ANN. § 2.2-3711 (Supp. 2019) (listing subject matters for which public bodies may meet in closed sessions).

<sup>58</sup> See, e.g., *Fed. Election Comm’n v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994); *State ex rel. Woods v. Block*, 942 P.2d 428, 436–37 (Ariz. 1997).

## IV. DECISIONS ELSEWHERE

The Virginia courts have not squarely addressed whether legislators can be appointed to executive-branch boards, but other courts have. These decisions are not binding in Virginia, but they are persuasive. With the exception of South Carolina, which has a unique and quite limited conception of separation of powers,<sup>59</sup> every court to consider the issue has held that it is unconstitutional for a legislator to serve on an executive-branch board.

*A. Decisions Squarely on Point*

The Supreme Court of North Carolina held that it violated that state's separation-of-powers clause to appoint legislators to serve on the North Carolina Environmental Management Commission, which performed executive functions.<sup>60</sup> This decision interpreted language substantially identical to that of the Virginia Constitution: that the powers of the three branches shall be "separate and distinct."<sup>61</sup> The opinion helpfully reviews several opinions from other states.<sup>62</sup>

The Supreme Court of Appeals of West Virginia held that it violated that state's separation-of-powers clause to appoint legislators to serve on the State Building Commission.<sup>63</sup> West Virginia appears to have copied its separation-of-powers provision verbatim from article II of the Virginia Constitution of 1851,<sup>64</sup> which was substantially identical to the current provision in article III, section 1.<sup>65</sup>

The Supreme Court of Georgia held that it violated that state's separation-of-powers clause to appoint legislators to serve on the World Congress Center Authority, a board created to carry out the provisions of a particular statute.<sup>66</sup> The Georgia provision closely tracks Virginia's, requiring that the powers of the separate branches be kept "separate and distinct" and also containing a Personal Separation Clause.<sup>67</sup>

The Supreme Court of Indiana held that it violated that state's separation-of-powers clause<sup>68</sup> to appoint legislators to serve on the State Office Building Commission or any other executive office or board.<sup>69</sup>

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<sup>59</sup> See *infra* notes 109–11 and accompanying text.

<sup>60</sup> State *ex rel.* Wallace v. Bone, 286 S.E.2d 79, 81–89 (N.C. 1982).

<sup>61</sup> Compare N.C. CONST. art. I, § 6, with VA. CONST. art. III, § 1.

<sup>62</sup> Wallace, 286 S.E.2d at 84–87.

<sup>63</sup> State *ex rel.* State Bldg. Comm'n v. Bailey, 150 S.E.2d 449, 451–57 (W. Va. 1966).

<sup>64</sup> Compare W. VA. CONST. art. V, § 1, with VA. CONST. of 1851, art. II, reprinted in SWINDLER, *supra* note 10, at 71.

<sup>65</sup> See *infra* Part VI for the evolution of the Virginia provision.

<sup>66</sup> Greer v. State, 212 S.E.2d 836, 837–39 (Ga. 1975).

<sup>67</sup> See GA. CONST. of 1945, art. I, § 1, para. 23 (current version at GA. CONST. art. I, § 2, para. 3).

<sup>68</sup> IND. CONST. art. III, § 1.

<sup>69</sup> Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 293–97 (Ind. 1958).

The Supreme Court of Kansas held that it violates the implicit separation-of-powers principle in that state's constitution for legislators to serve on the State Finance Council, which exercised extensive executive powers.<sup>70</sup> The court reached this conclusion even though it explicitly rejected "a strict application of the separation of powers,"<sup>71</sup> and even though it said that legislators could serve on boards and commissions "where such service falls in the realm of cooperation" and "there is no attempt to usurp functions of the executive department."<sup>72</sup> But the court found usurpation where the legislators served on a council that actually exercised executive functions.<sup>73</sup>

The Supreme Court of Colorado held that it violated that state's separation-of-powers clause<sup>74</sup> to appoint legislators to a committee to investigate certain claims involving the state's legal rights and to authorize the filing of lawsuits to enforce those rights or to authorize the defense of lawsuits filed against the state.<sup>75</sup> These were executive functions that could not be entrusted to legislators.<sup>76</sup>

### *B. Closely Analogous Decisions*

The Supreme Court of Virginia has relied on decisions interpreting the federal separation of powers in interpreting the state provisions.<sup>77</sup> There is no express separation-of-powers clause in the federal Constitution; separation of powers is implied from the separate delegation of legislative, executive, and judicial powers in Articles I, II, and III.<sup>78</sup> From that implicit principle, the Supreme Court of the United States has concluded that legislators cannot be vested with the power either to appoint<sup>79</sup> or to remove<sup>80</sup> an official performing executive functions. Power to appoint or remove fell far short of actually entrusting legislators with those functions, but it interfered with executive-branch control of the official's executive functions.<sup>81</sup>

The U.S. Supreme Court has not had to decide whether the general principle of separation of powers precludes legislators from serving on executive-branch boards, because the federal Constitution contains an express prohibition: "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."<sup>82</sup> But the Court has reached the same conclusion under

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<sup>70</sup> State *ex rel.* Schneider v. Bennett, 547 P.2d 786, 790–800 (Kan. 1976).

