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# "FOREVER SEPARATE AND DISTINCT": SEPARATION OF POWERS IN NORTH CAROLINA

BY JOHN V. ORTH<sup>†</sup>

*In 1982 the North Carolina Supreme Court issued two opinions dealing with separation of powers in North Carolina state government. These opinions limit the power of the legislature to appoint its own members to agencies within the executive branch, and restrict the ability of the legislature to delegate legislative functions to a group of its members or to interfere with the budgetary management authority of the executive. Professor Orth challenges the basis for these opinions, examines considerations not addressed by the court, and suggests that the ultimate explanation may lie in public policy concerns. He concludes that public policy may not be served best by the results.*

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

North Carolina Constitution, Art. 1, § 6

Separation of powers is one of the fundamental principles of American constitutionalism on both the federal and state levels. Legislative, executive, and judicial powers are allocated to branches of government independent of each other. The purpose of this separation is the better preservation of the liberty of the citizen. To be effective, government must be endowed with various powers, but every power is subject to abuse. To limit the risk of abuse, the necessary powers of government are divided among three branches. Furthermore, the separation of powers is so contrived that in many cases one power restrains the abuse of another. The principle of restraining one power with another is known as checks and balances; it, too, is one of the fundamental principles of American constitutionalism.

Although separation of powers and the related principle of checks and balances underlie American constitutions, they have rarely figured as such in the important constitutional decisions rendered by American courts. Specific constitutional or statutory provisions have been most often at issue.<sup>1</sup> In early 1982, however, the North Carolina Supreme Court decided a case expressly

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1. See, e.g., *Chadha v. Immigration & Naturalization Serv.*, 634 F.2d 408, 420 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983). Although the court of appeals invalidated a federal statute on the ground that it violated separation of powers, it admitted that it had found no prior case holding that "the Legislature has impermissibly invaded the prerogative of the Executive or the Judiciary absent a clause in the [Federal] Constitution which confers the power upon another branch with great specificity." *Id.* at 420.

concerned with separation of powers in state government, *State ex rel. Wallace v. Bone*.<sup>2</sup> A month later, the Justices issued *Advisory Opinion in re Separation of Powers*,<sup>3</sup> which reaffirmed *Wallace*.

This Article examines the legal arguments relied on in *Wallace* and the advisory opinion. Finding those arguments unpersuasive or incomplete, it reviews other considerations not mentioned by the court and observes that important questions concerning the appointments power remain unanswered. It suggests that the judicial pronouncements on separation of powers may be better explained in terms of public policy rather than legal arguments, but it questions whether public policy is well served by the results.

### I. STATE EX REL. WALLACE V. BONE

Wallace was serving as a member of the State Environmental Management Commission (EMC)<sup>4</sup> by appointment of the Governor.<sup>5</sup> In 1980 the General Assembly increased the membership of the EMC from thirteen to seventeen and provided that, of the four additional members, two shall be members of the House of Representatives appointed by the Speaker of the House and two shall be members of the Senate appointed by the President of the Senate.<sup>6</sup> Wallace and another member of the EMC who also had been appointed by the Governor instituted an action in the nature of quo warranto<sup>7</sup> against Representative Bone and another who were appointed to the EMC by the Speaker. At the same time, two other members of the EMC appointed by the Governor brought an action for declaratory judgment against all four legislators appointed to the EMC. The issue presented by the actions, which were consolidated for trial and disposition, was whether the membership of defendants in the EMC at the same time they were serving in the legislature violated the separation of powers clause of the state constitution. The trial judge held

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

3. 305 N.C. 767, 295 S.E.2d 589 (1982).

4. The EMC was created in 1974. Reorganization of State Government Act, ch. 1262, § 19, 1973 N.C. Sess. Laws (2d Sess.) 380 (codified at N.C. GEN. STAT. § 143B-282 (1983)).

5. As originally constituted, the EMC had thirteen members appointed by the Governor from groups with certain vocational qualifications. Reorganization of State Government Act, ch. 1262, § 20, 1973 N.C. Sess. Laws (2d Sess.) 381 (codified at N.C. GEN. STAT. § 143B-283(a) (1978)).

6. Act Relating to the Authority of the Environmental Management Commission, ch. 1158, § 6, 1979 N.C. Sess. Laws (2d Sess.) 92 (codified at N.C. GEN. STAT. § 143B-283(d) (1983)) (amended 1983 to provide that "the General Assembly shall appoint four members, two upon the recommendation of the Speaker of the House of Representatives, and two upon the recommendation of the President of the Senate").

7. The royal writ quo warranto (by what warrant) was used in the Middle Ages to test claimed rights, especially to jurisdiction. D. SUTHERLAND, QUO WARRANTO PROCEEDINGS IN THE REIGN OF EDWARD I, 1278-1294 (1963). In the sixteenth century the writ was replaced by an information filed by the attorney general. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 229-30 (7th ed. 1956). The writ of quo warranto and proceedings by information in the nature of quo warranto are abolished in North Carolina. N.C. GEN. STAT. § 1-514 (1969). Nonetheless, the action of quo warranto is still spoken of, although in fact what is involved is a civil action to try title to an office. Before a private person may bring such an action, he must secure leave from the Attorney General by providing satisfactory security to indemnify the state against all expenses accruing in consequence of the action. N.C. GEN. STAT. § 1-516 (1969).

that it did not, placing emphasis on the "clear minority position of the legislators on the Commission."<sup>8</sup> Reversing the judgment below, the North Carolina Supreme Court<sup>9</sup> unanimously held that the General Assembly lacks the constitutional authority to mandate the appointment of legislators to bodies in the executive branch.<sup>10</sup>

In reaching its decision, the court announced that it had considered "[1] the history of the principle of separation of powers in our state and nation, [2] the decisions of other jurisdictions in our nation respecting the principle, and [3] the specific provisions of our constitution and the statutes involved."<sup>11</sup>

### A. History of Separation of Powers

In its historical review, the court examined the language of the North Carolina and Federal Constitutions in light of some contemporary expressions of opinion. With regard to the state constitutional provision concerning separation of powers, the court also considered judicial opinions referring to the provision. A careful examination reveals, however, that the court's historical argument is seriously flawed.

#### 1. Constitutional Provisions

The principle of separation of powers has been explicitly proclaimed in each successive North Carolina Constitution with only slight variations in wording.<sup>12</sup> The first state constitution, adopted in 1776, declared "[t]hat the

8. *State ex rel. Wallace v. Bone*, Nos. 81CVS1191 & 81CVS1192, unpublished op. at 6 (Wake Co. Super. Ct. March 18, 1981).

9. Exercising the discretion authorized by N.C. GEN. STAT. § 7A-31 (1981), the supreme court had certified the case for review without a determination by the court of appeals. *Wallace*, 304 N.C. at 595, 286 S.E.2d at 81.

10. *Wallace*, 304 N.C. at 608, 286 S.E.2d at 88 (1982). The court did not consider the impact of its holding on the continued existence of the EMC. Presumably the Commission is permitted to function as originally constituted. See *supra* note 5.