<sup>71</sup> *Id.* at 791.

<sup>72</sup> *Id.* at 792.

<sup>73</sup> *Id.* at 797–98.

<sup>74</sup> COLO. CONST. art. III.

<sup>75</sup> Stockman v. Leddy, 129 P. 220, 223 (Colo. 1912).

<sup>76</sup> *Id.*

<sup>77</sup> See Taylor v. Worrell Enters., Inc., 409 S.E.2d 136, 139 (Va. 1991) (plurality opinion) (citing Nixon v. Adm'r of Gen'l Servs., 433 U.S. 425, 443 (1977)).

<sup>78</sup> See U.S. CONST. arts. I–III.

<sup>79</sup> Buckley v. Valeo, 424 U.S. 1, 119–24, 137–41 (1976).

<sup>80</sup> Bowsher v. Synar, 478 U.S. 714, 721–32 (1986).

<sup>81</sup> See *id.* at 726.

<sup>82</sup> U.S. CONST. art. I, § 6, cl. 2.

general separation-of-powers principles. It held that appointing legislators to a committee with an executive function (voting government-owned corporate stock) violated the implicit separation-of-powers principle of the Philippine Organic Act.<sup>83</sup>

The District of Columbia Circuit has held that it violates separation of powers to appoint the Secretary of the Senate and the Clerk of the House of Representatives as non-voting members of the Federal Election Commission.<sup>84</sup> These were not members of Congress expressly barred from holding another federal office. But they were legislative officials whose presence would inevitably influence other members of the Commission, thus violating the broader principle of separation of powers:

[W]e cannot conceive why Congress would wish or expect its officials to serve as *ex officio* members if not to exercise *some* influence. Even if the *ex officio* members were to remain completely silent during all deliberations (a rather unlikely scenario), their mere presence as agents of Congress conveys a tacit message to the other commissioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other commissioners.<sup>85</sup>

The Supreme Court of Arizona held that legislative leaders could not appoint a majority of the Constitutional Defense Council, a legislative body with some executive functions, nor could legislators serve as non-voting advisory members.<sup>86</sup> The court agreed with the D.C. Circuit that even non-voting members “have the ability to influence the decisions of the board.”<sup>87</sup> Arizona’s separation-of-powers clause is similar to Virginia’s, requiring that the three departments “shall be separate and distinct.”<sup>88</sup>

The Supreme Court of Alaska held that the legislature could not require legislative confirmation of executive-branch appointments beyond those for which confirmation was required by the state constitution.<sup>89</sup> This fell far short of actually putting legislators on executive-branch boards, but it legislatively interfered with executive control of those boards.

The Supreme Judicial Court of Massachusetts held that it violates that state’s separation-of-powers clause<sup>90</sup> to authorize legislators to approve or disapprove decisions to hire or promote employees in the executive branch.<sup>91</sup> The Boards of Visitors

<sup>83</sup> Springer v. Gov’t of the Philippine Islands, 277 U.S. 189 (1928).

<sup>84</sup> Fed. Election Comm’n v. NRA Political Victory Fund, 6 F.3d 821, 826–27 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994).

<sup>85</sup> *Id.* at 826.

<sup>86</sup> State *ex rel.* Woods v. Block, 942 P.2d 428, 434–37 (Ariz. 1997).

<sup>87</sup> *Id.* at 436–37.

<sup>88</sup> Compare ARIZ. CONST. art. III, with VA. CONST. art. III, § 1.

<sup>89</sup> Bradner v. Hammond, 553 P.2d 1, 3–8 (Alaska 1976).

<sup>90</sup> MASS. CONST. pt. 1, art. XXX.

<sup>91</sup> *In re Op. of the Justices*, 341 N.E.2d 254, 255–57 (Mass. 1976).

of Virginia universities must approve the appointment, promotion, and salary of every member of the faculty and every senior administrator;<sup>92</sup> a legislator serving as a Visitor would share in that function.

Two state supreme courts have squarely held it unconstitutional for legislators to serve on boards of public universities.<sup>93</sup> These decisions were based on state constitutional clauses specifically prohibiting legislators from holding other offices, but Virginia's Personal Separation Clause also explicitly prohibits any person from exercising the power of more than one branch at the same time.<sup>94</sup> The Supreme Court of Michigan held that a legislator could not serve on the Board of Regents of the University of Michigan, even though he had been elected by the people to both positions.<sup>95</sup> This decision was based on a constitutional clause providing that "[n]o person elected a member of the legislature shall receive any civil appointment within this state . . . ."<sup>96</sup> The court expressly rejected the argument that "regents of the university are not State officers but only officers of the corporate body known as the board of regents of the university."<sup>97</sup>

Similarly, the Supreme Court of Arkansas held that a legislator could not serve on the board of Southern State College.<sup>98</sup> This decision was based on a clause providing that "[n]o Senator or Representative shall, during the term for which he shall have been elected, be appointed or elected to any civil office under this State."<sup>99</sup> The court also relied on the state's general separation-of-powers provisions, specifically including its Personal Separation Clause.<sup>100</sup>

Two other state supreme courts have held that a legislator may not even be employed by a state university, again relying on specific provisions addressing that question. When a tenured professor at Columbus College was elected to the Georgia legislature, she was forced to resign her position at the college.<sup>101</sup> A Georgia statute provided that "[i]t shall be unlawful for (a) members of the General Assembly to accept or hold office or employment in the executive branch of the State Government,

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<sup>92</sup> See, e.g., MANUAL OF THE BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA 2004 at 4–5 (rev. 2019) (summarizing Board's understanding of its own responsibilities); *Resolutions Adopted by the Board of Visitors June 6–7, 2019*, at 11060–76, <https://bov.virginia.edu/system/files/public/minutes/%2719%20JUN%20FULL%20BOARD%20MINUTES%20-%20Corrected%206.24.19.pdf> [<https://perma.cc/NHE9-VVVG>] (listing personnel actions approved at a single meeting of the Board).

<sup>93</sup> *Starnes v. Sadler*, 372 S.W.2d 585, 586 (Ark. 1963); *Att'y Gen. ex rel. Cook v. Burhans*, 7 N.W.2d 370, 371 (Mich. 1942).

<sup>94</sup> VA. CONST. art. III, § 1; see *infra* Part V.

<sup>95</sup> *Cook*, 7 N.W.2d at 370–71.

<sup>96</sup> MICH. CONST. of 1908, art. V, § 7 (current version at MICH. CONST. art. IV, § 9).

<sup>97</sup> *Cook*, 7 N.W.2d at 371.

<sup>98</sup> *Starnes*, 372 S.W.2d at 585–86.

<sup>99</sup> ARK. CONST. art. V, § 10.

<sup>100</sup> *Starnes*, 372 S.W.2d at 586 (paraphrasing ARK. CONST. art. IV, § 2).

<sup>101</sup> *Galer v. Bd. of Regents*, 236 S.E.2d 617, 618–19 (Ga. 1977).

or any agency thereof . . . .”<sup>102</sup> The professor argued that this statute violated her fundamental right to participate in the political process and to serve in the legislature if elected.<sup>103</sup> Assuming that such a fundamental right exists, the Supreme Court of Georgia held that the statute served a compelling government interest by implementing the separation of powers.<sup>104</sup> And the court explicitly held that the college was “an agency of the executive branch of the state government.”<sup>105</sup>

The Supreme Court of South Dakota held that a cooperative extension agent for South Dakota State University could not be paid during her term in the legislature.<sup>106</sup> This decision was based on a conflict-of-interest clause in the state constitution, which said that no legislator could be interested, directly or indirectly, in any contract with the state authorized by any law passed during the legislator’s term of office.<sup>107</sup> The legislature passed an appropriation for South Dakota State, and that appropriation was used to pay salaries, thus funding her employment contract.<sup>108</sup> The court did not rely on the general separation-of-powers clause in the South Dakota constitution.

The Supreme Court of South Carolina has decided the other way, holding for example that legislators could serve on the board of the South Carolina Transportation Infrastructure Bank.<sup>109</sup> But the court recognized that South Carolina “is *some-what singular* in the extensive involvement of the legislature in the powers of the executive and judiciary.”<sup>110</sup> And it quoted a treatise describing “South Carolina’s *unique form of government* in which the legislative takes a permanent position among the three theoretically equal branches of government.”<sup>111</sup> Decisions from South Carolina are not precedents for Virginia or other states that take separation of powers more seriously.

Outside South Carolina, cases across the country agree that legislators cannot serve in the executive branch, appoint persons to serve in the executive branch, or otherwise interfere with the selection of personnel in the executive branch. If the legislature wants to regulate the executive, it must do so through legislation enacted in the usual way and presented to the governor for signature or veto. It cannot do so by inserting its members into the executive branch or its processes.

<sup>102</sup> *Id.* at 618 (quoting GA. CODE ANN. § 26-2309 (rev. 1972) (current version at GA. CODE ANN. § 16-10-9)).

<sup>103</sup> *Id.* at 618–19.