Nor did the court consider whether the official actions of the EMC taken during the service of the legislative members were valid. The court had earlier held that in the absence of a legally existing office there can be no de facto officer. *Idol v. Street*, 233 N.C. 730, 65 S.E.2d 313 (1951). Other courts, in similar cases, have held that officers appointed pursuant to statutes later declared invalid were nonetheless de facto officers during their time of service. See, e.g., *Book v. State Office Bldg. Comm'n*, 238 Ind. 120, 169, 149 N.E.2d 273, 298 (1958); *State ex rel. Schneider v. Bennett*, 219 Kan. 285, 301, 547 P.2d 786, 800 (1976). In response to the holding in *Wallace* major changes were made in the operation of state government. Separation of Powers Act of 1982, ch. 1191, 1981 N.C. Sess. Laws (Reg. Sess.) 1982 (codified in scattered sections of N.C. GEN. STAT.). Further legislation may be anticipated, restoring nondelegable legislative powers to the General Assembly and conditioning the exercise of certain executive powers on non-binding consultation with a legislative committee, the Advisory Budget Commission. LEGISLATIVE RESEARCH COMM'N, SEPARATION OF POWERS: REPORT TO THE 1983 GENERAL ASSEMBLY OF NORTH CAROLINA 3-4 (1983).

11. *Wallace*, 304 N.C. at 595, 286 S.E.2d at 81 (numbers added).

12. N.C. CONST. of 1776, Declaration of Rights, § 4: "That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other."

N.C. CONST. of 1868, art. I, § 8: "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other."

N.C. CONST. of 1970, art. I, § 6: "The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other."

legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other."<sup>13</sup> In its opinion in *Wallace*, the court traced this declaration to instructions from the counties to their delegates to the North Carolina Provincial Congress that drafted the constitution.<sup>14</sup> It also observed that the present constitution, adopted in 1970, not only retains a separation of powers clause but also expressly allocates the "legislative power," the "executive power," and the "judicial power" to the respective branches of state government.<sup>15</sup>

The United States Constitution of 1787, although it contains no explicit provision regarding separation of powers comparable to the North Carolina declaration, clearly incorporates the principle. The three powers of government are allocated to independent branches.<sup>16</sup> To explain the Founding Fathers' fondness for separation of powers the court quoted from *The Federalist*:

13. N.C. CONST. of 1776, Declaration of Rights, § 4.

14. Instructions to the Mecklenburg County delegation included the following:

4. That you shall endeavor that the form of Government shall set forth a bill of rights containing the rights of the people and of individuals which shall never be infringed in any future time by the law-making power or other derived powers in the State.

5. That you shall endeavor that the following maxims be substantially acknowledged in the Bills of Rights (viz):

1st. Political power is of two kinds, one principal and superior, the other derived and inferior.

2nd. The principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ.

6. That you shall endeavor that the Government shall be so formed that the derived inferior power shall be divided into three branches distinct from each other, viz:

The power of making laws

The power of executing laws and

The power of Judging.

.....

9. The law making power shall be restrained in all future time from making any alteration in the form of Government.

Instructions to the Orange County delegation included the following:

Fourthly. We require that in framing the civil constitution the derived inferior power shall be divided into three branches, to wit: The power of making laws, the power of executing and the power of judging.

Fifthly. That the power of making laws shall have authority to provide remedies for any evils which may arise in the community, subject to the limitations and restraints provided by the principal supreme power.

.....

Seventhly. That the executive power shall have authority to apply the remedies provided by the law makers in that manner only which the laws shall direct, and shall be entirely distinct from the power of making laws.

Eighthly: That the judging power shall be entirely distinct from and independent of the law making and executive powers.

Ninthly: *That no person shall be capable of acting in the exercise of any more than one of these branches at the same time lest they should fail of being the proper checks on each other and by their united influence become dangerous to any individual who might oppose the ambitious designs of the persons who might be employed in such power.*

*Wallace*, 304 N.C. at 596-98, 286 S.E.2d at 82-83 (quoting 10 COLONIAL RECORDS OF NORTH CAROLINA 870a, 870b, 870g, 870h (W. Saunders ed. 1890)) (emphasis added by the Court).

For an investigation of the deeper roots of separation of powers see Sharpe, *The Classical American Doctrine of the Separation of Powers*, 2 U. CHI. L. REV. 385 (1935).

15. N.C. CONST. art. II, § 1; art. III, §1; art. IV, § 1.

16. U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1.

In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and the usurpations are guarded against, by a division of the government into *distinct and separate* departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among *distinct and separate* departments.<sup>17</sup>

The court also repeated a passage from George Washington's farewell address of 1796, warning against encroachment by one branch on the powers of another.<sup>18</sup>

All the citations of historical authority in *Wallace* support these propositions: (1) the drafters of the federal and state constitutions intended to separate the powers of government and, (2) they expected the separated powers to check and balance one another. Both points may be conceded. The important question remaining, however, is this: What limit does the principle of separation of powers, in and of itself, impose on the power of the legislature?

The same author whose passage from *The Federalist* the court quoted in support of separation of powers had occasion in an earlier Number to comment on the actual assignment of powers in North Carolina:

If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom [separation of powers] has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct . . . The constitution of North Carolina, which declares "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other," refers, at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.<sup>19</sup>

The same constitution, in other words, that mandated separation of powers

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17. 304 N.C. at 598, 286 S.E.2d 83 (quoting THE FEDERALIST No. 51, at 350-51 (J. Madison) (J. Cooke ed. 1961) (emphasis added by the court). The court attributed this Number of THE FEDERALIST to Alexander Hamilton, "one of the drafters of the federal constitution and keeper of copious notes." *Id.* There is persuasive evidence that Number 51, was actually written by James Madison. THE FEDERALIST xxvi-xxix (J. Cooke ed. 1961); Brant, *Settling the Authorship of The Federalist*, 67 AM. HIST. REV. 71, 71 (1961).

18. It is important, likewise, that the habit of thinking in a free country should inspire caution, in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of the love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position.

*Wallace*, 304 N.C. at 599, 286 S.E.2d at 83 (quoting *Book v. State Office Bldg. Comm'n*, 238 Ind. 120, 162, 149 N.E.2d 273, 294 (1958)).

19. THE FEDERALIST No. 47, at 327-30 (J. Madison) (J. Cooke ed. 1961). This Number, too, may be attributed to Madison. *Id.* at xxi.

also provided for the election by the General Assembly of the Governor,<sup>20</sup> the members of the Council of State,<sup>21</sup> the Attorney General,<sup>22</sup> the State Treasurer,<sup>23</sup> the State Secretary,<sup>24</sup> and all the judges.<sup>25</sup> This arrangement seems to have conformed to the wishes of the people of North Carolina.<sup>26</sup> With only one modification,<sup>27</sup> it endured for almost a century, until the upheaval of the Civil War led to the drafting of the constitution of 1868.

Thus the court's argument based on the history of the separation of powers clause is unpersuasive. While it is clear that North Carolina's Founding Fathers were committed to the principle of separation of powers, it is equally clear from a reading of the entire text of the constitution of 1776 that they failed to discern any violation of that principle in the predominance of the legislature over the other branches of government.<sup>28</sup>

20. N.C. CONST. of 1776, § 15.

21. *Id.* § 16. The Council of State, composed of seven members, advised the Governor in the execution of his office. Its consent was required before the Governor could take certain important actions.

22. *Id.* § 13.

23. *Id.* § 22.

24. *Id.* § 24.

25. *Id.* § 13.

26. Among the instructions to the Mecklenburg County delegation to the Provincial Congress are to be found the following:

16. You shall endeavour that all Treasurers and Secretaries for this State shall be appointed by the General Assembly.

17. You shall endeavour that all Judges of the Court of Equity, Judges of the Court of Appeals and Writs of Error and all Judges of the Superior Courts shall be appointed by the General Assembly and hold their office during one year.

10 COLONIAL RECORDS OF NORTH CAROLINA 870d (W. Saunders ed. 1890).

This legislative predominance reflected an aversion to the executive supremacy of colonial days. H. LEFLER & A. NEWSOME, *NORTH CAROLINA: THE HISTORY OF A SOUTHERN STATE* 210 (3d ed. 1973).