<sup>104</sup> *Id.* at 619.

<sup>105</sup> *Id.* at 618.

<sup>106</sup> *Pitts v. Larson*, 638 N.W.2d 254 (S.D. 2001).

<sup>107</sup> S.D. CONST. art. III, § 12.

<sup>108</sup> *Pitts*, 638 N.W.2d at 255.

<sup>109</sup> *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 744 S.E.2d 521, 521–28 (S.C. 2013).

<sup>110</sup> *Id.* at 526 (emphasis added).

<sup>111</sup> *Id.* (quoting JAMES L. UNDERWOOD, *THE CONSTITUTION OF SOUTH CAROLINA, VOLUME 1: THE RELATIONSHIP OF THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES* 13 (1986) (emphasis added)).

## V. VIRGINIA'S PERSONAL SEPARATION CLAUSE

Virginia decisions on the separation of powers have addressed the broad principle and have not closely parsed the language of the state Constitution. But that language explicitly prohibits appointing a member of one branch to exercise the powers of another. Article III, section 1 provides:

The legislative, executive and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, *nor any person exercise the power of more than one of them at the same time.*<sup>112</sup>

The italicized Personal Separation Clause is a separate and distinct prohibition. No *department* may exercise the powers of either of the other two (the Departmental Separation Clause, in roman type), and no *person* may exercise the powers of two departments at the same time (the Personal Separation Clause, in italics). Appointing a legislator to an executive-branch agency or board appears to violate each of these clauses, but it unambiguously violates the second. The legislator appointed would be serving in the legislature, exercising the whole power of a legislator, and also in the executive branch, exercising the whole power of a Visitor, at the same time.

This Personal Separation Clause is Virginia's equivalent of the federal, Michigan, and Arkansas clauses that expressly prohibit legislators from holding any other office.<sup>113</sup> It applies not just to legislators, but to any person serving in any branch of government; no person in any branch can simultaneously serve in either of the other two branches.

Grammatically, the Personal Separation Clause is a dependent clause, attached to the independent clause that requires the three departments to be "separate and distinct."<sup>114</sup> For at least two independent reasons, this does not affect the meaning of the clause. First, the Personal Separation Clause was grammatically independent, unambiguously a separate prohibition, through Virginia's first five Constitutions.<sup>115</sup> The change from independent to dependent clause happened in the Committee on Final Revision and Adjustment, an editorial committee with no power to make substantive changes, in the convention that produced the Constitution of 1902.<sup>116</sup> This change was stylistic, not substantive; the clause still means what it meant as an independent clause in earlier Constitutions. The details of this drafting history are set out in Part VI.

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<sup>112</sup> VA. CONST. art. III, § 1 (emphasis added).

<sup>113</sup> See *supra* notes 82, 96, 99 and accompanying text.

<sup>114</sup> VA. CONST. art. III, § 1.

<sup>115</sup> See *infra* Part VI.

<sup>116</sup> See *infra* text accompanying notes 134–37.

Second, even if this Personal Separation Clause is treated as simply stating a purpose of the Departmental Separation Clause, it is a purpose that is fully achievable, and it is a purpose that need never be violated. At the very least, this language says that the Departmental Separation Clause is to be interpreted and enforced to the end that no person shall exercise the powers of two branches at the same time.<sup>117</sup> There are plausible reasons, including checks and balances and the inevitable overlap of functions, for one branch to sometimes modestly intrude into the functions of another. There are reasons for creating modern administrative agencies that exercise mixed powers with respect to particular subject matters. The Virginia Constitution therefore authorizes the creation of administrative agencies “with such authority and duties as the General Assembly may prescribe”<sup>118</sup>—but it carefully does *not* say with such “personnel” as the legislature may prescribe. Such administrative agencies may have mixed functions, but in most cases, some or many of those functions are clearly executive.

Neither of these reasons, nor any other reason, can justify electing or appointing the same individual to serve in two branches of government at the same time. There are more than six million adult Virginians available to serve,<sup>119</sup> and many of them would be qualified. To appoint legislators to executive-branch boards would be violating separation of powers for the sake of the violation—for the very purpose of imposing legislative influence or control on an executive-branch function.

The violation would seem obvious and flagrant if a legislator were appointed or elected to serve on the Supreme Court, or as Governor, or as Secretary of an executive-branch department. The violation should be equally obvious, and it is equally flagrant, when a legislator is appointed to a Board of Visitors. Each Visitor exercises part of the executive-branch function, and any hope that other members of the Board might proceed uninfluenced by the legislative intrusion is delusional. Of course they would be influenced; as the D.C. Circuit said, that would be the very purpose of appointing a legislator in the first place.<sup>120</sup>

## VI. THE EVOLUTION OF VIRGINIA’S SEPARATION-OF-POWERS CLAUSES

Virginia’s Separation of Powers Clauses have evolved stylistically over the years, but there has been little substantive change. For much of Virginia’s history as a state, the Personal Separation Clause was grammatically an independent clause. The Constitution of 1776 provided:

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<sup>117</sup> See VA. CONST. art. III, § 1.