27. The extensive amendments to the constitution made in 1835 first provided for the direct election of the Governor by the voters. N.C. CONST. of 1776, amend. art. II, § 1 (1835).

28. Students of American constitutional history have observed a similar understanding of fundamental principles on the part of other drafters of early constitutions:

The bitter rivalry between governors and assemblies in colonial times had instilled in the people a deep distrust of the executive, and the [first state] constitutions reflected this . . . . Under most of the state constitutions the governor was elected by the assembly and was intended to be its creature . . . . Even the appointive power, by long tradition an executive prerogative, was often drastically impaired by provisions for appointments by the legislature or council . . . .

The ascendancy of legislature over executive was in curious contrast to another provision, concerning the separation of powers. Some of the constitutions specified the distinct existence of the three principal departments of government.

A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT* 91-92 (5th ed. 1976).

[T]he framers of the [first state] constitutions accepted the doctrine of separation of powers, . . . . But, while they accepted the theory of separation of powers, they did not in practice establish such separation. The legislative bodies were not only made the dominant branch of government, but in many cases exercised administrative or executive functions. The legislatures appointed most of the officials in Virginia and the two Carolinas . . . .

F. GREEN, *CONSTITUTIONAL DEVELOPMENT OF THE SOUTH ATLANTIC STATES, 1776-1860*, at 83 (1930).

## 2. North Carolina Decisional Law

The state supreme court found *Wallace* to be a case of first impression. The court took the "absence of cases which have come to this court contending that a branch of our state government violated the separation of powers principle" to be an indication that "North Carolina, for more than 200 years, has strictly adhered to the principle of separation of powers."<sup>29</sup> The court cited only two cases, *Bayard v. Singleton*<sup>30</sup> and *State v. Bell*,<sup>31</sup> "in which members of the judiciary have expressed themselves on the principle."<sup>32</sup>

*Bayard v. Singleton* is one of the most famous cases ever decided in North Carolina. Sitting at New Bern in 1787, the superior court held a statute void because contrary to the state constitution.<sup>33</sup> Decided at a time when the relation between constitution and statute was still unclear, *Bayard* has been hailed as the first reported case supporting what became another one of the fundamental principles of American constitutionalism, judicial review.<sup>34</sup>

Since the principle of judicial review was not at issue in *Wallace*, the court referred not to the holding in *Bayard* but to some expressions by Judge Samuel Ashe that were clearly obiter dictum:<sup>35</sup>

[A]t the time of our separation from Great Britain, we were thrown into a similar situation with a set of people shipwrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system or those fundamental principles comprised in the constitution, dividing the powers of government into separate and distinct branches, to wit: the legislative, the judicial and executive, and assigning to each, several and distinct powers, and prescribing their several limits and boundaries . . . .<sup>36</sup>

This may be accepted as an unexceptionable statement of historical fact.

The court was wrong, however, when it described this dictum as "[o]bviously referring to our national government."<sup>37</sup> The reference was to

29. *Wallace*, 304 N.C. at 599, 286 S.E.2d at 83-84.

30. 1 N.C. (1 Mart.) 5 (1787).

31. 184 N.C. 701, 115 S.E. 190 (1922).

32. *Wallace*, 304 N.C. at 599, 286 S.E.2d at 84.

33. *Bayard*, 1 N.C. (1 Mart.) at 7.

34. B. COXE, AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION 68 (1893); Biggs, *The Power of the Judiciary Over Legislation*, in 17 PROCEEDINGS OF NORTH CAROLINA BAR ASSOCIATION 5, 10 (1915); 1 R. CONNOR, NORTH CAROLINA: REBUILDING AN ANCIENT COMMONWEALTH, 1584-1925, at 396 (1929); W. POWELL, NORTH CAROLINA, A BICENTENNIAL HISTORY 85 (1977). See also A. KELLY & W. HARBISON, *supra* note 28, at 94.

35. With the liberty of the early reporters, Martin appended to Judge Ashe's comment the observation: "this he said without disclosing a single sentiment upon the cause of the proceeding, or the law introduced in support of it." 1 N.C. (1 Mart.) at 6. The court in *Wallace* recognized that Ashe had "deviated from the case under consideration." 304 N.C. at 599, 286 S.E.2d at 84.

36. *Bayard*, 1 N.C. (1 Mart.) at 6.

37. *Wallace*, 304 N.C. at 599, 286 S.E.2d at 84.

state government instead. The words were uttered at the May term 1786.<sup>38</sup> Although *Bayard* was not decided until the November term 1787, it was opened more than a year earlier. When Judge Ashe used the quoted language, the constitutional convention that was to draft the federal constitution had not even been called, let alone convened.<sup>39</sup> Once the chronology is established, the references become clear. The "country" that separated from Great Britain is North Carolina, not the United States. The "Congress" that established the government is the North Carolina Provincial Congress.<sup>40</sup> The "constitution, dividing the powers of government into separate and distinct branches" is the North Carolina Constitution of 1776.<sup>41</sup> As an observation on the state's first constitution, the dictum shows that a contemporary judge believed it embodied the principle of separation of powers despite the predominance of the legislature.

The second judicial expression on separation of powers quoted by the court in *Wallace* is from Judge W. P. Stacy's dissent in *State v. Bell*.<sup>42</sup> Judge Stacy was not dissenting from a holding expressly involving separation of powers; *Bell* was instead a case concerning the proper interpretation of a criminal statute. The majority had given what Judge Stacy viewed as a liberal interpretation, and he dissented principally on the ground that criminal statutes were to be construed strictly. Bolstering his argument about statutory construction, Judge Stacy stigmatized liberal interpretation as judicial legislation in violation of the principle of separation of powers.<sup>43</sup> In so doing, he joined the long line of judges who, usually in dissenting opinions, charge

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38. *Bayard*, 1 N.C. (1 Mart.) at 5-6.

39. In September, 1786, the Annapolis Convention issued the call for the Constitutional Convention to meet in May, 1787. A. KELLY & W. HARBISON, *supra* note 28, at 106.

40. The Provincial Congress not only drafted the constitution of 1776, it also adopted it without submitting it to the people. The court in *Wallace* had earlier recognized this fact. 304 N.C. 596 n.2, 286 S.E.2d 82 n.2 (citing H. LEFLER & A. NEWSOME, *supra* note 26, at 221). It explains Ashe's otherwise curious reference: "the people . . . by their delegates, met in Congress, and formed that system . . . comprised in the constitution . . ." 1 N.C. (1 Mart.) at 6. The federal constitution, drafted by the Constitutional Convention, was adopted by conventions of the several states. U.S. CONST. art. VII.

41. N.C. CONST. of 1776, Declaration of Rights, § 4.

42. 184 N.C. 701, 719, 115 S.E. 190, 199 (1922) (Stacy, J., dissenting).

43. We must hew to the line and let the chips fall wherever they may. And though we may think the law ought to be otherwise, this should not blind our judgment to what it really is. The duty of legislation rests with another department of the Government. It is ours only to declare the law, not to make it. *Moore v. Jones*, 76 N.C. 189. The people of North Carolina have ordained in their Constitution (Art. I, § 8) that the legislative, executive, and supreme judicial powers of the Government should be and ought to remain forever separate and distinct from each other. Such is their expressed will, and from the earliest period in our history they have endeavored with sedulous care to guard this great principle of the separation of the powers. In this country those who make the laws determine their expediency and wisdom, but they do not administer them. The chief magistrate who executes them is not allowed to judge them. To another tribunal is given the authority to pass upon their validity and constitutionality, "to the end that it be a government of laws and not of men." From this unique political division results our elaborate system of checks and balances—a complication and refinement which repudiates all hereditary tendencies and makes the law supreme. In short, it is one of the distinct American contributions to the science of government . . .