<sup>118</sup> *Id.*

<sup>119</sup> See *Quick Facts Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/VA,US/PST045218> [<https://perma.cc/HNR8-P8RN>] (noting that the total estimated population in Virginia is 8,517,685 and that approximately 22% of that population is under 18).

<sup>120</sup> See *supra* note 85 and accompanying text.



The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: *nor shall any person exercise the powers of more than one of them, at the same time*; except that the Justices of the County Courts shall be eligible to either House of Assembly.<sup>121</sup>

This 1776 text clearly contains an independent clause that prohibits any person from exercising the powers of two branches at the same time.<sup>122</sup> The express exception for county judges further confirms this meaning; without the express exception, these judges could not have served in two branches at the same time.<sup>123</sup>

This provision was carried forward with minor stylistic tweaks in the Constitution of 1830. “[D]epartment” in the first line was changed to “departments”; “the other” was changed to “either of the others,” and the colon after this phrase was changed to a semicolon; the commas after “department” and after “one of them” were omitted; the semicolon after “same time” was changed to a comma; and the capitalization was dropped in the exception for county judges.<sup>124</sup> None of these changes affected meaning, and the Personal Separation Clause was still an independent clause. The provision now read:

The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others; *nor shall any person exercise the powers of more than one of them at the same time*, except that the justices of the county courts shall be eligible to either house of assembly.<sup>125</sup>

In the Constitution of 1851, the reference to “justices of the county courts” was changed to “justices of the peace”; there was no change in the clauses of interest here.<sup>126</sup> That version was carried forward verbatim in the Constitution of 1864.<sup>127</sup> In the Constitution of 1870, the exception for justices of the peace was reduced to a cross reference; there was no other change:

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<sup>121</sup> VA. CONST. of 1776 (emphasis added), *reprinted in* SWINDLER, *supra* note 10, at 52.

<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

<sup>124</sup> *Compare* VA. CONST. of 1830, art. II, *reprinted in* SWINDLER, *supra* note 10, at 59, *with* VA. CONST. of 1776, art. II, *reprinted in* SWINDLER, *supra* note 10, at 52.

<sup>125</sup> VA. CONST. of 1830, art. II (emphasis added), *reprinted in* SWINDLER, *supra* note 10, at 59.

<sup>126</sup> *Compare* VA. CONST. of 1851, art. II, *reprinted in* SWINDLER, *supra* note 10, at 71, *with* VA. CONST. of 1830, art. II, *reprinted in* SWINDLER, *supra* note 10, at 59.

<sup>127</sup> VA. CONST. of 1864, art. II, *reprinted in* SWINDLER, *supra* note 10, at 94.

The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others; *nor shall any person exercise the power of more than one of them at the same time, except as hereinafter provided.*<sup>128</sup>

No exception was later provided; no provision in the Constitution of 1870 authorizes any person to serve in two branches at the same time.<sup>129</sup>

Through each of these five Constitutions, the prohibition on any person serving in two branches at the same time was unambiguously a freestanding and independent prohibition. In the 1901 Convention, which proposed and enacted the Constitution of 1902,<sup>130</sup> the relevant substantive committee proposed to continue verbatim the separation-of-powers language of the 1870 Constitution, and its report mentioned no changes to the relevant clauses.<sup>131</sup> That committee's proposals were considered by the Committee of the Whole,<sup>132</sup> and then by the Convention,<sup>133</sup> each of which also retained the 1870 language verbatim.<sup>134</sup> The Personal Separation Clause was still an independent clause.

That draft was then referred to the Committee on Final Revision and Adjustment. This committee was an editorial committee, not a substantive committee. It reported that it had "observed the rule of making no changes in the articles as they were adopted by the Convention, except such as are necessary or proper to give greater

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<sup>128</sup> VA. CONST. of 1870, art. II (emphasis added), *reprinted in* SWINDLER, *supra* note 10, at 116.

<sup>129</sup> *See* VA. CONST. of 1870, *reprinted in* SWINDLER, *supra* note 10, at 112–41.

<sup>130</sup> Leroy Rountree Hassell, Sr., *The Evolution of Virginia's Constitutions: A Celebration of the Rule of Law in America*, 20 REGENT U. L. REV. 1, 11 (2007).

<sup>131</sup> *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION (1901). The provision was assigned to the Committee on Preamble and Bill of Rights, the Division of Governmental Powers and on Such Portions of the Constitution as Shall Not Be Referred to Other Committees. Committee reports are reprinted in the back of the *Journal of the Constitutional Convention*; they are not continuously paginated and so cannot be cited by page number. The Committee on Preamble etc. filed four reports, one of which is a minority report, and one of which is simply the Committee's proposed constitutional text. None of the four reports discusses the separation of powers.

<sup>132</sup> *See Report of the Committee on Preamble and Bill of Rights, the Division of Governmental Powers and on Such Portions of the Constitution as Shall Not Be Referred to Other Committees, as Amended by the Committee of the Whole*, in JOURNAL OF THE CONSTITUTIONAL CONVENTION (1901); *see also* II REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION 2097–139, 2578–624 (1906) [hereinafter PROCEEDINGS AND DEBATES] (containing the discussion in the Committee of the Whole).

<sup>133</sup> *See* PROCEEDINGS AND DEBATES, *supra* note 132, at 2745–59 (containing the Convention's discussion of the Committee's report as amended by the Committee of the Whole).

<sup>134</sup> DRAFT OF THE CONSTITUTION OF VIRGINIA AS FINALLY ADOPTED BY THE CONVENTION AND REFERRED TO THE COMMITTEE ON FINAL REVISION AND ADJUSTMENT OF THE VARIOUS PROVISIONS OF THE CONSTITUTION THAT MAY BE AGREED UPON, AND UPON THE SCHEDULE 5 (1902).

clearness and conciseness to the expression of what is believed to be the true intent and meaning of the Convention.”<sup>135</sup> And it said that “no substantial change in, or addition to, the instrument has been made, except when such amendments were clearly necessary to the efficient operation of the articles as they came to us from the Convention.”<sup>136</sup>

The change from independent to dependent clause happened in the Committee on Final Revision and Adjustment. The cross reference was moved from the end to the beginning, the verb necessary to an independent clause was omitted, and the two clauses were combined by changing the semicolon to a comma:

Except as hereinafter provided, the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, *nor any person exercise the powers of more than one of them at the same time.*<sup>137</sup>

The entire Convention then reviewed the Committee’s draft section by section,<sup>138</sup> and the Separation of Powers Clause as modified by the Committee on Final Revision and Adjustment became the clause in the Constitution of 1902.<sup>139</sup> Once again, no later section created any exception to the Personal Separation Clause.

Clearly this change in the Committee on Final Revision and Adjustment was understood as stylistic, not substantive. The change could not possibly have been understood as a substantive change “*clearly necessary* to the efficient operation of the articles.”<sup>140</sup> The Committee offered no explanation for the change; it did not suggest any change in meaning, however slight or nuanced. In the discussion of the Committee’s draft in the Convention, no one suggested that the Committee had changed the meaning of the Separation of Powers Clause. The change was stylistic, and understood as such, and the Constitution is best understood as still containing an independent prohibition on the same person serving in two branches at the same time.

The Commission on Constitutional Revision, whose report led to the Constitution of 1971, reviewed the history of the separation-of-powers provisions in Virginia’s Constitutions.<sup>141</sup> Describing the changes from 1776 to 1969, the Commission said, “Since 1776 the language of the section has changed in two regards: the elimination of the special exception regarding county courts, and the addition of the qualifying clause,

<sup>135</sup> PROCEEDINGS AND DEBATES, *supra* note 132, at 3097.

<sup>136</sup> *Id.*

<sup>137</sup> THE DRAFT OF THE CONSTITUTION AND SCHEDULE AS REPORTED TO THE CONVENTION BY THE COMMITTEE ON FINAL REVISION AND ADJUSTMENT 17 (1902) (emphasis added).

<sup>138</sup> See PROCEEDINGS AND DEBATES, *supra* note 132, at 3260–63.

<sup>139</sup> VA. CONST. of 1902, art. III, § 39, *reprinted in* SWINDLER, *supra* note 10, at 153. In the Constitution of 1902, sections were numbered continuously from article to article.

<sup>140</sup> PROCEEDINGS AND DEBATES, *supra* note 132, at 3097 (emphasis added).

<sup>141</sup> THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 121 (1969) [hereinafter COMMISSION ON CONSTITUTIONAL REVISION].

found in present section 39, ‘Except as hereinafter provided.’”<sup>142</sup> The Commission did not treat the change from an independent to a dependent clause as a change.