*Wallace*, 304 N.C. at 600-01, 286 S.E.2d at 84 (quoting *State v. Bell*, 184 N.C. at 719, 115 S.E. at 199). In the passage quoted, the last five sentences are repeated almost verbatim from Judge

judges who have reached a different conclusion with exceeding the limits of judicial power.<sup>44</sup> This forensic commonplace does nothing to better the understanding of separation of powers.

Notwithstanding the asserted absence of cases involving a separation of powers claim, the *North Carolina Reports* contain numerous such cases, some of them quite recent.<sup>45</sup> In particular, the delegation of legislative authority to administrative agencies has provoked several recent cases raising the constitutional issue. In 1978 the court observed:

Article I, section 6 of the North Carolina Constitution provides that the legislative, executive and judicial branches of government "ought to be forever separate and distinct from each other." Legislative power is vested in the General Assembly by Article II, section 1 of the Constitution. It is obvious that if interpreted literally the Constitution would absolutely preclude any delegation of legislative power. However, it has long been recognized by this Court that the problems which a modern legislature must confront are of such complexity that strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers.<sup>46</sup>

Although the General Assembly may not delegate its supreme legislative power to an agency, it may constitutionally delegate a limited portion of its power over some specific subject matter if it prescribes adequate guiding

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Stacy's majority opinion in *Long v. Watts*, 183 N.C. 99, 103-04, 110 S.E. 765, 767 (1922). Compare the above with MASS. CONST. of 1780, part 1, art. 30:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

44. For a striking statement of the same theme by a distinguished contemporary of Judge Stacy, see *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924) (Brandeis, J. dissenting) ("an exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review").

45. See, e.g., *In re The Broad & Gales Creek Community Ass'n*, 300 N.C. 267, 266 S.E.2d 645 (1980) (statute delegating legislative power to Department of Natural Resources and Community Development not violative of separation of powers because adequate guiding standards provided); *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978) (statute delegating legislative power to Coastal Resources Commission not violative of separation of powers because adequate guiding standards provided); *Jernigan v. North Carolina*, 279 N.C. 556, 184 S.E.2d 259 (1971) (statute granting judicial power to Board of Paroles not violative of separation of powers); *State Educ. Assistance Auth. v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970) (statute delegating legislative power to Authority not violative of separation of powers because sufficient legislative standards implicit); *North Carolina Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965) (statute delegating legislative power to Authority not violative of separation of powers because sufficient guiding standards provided); *Cox v. City of Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940) (exercise of quasi-judicial and administrative functions by Housing Authority created under state law not violative of separation of powers).

46. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. at 696-97, 249 S.E.2d at 410. N.C. CONST. of 1970, art. I, § 6 provides that the powers "shall be" forever separate and distinct from each other. The court in *Adams* is actually quoting the superseded N.C. CONST. of 1868, art. I, § 8. For the separation of powers clause in each successive North Carolina Constitution, see *supra* note 12.

standards.<sup>47</sup>

Thus, the argument in favor of the result in *Wallace* based on North Carolina decisions is incomplete. In addition to the dictum and dissenting opinion cited by the court, there are cases on the delegation of legislative power that are relevant. They indicate that the principle of separation of powers has not been strictly adhered to; instead, reasonable exceptions have been made in consideration of the complex problems dealt with by modern government. At issue in *Wallace* was whether another exception should be carved out in favor of legislative members of administrative agencies.

### B. *Decisional Law of Other States and of the United States*<sup>48</sup>

The second factor considered by the court in reaching its decision in *Wallace* was foreign decisional law. Such law should be relevant only insofar as the litigated facts are similar and the judicial reasoning is persuasive. The North Carolina trial judge who found no violation of separation of powers was influenced by the reasoning in cases from South Carolina<sup>49</sup> and Kansas<sup>50</sup> as well as in one federal case.<sup>51</sup> The North Carolina Supreme Court rejected the state cases, finding that "South Carolina and Kansas have deviated from the separation of powers principle."<sup>52</sup> Instead, it preferred decisions from Indiana,<sup>53</sup> West Virginia,<sup>54</sup> Georgia,<sup>55</sup> and Colorado.<sup>56</sup> In addition, the supreme court cited four other decisions<sup>57</sup> and two advisory opinions;<sup>58</sup> it adverted briefly to one federal case.<sup>59</sup>

#### 1. Decisional Law of Other States

Neither the trial judge nor the supreme court quoted the constitutional

47. *In re The Broad & Gales Creek Community Ass'n*, 300 N.C. 267, 266 S.E.2d 645 (1980); *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978); *State Educ. Assistance Auth. v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970); *North Carolina Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965); *Cox v. City of Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940).

48. As shown in a recent article, problems concerning separation of powers arise in countries other than the United States. Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363 (1982).

49. *State ex rel. McLeod v. Edwards*, 269 S.C. 75, 236 S.E.2d 406 (1977). See also *Guidry v. Roberts*, 335 So.2d 438 (La. 1976), which is to the same effect as *McLeod*, but not cited in *Wallace*.

50. *State ex rel. Schneider v. Bennet*, 219 Kan. 285, 547 P.2d 786 (1976). Although not cited by the North Carolina courts, an Advisory Opinion by the Supreme Court of Delaware relied extensively on *Schneider*. Opinion of the Justices, 380 A.2d 109 (Del. 1977).

51. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

52. *Wallace*, 304 N.C. at 604, 286 S.E.2d at 85.

53. *Book v. State Office Bldg. Comm'n*, 238 Ind. 120, 149 N.E. 2d 273 (1958).

54. *State ex rel. State Bldg. Comm'n v. Bailey*, 151 W. Va. 79, 150 S.E.2d 449 (1966).

55. *Greer v. Georgia*, 233 Ga. 667, 212 S.E.2d 836 (1975).

56. *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220 (1912).

57. *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976); *Ahearn v. Bailey*, 104 Ariz. 250, 451 P.2d 30 (1969); *Township of Dearborn v. Dail*, 334 Mich. 673, 55 N.W.2d 201 (1952); *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 208 N.W.2d 780 (1973).

58. *In re Advisory Opinion to the Governor*, 276 So. 2d 25 (Fla. 1973); *In re Opinion of the Justices to the Governor*, 369 Mass. 990, 341 N.E.2d 254 (1976).

59. *O'Donoghue v. United States*, 289 U.S. 516 (1933).

provisions construed in the decisions from other states. Failure to compare the foreign constitutions with North Carolina's lessens the persuasiveness of these citations. In the following discussion, the separation of powers clause involved in each case will be set out first.

(a) South Carolina

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.<sup>60</sup>

*State ex rel. McLeod v. Edwards*<sup>61</sup> was an original action in the South Carolina Supreme Court in which the Attorney General attacked the constitutionality of legislation creating the State Budget and Control Board. The Board was composed of the Governor, the State Treasurer, the Comptroller General, the Chairman of the Senate Finance Committee, and the Chairman of the House Ways and Means Committee. The Board was "an executive body dealing primarily with the fiscal affairs of the State government."<sup>62</sup> The legislation was challenged as violating the separation of powers clause set out above.<sup>63</sup> The court noted that the constitutionality of the Board had been sustained in previous cases<sup>64</sup> against attacks alleging violation of the dual office holding provision<sup>65</sup> and the separation of powers clause;<sup>66</sup> it further noted that subsequent to those decisions the article of the state constitution containing the separation of powers clause had been rewritten but the language on that point had been retained unchanged. The court held that ratification of the rewritten article implied adoption of the prior judicial construction.<sup>67</sup> Ex-

60. S. C. CONST. art. I, § 8.

61. 269 S.C. 75, 236 S.E.2d 406 (1977).