In the Constitution of 1971, the cross reference to possible but non-existent exceptions was dropped. The word “neither” was changed to “none,” and “either of the others” was simplified to just “the others.”<sup>143</sup> And a provision was added “acknowledging the existence of regulatory agencies which are not solely legislative, or executive, or judicial.”<sup>144</sup> The language relevant here was unchanged. And so we have the current provision, which reads in full:

The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, *nor any person exercise the power of more than one of them at the same time*; provided, however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe. Provisions may be made for judicial review of any finding, order, or judgment of such administrative agencies.<sup>145</sup>

The italicized Personal Separation Clause should be treated as an independent and free standing prohibition, as it always had been before the stylistic tweak in 1902. But even treating it as a dependent clause, it states a fundamental purpose of the entire provision. Powers shall be separate and distinct “so that” no person exercises the power of more than one branch at the same time.<sup>146</sup> This clause squarely prohibits any legislator from serving on an executive-branch board, including a Board of Visitors.

## VII. THE GENERAL ASSEMBLY’S VIEW, AND SOME COUNTER-ARGUMENTS

As noted at the beginning, the General Assembly has generally recognized the impropriety of its members serving on executive-branch boards “responsible for administering programs established by the General Assembly.”<sup>147</sup> The statute expressly forbids such appointments and declares any other statutes that may provide for such appointments to be void.<sup>148</sup> But this latter provision merely forces any exceptions to be codified in the same statutory section that creates the prohibition, and the Assembly has enacted a number of express exceptions to this principle.<sup>149</sup>

<sup>142</sup> *Id.*

<sup>143</sup> Compare VA. CONST. art. III, § 1, with VA. CONST. of 1902, art. III, § 39, reprinted in SWINDLER, *supra* note 10, at 153.

<sup>144</sup> COMMISSION ON CONSTITUTIONAL REVISION, *supra* note 141, at 122.

<sup>145</sup> VA. CONST. art. III, § 1 (emphasis added).

<sup>146</sup> *Id.*

<sup>147</sup> VA. CODE ANN. § 2.2-2101 (Supp. 2019).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

The mere fact that these exceptions have existed, and that no one has challenged them, does not mean that they are constitutional. It means only that no one has seriously considered the question and that the courts have had no occasion to rule. The North Carolina court considered a similar situation when it held that legislators could not serve on an executive-branch board.<sup>150</sup> The litigants defending such appointments in North Carolina listed forty-nine other boards and commissions with legislative members.<sup>151</sup> The court ruled only with respect to the one board in the case before it.<sup>152</sup> But it squarely rejected the relevance of the other forty-nine; the fact that it had become somewhat common to appoint legislators to boards and commissions did not make it consistent with separation of powers or foreclose adjudication of the issue when it was finally presented to the courts.<sup>153</sup> Similarly in the South Dakota case, it did not matter that “other state employees have served in the legislature in the past.”<sup>154</sup>

In 2016, the General Assembly attempted to create another exception, providing that legislators and persons appointed by legislators would constitute a majority of the Virginia Growth and Opportunity Board.<sup>155</sup> The Attorney General advised the Governor that this structure would probably be unconstitutional,<sup>156</sup> and the Assembly enacted a new bill providing for legislators to be a minority of the Board.<sup>157</sup> There is no negative implication in this Attorney General opinion that legislators on the Board would be permissible if legislators were a minority of the Board, or if only one legislator served on the Board. The Attorney General answered the only question he was asked, about a particular proposed statute that provided for majority control by the legislature.<sup>158</sup> He expressed no opinion on any lesser number of legislators filling executive-branch positions.

If legislators could be appointed to multi-member bodies in the other two branches so long as they did not constitute a majority, little would be left of separation of powers. Recall that the D.C. Circuit and the Supreme Court of Arizona held that even non-voting members violated separation of powers, because their only plausible purpose was to intrude legislative influence into an executive-branch body.<sup>159</sup> Suppose that a legislator, or three legislators, were appointed to the Virginia Supreme Court. No one would say that it doesn't matter because they would be only one or three votes on a

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<sup>150</sup> *State ex rel. Wallace v. Bone*, 286 S.E.2d 79, 88 (N.C. 1982).

<sup>151</sup> *Id.*

<sup>152</sup> *See id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Pitts v. Larson*, 638 N.W.2d 254, 259 (S.D. 2001) (Gors, J., concurring).

<sup>155</sup> H.B. 834, 2016 Gen. Assemb., Reg. Sess. (Va. 2016).

<sup>156</sup> 2016 OP. VA. ATT'Y GEN. 16-013, *supra* note 43.

<sup>157</sup> *See* VA. CODE ANN. § 2.2-2485 (2017).

<sup>158</sup> *See* 2016 OP. VA. ATT'Y GEN. 16-013, *supra* note 43.

<sup>159</sup> *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994); *State ex rel. Woods v. Block*, 942 P.2d 428, 436–37 (Ariz. 1997).

seven-judge court. It is no different if a legislator is appointed to be one member of a Board of Visitors.

Finally, there is an overlapping provision in article IV, section 4, which states the qualifications of legislators and explicitly prohibits holders of certain offices from serving in the legislature:

No person holding a salaried office under the government of the Commonwealth, and no judge of any court, attorney for the Commonwealth, sheriff, treasurer, assessor of taxes, commissioner of the revenue, collector of taxes, or clerk of any court shall be a member of either house of the General Assembly during his continuance in office; and his qualification as a member shall vacate any such office held by him.<sup>160</sup>

Most of the offices specifically mentioned are local offices, and the Separation of Powers Clauses arguably refer only to the powers of the Commonwealth; the prohibition on holding certain combinations of state and local offices adds something that is not unambiguously there in the Separation of Powers Clauses. But the first phrase of article IV, section 4, providing that “[n]o person holding a salaried office under the government of the Commonwealth” may serve in the legislature appears to be redundant with the two Separation of Powers Clauses.<sup>161</sup> Considered in isolation, it might give rise to a negative inference that persons holding unpaid offices may serve in the legislature, and carrying it one step further, that legislators might be appointed to unpaid offices in the executive branch.

But this reading would strip any meaning out of the Personal Separation Clause in article III as that clause applies to the legislature. It would permit legislators to serve in any unpaid office in either of the other branches of government. It is clear that the constitution’s drafters were not avoiding redundancy in this area, or adhering to any drafting convention that each word or clause must add some meaning independent of all the others. Each clause must mean something, but the meanings may overlap. We know this because they repeated the Departmental Separation Clause, almost verbatim, in article I, section 5<sup>162</sup> and article III, section 1.<sup>163</sup> Article IV, section 4 is about the qualifications of legislators and the intrusion of other office holders into the legislature.<sup>164</sup> The application of article III, section 1 under discussion here is about the converse: the intrusion of legislators into the other branches. Article IV, section 4 does not address that question.<sup>165</sup>

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<sup>160</sup> VA. CONST. art. IV, § 4.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* art. I, § 5.

<sup>163</sup> *Id.* art. III, § 1.

<sup>164</sup> *Id.* art. IV, § 4.

<sup>165</sup> *See id.*

There is an opinion of the Attorney General allowing a legislator to serve for ninety days as a temporary assistant Commonwealth's attorney, on the ground that that position is not mentioned in article IV, section 4.<sup>166</sup> The Attorney General treated this as a local office and not as "a salaried office under the government of the Commonwealth."<sup>167</sup> Perhaps because he viewed the office as local, or perhaps because he was asked only about article IV, section 4, the opinion does not mention either Separation of Powers Clause and is not an interpretation of those clauses.<sup>168</sup> The opinion relies in part on a Supreme Court decision interpreting a similar provision in article VII, section 6, which prohibits dual office holding in local government.<sup>169</sup> The court in that case did not mention the Separation of Powers Clause either, and it explicitly refused to consider another constitutional clause that one side relied on.<sup>170</sup> It read the implementing statute at issue as based exclusively on article VII, section 6 and as confining the dispute to that section.<sup>171</sup>

Perhaps the most relevant thing the court said is that it would follow the plain meaning of article VII, section 6: "When the language of an enactment is plain and unambiguous, as in this case, we apply its plain meaning."<sup>172</sup> Other Virginia cases also emphasize adherence to the plain meaning of the constitutional text.<sup>173</sup> And article III, section 1 plainly prohibits any one person from exercising the powers of more than one branch of government at the same time.<sup>174</sup> The three great branches of government shall be separate and distinct so that none exercise the powers of the others and so that no person exercises the power of more than one of them at the same time. This language should be enforced according to its terms.

## CONCLUSION

Appointing a legislator to a Board of Visitors would violate the separation of powers. It would violate the Departmental Separation Clauses by intruding into and influencing executive-branch functions. And it would flagrantly violate the Personal Separation Clause by permitting the same person to exercise the whole power of a legislative position and the whole power of an executive-branch position at the same time.

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<sup>166</sup> 2002 OP. VA. ATT'Y GEN. 02-024, <https://www.oag.state.va.us/files/Opinions/2002/02-024.pdf> [<https://perma.cc/DSX7-W8ZF>].

<sup>167</sup> *Id.*

<sup>168</sup> *See id.*

<sup>169</sup> *See id.* (citing *Bray v. Brown*, 521 S.E.2d 526, 527 (Va. 1999)).

<sup>170</sup> *Bray*, 521 S.E.2d at 528.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 527.

<sup>173</sup> *See, e.g.,* *Blount v. Clarke*, 782 S.E.2d 152, 155 (Va. 2016); *Town of Madison, Inc. v. Ford*, 498 S.E.2d 235, 236 (Va. 1998); *Scott v. Commonwealth*, 443 S.E.2d 138, 141 (Va. 1994); *Harrison v. Day*, 106 S.E.2d 636, 644 (Va. 1959).

<sup>174</sup> VA. CONST. art. III, § 1.