62. *Id.* at 78, 236 S.E.2d at 406-07.

63. There was also a contention that the Board was an unconstitutional invasion of the executive power confided to the Governor by S.C. CONST. art. IV, § 1. The court rejected this argument, finding that the composition of the Board did not limit the Governor's powers. *McLeod*, 269 S.C. at 84, 236 S.E.2d at 409.

64. *Mims v. McNair*, 252 S.C. 64, 165 S.E.2d 355 (1969); *Elliott v. McNair*, 250 S.C. 75, 156 S.E.2d 421 (1967).

65. S.C. CONST. of 1895, art. II, § 2:

Every qualified elector shall be eligible to any office to be voted for, unless disqualified by age, as prescribed in this Constitution. But no person shall hold two offices of honor or profit at the same time: *Provided*, that any person holding another office may at the same time be an officer in the militia or a Notary Public.

The dual office holding provision now appears in S.C. CONST. art. II, § 5. See *Harper v. Schooler*, 258 S.C. 486, 189 S.E.2d 284 (1972).

66. S.C. CONST. of 1895, art. I, § 14 (now S.C. Const. art. I, § 8).

67. It is uncertain whether the holding in *McLeod* extends to administrative agencies other than the State Budget and Control Board. See *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 44 S.E.2d 88 (1947) (invalidating an act that established a board to supervise the erection and maintenance of an auditorium because the board included a state senator and representative).

Subsequent to the decision in *McLeod* the South Carolina Supreme Court held that delegation of legislative power to a portion of the legislature violates separation of powers. *Aiken County Bd. of Educ. v. Knotts*, 274 S.C. 144, 262 S.E.2d 14 (1980).

plaining the prior interpretation, the court emphasized the facts that the legislators were in a minority on the Board and that their presence represented "a cooperative effort by making available to the executive department the special knowledge and expertise of the chairman [*sic*] of the two finance committees in the fiscal affairs of the State and the legislative process in general."<sup>68</sup>

(b) Kansas

[No distinct separation of powers clause]

*State ex rel. Schneider v. Bennett*<sup>69</sup> was an action of quo warranto brought by the Attorney General to prevent legislators serving on the State Finance Council from exercising various powers conferred by statute. The Council was composed of the Governor, the President pro tempore of the Senate, the Speaker of the House of Representatives, the Chairman of the Senate Ways and Means Committee, the Chairman of the House Ways and Means Committee, the Majority Floor Leader of the Senate, the Minority Floor Leader of the Senate, the Majority Floor Leader of the House, and the Minority Floor Leader of the House. The Council was vested with a wide array of powers,<sup>70</sup> including supervision of the operations of the Department of Administration, authority to make allocations from the State Emergency Fund and to borrow money for short terms on behalf of the state, and authority to transfer and expend state money. The legislation conferring these powers was challenged as violating separation of powers and as an unconstitutional delegation of leg-

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68. *McLeod*, 269 S.C. at 83, 236 S.E.2d at 409.

69. 219 Kan. 285, 547 P.2d 786 (1976).

70. The court listed some of these powers as follows:

- (1) The power to fix or approve the compensation paid to state officers and employees;
- (2) Certain powers under the civil service act, such as the adoption of rules and regulations for carrying out the act, approval of assignment of positions in the civil service to classes, and the assignment of classes to salary ranges, approval of the pay plan containing a schedule of salary and wage ranges and steps, approval of terms upon which state agencies may furnish housing, food service and other employee maintenance to state officers and employees in the civil service, and the determination of the cost and value of such benefits;
- (3) The determination of appeals by state agencies from actions by the secretary of administration in the allotment of the general fund or special revenue funds when insufficient to cover appropriations from such funds;
- (4) Determination of the amount, not less than 25 cents, to be credited by the secretary of corrections to inmates for employment;
- (5) Resolution of disputes between the director of architectural services and the head of a state agency over construction of buildings, major repairs, or improvements authorized by the legislature for the state agency;
- (6) Setting of limitations on payment of moving expenses of state employees;
- (7) Approval of rules and regulations governing operations of the department of administration and each of its divisions;
- (8) Determination of appeals by state agencies from decisions of the secretary of administration or director of computer services;
- (9) Approval of rules and regulations to carry out the uniform standard code for mobile homes and recreational vehicles;
- (10) Approval of the transfer by a state agency of a part of an appropriated item to any other item of its appropriation.

*Id.* at 297-98, 547 P.2d at 797.

islative powers without adequate guidelines. Although the Kansas Constitution, like the United States Constitution, lacks an express provision mandating the separation of powers, the Kansas Supreme Court found the principle to be implicit in the state constitution. Nonetheless, the court was of the opinion that "individual members of the legislature may serve on administrative boards or commissions where such service falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of the government."<sup>71</sup> After examining the particular duties involved, the court held the supervisory power over the Department of Administration was a violation of separation of powers, but it found no such violation with regard to the power to draw on the Emergency Fund and to borrow, since the latter actions could be taken only by unanimous vote of the Council, of which the Governor was a member. The powers to transfer and expend money were held to be unconstitutional as a delegation of legislative powers without adequate guidelines.<sup>72</sup>

### (c) Indiana

The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.<sup>73</sup>

*Book v. State Office Building Commission*<sup>74</sup> was a taxpayer's action to enjoin members of the Commission from proceeding further with the construction of a State Office Building.<sup>75</sup> The membership of the Commission included the Governor, the Lieutenant Governor, the members of the State Budget Committee, one member of the Senate appointed by the Lieutenant Governor, and one member of the House appointed by the Speaker. Since all the members of the State Budget Committee except the Budget Director were also members of the General Assembly, legislators constituted a majority of the Commission. The legislation creating the Commission was challenged as violating various provisions of the Indiana Constitution, including the dual

71. *Id.* at 290, 547 P.2d at 792, *quoted with disapproval in Wallace*, 304 N.C. at 606, 286 S.E.2d at 87. For a subsequent Kansas decision finding no usurpation, see *Parcell v. Kansas*, 228 Kan. 794, 620 P.2d 834 (1980) (majority of members of Governmental Ethics Comm'n appointed by legislative leadership).

72. In a subsequent case, with the same caption as the principal case, various fiscal powers of the State Finance Council were held not to violate separation of powers. *State ex rel. Schneider v. Bennett*, 222 Kan. 11, 564 P.2d 1281 (1977).

73. IND. CONST. art. III, § 1.

74. 238 Ind. 120, 149 N.E.2d 273 (1958).

75. The Court described the duties of the State Office Building Commission as follows:

[T]o acquire a site within the City of Indianapolis, Indiana, and to construct and erect thereon with all necessary equipment, a State Office Building suitable and adequate to house the offices of the various departments and agencies of the State Government . . . to issue and sell interest bearing State Office Building revenue debentures, and . . . to enter into appropriate agreements with the various State departments and agencies for the use and occupancy of such building.

*Id.* at 131, 149 N.E.2d at 279.

office holding provision<sup>76</sup> and the separation of powers clause set out above. The Indiana Supreme Court rejected the claim of unconstitutional dual office holding because the provision applies to "lucrative" offices and the Commissioners receive only reimbursement of expenses. But the court held that the presence of legislators on a commission with executive or administrative duties violated separation of powers.

(d) West Virginia

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall 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 justices of the peace shall be eligible to the legislature.<sup>77</sup>

*State ex rel. State Building Commission v. Bailey*<sup>78</sup> was an original action in the Supreme Court of West Virginia for a writ of mandamus to require the Secretary of State to validate a bond certificate issued on the order of the State Building Commission. The Secretary of State had refused on the ground that the Commission included legislators in violation of the state constitution's separation of powers clause. The Commission was composed of the Governor, the Attorney General, the Treasurer, the Auditor, the Commissioner of Agriculture, the Secretary of State, the President of the Senate, the Speaker of the House, the Minority Leader of the Senate, and the Minority Leader of the House. The Commission was "to provide for the construction of buildings for specified purposes and to provide for the payment of the designated projects by the issuance and sale of the bonds authorized by the statute."<sup>79</sup> Relying heavily on *Book*, the court found the membership of legislators to be unconstitutional but upheld the constitutionality of the Commission stripped of the legislative members and issued the writ.

(e) Georgia

The legislative, judicial and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.<sup>80</sup>

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76. IND. CONST. art. II, § 9:

*Effect of holding lucrative offices.* No person holding a lucrative office or appointment under the United States or under this State, shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this Constitution expressly permitted: Provided, that offices in the militia to which there is attached no annual salary, and the office of Deputy Postmaster where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative: And provided, also, that counties containing less than one thousand polls, may confer the office of Clerk, Recorder, and Auditor, or any two of said offices, upon the same person.

77. W. VA. CONST. art. V, § 1.

78. 151 W. Va. 79, 150 S.E.2d 449 (1966).

79. *Id.* at 83, 150 S.E.2d at 452.

80. GA. CONST. art. I, § 2, ¶ 3.

*Greer v. State*<sup>81</sup> was an action challenging the constitutionality of the legislation creating the World Congress Center Authority. The governing body of the Authority consisted of twenty members, six of whom were also members of the General Assembly. The Authority was "to plan, construct, erect, acquire, own, repair, remodel, maintain, add to, extend, improve, equip, operate, and manage" the Center.<sup>82</sup> Quoting from *Bailey*, the Georgia Supreme Court held that the membership of legislators on an executive Authority violated the separation of powers clause set out above.

(f) Colorado

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.<sup>83</sup>

*Stockman v. Leddy*<sup>84</sup> was an action in mandamus to compel the State Auditor to pay for services rendered to a joint legislative committee. The Auditor questioned the constitutionality of the committee which was empowered to conduct an investigation and to take action to protect the State's property. The Colorado Supreme Court found the legislation an attempt to confer executive power on a small group of legislators and held it unconstitutional under the separation of powers clause.

2. Federal Decisional Law

Although the United States Constitution contains no distinct separation of powers clause, it has been recognized from the beginning as an embodiment of that principle.<sup>85</sup> Because constitutional litigation in the first century of the Republic rarely raised the abstract issue of separation of powers but concerned instead the interpretation of specific provisions, little decisional law accumulated on the point. Not until the advent of the administrative agency with quasi-legislative and quasi-judicial powers was the United States Supreme Court forced to confront the issue. The Interstate Commerce Commission (ICC), created in 1887, was the first permanent administrative agency, and the cases involving the ICC during the first three decades of its existence reveal a cautious acceptance of this departure from the principle of separation of

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81. 233 Ga. 667, 212 S.E.2d 836 (1975).

82. *Id.* at 667, 212 S.E.2d at 837.

83. COLO. CONST. art. III.

84. 55 Colo. 24, 129 P. 220 (1912).

85. THE FEDERALIST Nos. 47 & 48 (J. Madison). A decade ago Arthur Selwyn Miller challenged the conventional wisdom that the drafters of the federal constitution separated the powers of government to reduce temptations for erring mortals; instead, Miller argued, the Founding Fathers were seeking greater efficiency in government. Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583 (1973).

powers.<sup>86</sup>

Nonetheless, the Court has periodically reaffirmed the principle, as in 1933 in *O'Donoghue v. United States*,<sup>87</sup> an opinion quoted by the North Carolina Supreme Court in *Wallace*.<sup>88</sup> In 1976, however, in *Nixon v. Administrator of General Services*<sup>89</sup> the United States Supreme Court adopted with explicit reference to *O'Donoghue* a "more pragmatic, flexible approach"<sup>90</sup> and rejected an "archaic view of the separation of powers as requiring three airtight departments of government."<sup>91</sup> In formulating a test for the violation of the principle of separation of powers, the Court declared that the "proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions."<sup>92</sup> Even if there is potential for disruption, separation of powers is not necessarily violated because the Court must then determine "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."<sup>93</sup>

### 3. Conclusions

The review of foreign decisional law permits few firm conclusions. Federal authority is certainly more permissive than the North Carolina Supreme Court recognized. State decisions are divided, although a majority of state courts did find violations of separation of powers in somewhat similar circumstances. The persuasiveness of the state decisions is weakened, however, by the dissimilarity of the various constitutions. All the constitutional provisions expressly requiring separation of powers include a clause similar to that in the South Carolina Constitution: "and no person or persons exercising the func-

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86. *United States v. Atchison, T. & S.F.R.R.*, 234 U.S. 476 (1914) (statute granting rate-fixing power to ICC not unconstitutional delegation of legislative authority); *Interstate Commerce Comm'n v. Chicago, R.I. & Pac. Ry.*, 218 U.S. 88 (1910) (rate-fixing order not beyond power of ICC); *Interstate Commerce Comm'n v. Illinois Cent. R.R.*, 215 U.S. 452 (1910) (narrow scope of review of ICC orders); *Illinois Cent. R.R. v. Interstate Commerce Comm'n*, 206 U.S. 441 (1907) (no *de novo* investigation of facts on appeal from ICC order); *Interstate Commerce Comm'n v. Alabama Midland Ry.*, 168 U.S. 144 (1897) (judicial review of facts upon which ICC orders were based not prohibited by statute); *Interstate Commerce Comm'n v. Cincinnati, N.O. & Tex. Pac. Ry.*, 167 U.S. 479, 501 (1897) (power granted to ICC "partly judicial, partly executive and administrative, but not legislative"); *Cincinnati, N.O. & Tex. Pac. Ry. v. Interstate Commerce Comm'n*, 162 U.S. 184 (1896) (ICC not empowered to fix rates).

87. 289 U.S. 516, 551 (1933) (statute reducing salaries and pensions of judges not applicable to judges of District of Columbia courts).

88. 304 N.C. at 604, 286 S.E.2d at 86 (quoting *O'Donoghue*, 289 U.S. at 530): "This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Philippine Islands*, 277 U.S. 189, 201, namely, to preclude a commingling of these essentially different powers of government in the same hands."

89. 433 U.S. 425, 441-46 (1976) (statute directing Administrator to take custody of presidential materials not violative of separation of powers).

90. *Id.* at 442. See also *United States v. Nixon*, 418 U.S. 683, 711-12 (1974).

91. *Administrator of General Services*, 433 U.S. at 443 (quoting *Nixon v. Administrator of Gen. Serv.*, 408 F.Supp. 321, 342 (D.D.C. 1976)).

92. *Id.*

93. *Id.* For an argument that this standard should be generalized, see Note, *Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in the Special Prosecutor Provisions of the Ethics in Government Act*, 49 BROOKLYN L. REV. 113 (1982).

tions of one of said departments shall assume or discharge the duties of any other."<sup>94</sup> At issue in *Wallace* was whether the North Carolina Constitution, which lacks such a clause, should be interpreted to include it by implication. To assume as much and then to cite as support decisions interpreting constitutions containing the clause was to commit the logical fallacy known as *petitio principii*, in which what is to be proved is implicitly taken for granted.

The persuasiveness of the state decisions finding violations of separation of powers is further weakened because the functions of many of the challenged bodies were exclusively executive. Three of the decisions<sup>95</sup> involved commissions to construct state buildings, a function not related to rule-making. In these cases the invasion of executive power was clear. The less executive the functions, however, the less clear would be the violation of separation of powers.

### C. Statutory Duties of the EMC

In addition to history and precedent the court in *Wallace* considered the specific provisions of the statutes involved. "It is crystal clear to us," announced the Justices, "that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws."<sup>96</sup> In support of this conclusion the court reviewed some of the duties imposed on the EMC by statute. Quoting the legislation creating the EMC, the court discerned the purpose it was meant to serve: "There is hereby created the Environmental Management Commission of the Department of Natural Resources and Community Development with the power and duty to *promulgate rules and regulations* to be followed in the protection, preservation, and enhancement of the water and air resources of the State."<sup>97</sup>

There can be no question that the EMC is organizationally within the executive branch of state government. It is part of an executive department. Until 1979 the Governor appointed all the members of the EMC; even under the legislation declared invalid in *Wallace*, the Governor would have ap-

94. S.C. CONST. art. 1, § 8.

95. *Book v. State Office Bldg.* Comm'n, 238 Ind. 120, 149 N.E.2d 273 (1958); *State ex rel. State Bldg. Comm'n v. Bailey*, 151 W. Va. 79, 150 S.E.2d 449 (1966); *Greer v. State*, 233 Ga. 667, 212 S.E.2d 836 (1975).

96. *Wallace*, 304 N.C. at 608, 286 S.E.2d at 88. The trial judge had come to a different conclusion. Among the "findings of fact" he listed: "3. The Environmental Management Commission is a quasi-independent State regulatory agency, a part of the executive branch whose functions include, but are not limited to, quasi-legislative and quasi-judicial powers and duties as generally enumerated in G.S. 143 B-282. See also G.S. 143-215.3 and .4." *State ex rel. Wallace v. Bone*, Nos. 81CVS1191 & 81CVS1192, unpublished op. at 2 (Wake Co. Super. Ct. March 18, 1981).

The parties had previously agreed to a pre-trial order containing the following undisputed fact: "1. The Environmental Management Commission is a quasi-independent regulatory agency of the State with quasi-legislative and quasi-judicial powers and duties as enumerated in G.S. 143 B-282." *Wallace*, 304 N.C. at 593, 286 S.E.2d at 80.

97. 304 N.C. at 607, 286 S.E.2d at 88 (quoting N.C. GEN. STAT. §143 B-282 (1978)) (emphasis added by author).

pointed a majority of the members. Furthermore, the EMC has duties that commonly belong to the executive branch in modern administration. Among other things, it is empowered pursuant to statutes:<sup>98</sup> to grant permits with regard to controlling sources of air and water pollution;<sup>99</sup> to issue special orders to any person whom it finds responsible for water or air pollution;<sup>100</sup> to conduct investigations or direct that investigations be conducted;<sup>101</sup> to conduct public hearings, institute actions in superior court, and agree upon settlements;<sup>102</sup> to review local air pollution control programs;<sup>103</sup> to declare an emergency when it finds a generalized dangerous condition of water or air pollution;<sup>104</sup> to grant permits for water use within capacity use areas;<sup>105</sup> to approve all applications for dam construction;<sup>106</sup> to supervise the maintenance of dams;<sup>107</sup> and to have jurisdiction over oil pollution.<sup>108</sup>

As the court recognized, the EMC has other duties as well. It is empowered "to establish standards and adopt rules and regulations"<sup>109</sup> for air quality standards, emission control standards, and classifications for air contaminant sources;<sup>110</sup> for water quality standards and classifications;<sup>111</sup> for reporting on water and air quality;<sup>112</sup> for capacity use areas;<sup>113</sup> for the issuance of permits for water use within capacity use areas;<sup>114</sup> for protection from oil pollution.<sup>115</sup> The power to issue rules with the effect of law is today recognized as quasi-legislative, although the supreme court denied that characterization in *Wallace*.

Unmentioned in *Wallace* were the powers of the EMC to conduct hearings, receive evidence, and hand down decisions with the effect of court orders; powers usually recognized as quasi-judicial. The EMC is empowered to designate hearing officers<sup>116</sup> and conduct public hearings,<sup>117</sup> after notice,<sup>118</sup> at

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98. N.C. GEN. STAT. § 143B-282(1) (1983). In the exercise of these powers the EMC is limited by N.C. GEN. STAT. § 143-215.9 (1983).

99. *Id.* §§ 143-215.1 & 143-215.108.

100. *Id.* §§ 143-215.2(b) & 143-215.110.

101. *Id.* §§ 143-215.3, 143-215.19, 143-215.108(b)(5).

102. *Id.* § 143-215.3.

103. *Id.* § 143-215.311 & 143-215.112.

104. *Id.* § 143-215.312.

105. *Id.* § 143-215.15.

106. *Id.* § 143-215.28.

107. *Id.* § 143-215.31.

108. *Id.* §§ 143-215.75 to 143-215.102. In its opinion the Court misreads the statute as providing the EMC jurisdiction over "all" pollution, rather than "oil" pollution. *Wallace*, 304 N.C. at 607, 286 S.E.2d at 88.

109. N.C. Gen. Stat. § 143B-282(2) (1983).

110. *Id.* § 143-215.107.

111. *Id.* §§ 143-214.1 & 143-215.

112. *Id.* § 143-215.68.

113. *Id.* § 143-214.14.

114. *Id.* § 143-215.20.

115. *Id.* §§ 143-215.75 to 143-215.102.

116. *Id.* § 143-215.4(e).

117. *Id.* § 143-215.4(d)(2).

118. *Id.* § 143-215.4(d)(1).

which oaths may be administered,<sup>119</sup> and of which a complete record must be kept by a reporter.<sup>120</sup> The hearings "follow generally the procedures applicable in civil actions in the superior court insofar as practicable, including rules and procedures with regard to the taking and use of depositions, the making and use of stipulations, and the entering into of agreed settlements and consent orders."<sup>121</sup> Subpoenas and subpoenas duces tecum may be issued, and state officers are directed to follow the same procedures with regard to them "as if issued by a court of record."<sup>122</sup> Enforcement procedures include, in addition to criminal penalties<sup>123</sup> and injunctive relief<sup>124</sup> ordered by a court, civil penalties up to \$10,000 assessed by the EMC itself.<sup>125</sup>

It is difficult to escape the conclusion that the EMC is an administrative agency with quasi-legislative and quasi-judicial powers. As the North Carolina Supreme Court has recognized, administrative agencies are incompatible with strict adherence to separation of powers.<sup>126</sup> Nonetheless, they are constitutional as long as adequate guiding standards are provided.<sup>127</sup> It may be presumed that the EMC is constitutional even though its duties do have a relation to the function of the legislative branch because adequate statutory guidelines are present. By not recognizing the quasi-legislative and quasi-judicial character of the EMC, the *Wallace* court failed to address the more important issue of whether the General Assembly may appoint legislators to serve on these otherwise constitutional agencies.

## II. ADVISORY OPINION *IN RE* SEPARATION OF POWERS

Within days of the decision in *Wallace*, the Governor, Lieutenant Governor, and Speaker of the House of Representatives requested an advisory opinion from the Justices of the Supreme Court<sup>128</sup> about the constitutionality in light of *Wallace* of two statutes enacted in 1981. The first statute related to

119. *Id.* § 143-215.4(d)(2).

120. *Id.* § 143-215.4(d)(3).

121. *Id.* § 143-215.4(d)(4).

122. *Id.* § 143-215.4(d)(5).

123. *Id.* § 143-215.6(b).

124. *Id.* § 143-215.6(c).

125. *Id.* § 143-215.6(a).

126. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 696-97, 249 S.E.2d 402, 410-11 (1978). See *supra* text accompanying note 46.

127. *In re The Broad & Gales Creek Community Ass'n*, 300 N.C. 267, 266 S.E.2d 645 (1980); *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978); *State Educ. Assistance Auth. v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970); *North Carolina Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965); *Cox v. City of Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940).

128. The Advisory Opinion has been defined as:

[A]n opinion rendered by the highest judicial officers in the state, acting as individuals and not in a judicial capacity, in response to a request for information as to the state of the law or counsel as to the constitutionality of proposed action, coming from the legislative or executive branches of the government.

Edsall, *The Advisory Opinion in North Carolina*, 27 N.C.L. REV. 297, 297 (1949) (quoting A. Ellingwood).

The judges of only a small minority of American states give advisory opinions; of those that do, most are acting pursuant to authorization in the state constitution or a state statute. *Id.* at 299

transfers within the state budget,<sup>129</sup> the second related to federal block grants.<sup>130</sup>

The General Assembly is, of course, responsible for enacting the state budget. No revenue may be raised or state money expended except pursuant to an act of the legislature.<sup>131</sup> Since 1929, however, the Governor in his capacity as Director of the Budget<sup>132</sup> has been authorized to permit "[t]ransfers or changes as between objects and items" in the appropriations for the various spending agencies of the state.<sup>133</sup> In 1981 the General Assembly restricted that authorization by enacting the following statute:

[N]o requested transfer or change from a program line item may be made if the total amount transferred from that line item during the fiscal year would be more than ten percent (10%) of the amount appropriated for that program line item for that fiscal year, unless the Joint Legislative Commission on Governmental Operations has given its prior approval for that transfer. This restriction applies to all State departments with a total General Fund appropriation of at least fifty million dollars (\$50,000,000). All other departments shall apply the ten percent (10%) limitation to the summary by object line items. No transfers or changes, regardless of amount, from salary funds may be made without the prior approval of the Joint Legislative Commission on Governmental Operations. The Commission must take action within 40 days of receiving a request for approval from the Office of State Budget and Management. Transfers or changes within the Medicaid program are exempt from this subsection.<sup>134</sup>

The Joint Legislative Commission on Governmental Operations was established in 1975 to provide for "the continuing review of operations of State government."<sup>135</sup> It is composed of the President of the Senate, the Speaker of the House, and twelve other members of the General Assembly.<sup>136</sup> The first challenged statute, in other words, gave a commission of legislators power

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n.4. Perhaps alone, the justices of the North Carolina Supreme Court render advisory opinions without express constitutional or statutory authority. *Id.* at 329.

The federal judiciary have never offered advisory opinions. Ironically for present purposes, the precedent was set in 1793 when the Justices of the U.S. Supreme Court declined to answer President George Washington's questions out of regard for separation of powers. P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, CORRESPONDENCE OF THE JUSTICES 64-66 (2d ed. 1973).

129. Act of Oct. 10, 1981, ch. 1127, § 82, 1981 Sess. Laws (Reg. Sess.) 1654 (codified at N.C. GEN. STAT. § 143-23(b) (1983)).

130. Act of Oct. 10, 1981, ch. 1127, § 63, 1981 Sess. Laws (Reg. Sess.) 1651-52 (codified at N.C. GEN. STAT. §§ 120-84.1 to 120-84.5) (Supp. 1981)).

131. N.C. CONST. art. II, § 23; art. V, § 7(1).

132. N.C. GEN. STAT. § 143-2 (Cum. Supp. 1981). *See also* N.C. CONST. art. III, § 5(3).

133. Act of March 7, 1929, ch. 100, § 24, 1929 Sess. Laws 84-85 (codified at N.C. GEN. STAT. § 143-23(a) (Cum. Supp. 1981)).

134. Act of Oct. 10, 1981, ch. 1127, § 82, 1981 Sess. Laws (Reg. Sess.) 1654 (codified at N.C. GEN. STAT. § 143-23(b) (Cum. Supp. 1981)).

135. An Act to Provide for Continuing Review of Governmental Operations by the General Assembly, ch. 490, 1975 Sess. Laws (1st Sess.) 498 (codified at N.C. GEN. STAT. §§ 120-71 to 120-79 (1981 & Supp. 1981)).

136. N.C. GEN. STAT. § 120-74 (Supp. 1981).

over budget transfers (of the specified magnitude) proposed to be made by the Governor.

For years the state has received, in addition to its tax revenues, money from various federal programs.<sup>137</sup> After the enactment of the fiscal 1981-83 state budget, the federal government changed the structure of federal programs and offered the several states funds in the form of block grants.<sup>138</sup> The North Carolina General Assembly responded by enacting a statute that declared that "all federal block grant funds . . . shall be received by the General Assembly."<sup>139</sup> Then, by the second challenged statute, the legislature created a Joint Legislative Committee to Review Federal Block Grant Funds composed of twelve legislators. That statute also provided the following:

(a) After federal block grant funds have been accepted by the General Assembly, the Director of the Budget shall propose administration and use of those funds. All proposals shall be submitted to the Committee, or to the General Assembly if it is in session, for its prior approval.

(b) None of the following actions with regard to State use of federal block grant funds may be taken without the prior approval of the Committee or of the General Assembly if it is in session:

- (1) acceptance of federal block grants,
- (2) determination of pro rata reduction procedures and amounts for State programs,
- (3) determination of distribution formulas,
- (4) transfer of funds between block grants,
- (5) intradepartmental transfer of block grant funds,
- (6) encumbrance of anticipated block grant funds,
- (7) adoption of departmental rules relating to federal block grant funds,
- (8) contracting between State departments involving block grant funds, and
- (9) any other final action affecting acceptance or use of federal block grant funds.

The Committee shall take action within 40 days of receiving a request for approval from the Office of State Budget and Management.<sup>140</sup> The second challenged statute, in other words, gave a committee of legislators (during the recess of the General Assembly) power over actions proposed to be taken by the Governor with respect to the administration of federal block grant funds.

In the advisory opinion the Justices advised the Governor, Lieutenant

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137. See Act of May 11, 1935, ch. 479, § 2 1935 Sess. Laws (Reg. Sess.) 848 (codified at N.C. GEN. STAT. §143-164 (1978)).

138. Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 1981 U.S. CONG. & AD. NEWS (95 Stat.) 357 (codified in scattered sections of U.S.C.).

139. Act of Oct. 10, 1981, ch. 1127, § 62, 1981 Sess. Laws (1st Sess.) 1651.

140. Act of Oct. 10, 1981, ch. 1127, § 63, 1981 Sess. Laws 1651-52 (codified at N.C. GEN. STAT. §§ 120-84.5 (Supp. 1981)).

Governor, and Speaker of the House that the two statutes are unconstitutional.<sup>141</sup> For the history and meaning of separation of powers in North Carolina they principally relied on *Wallace*. "For the sake of brevity," the Justices said, "we will not restate all that we said in that opinion."<sup>142</sup> Summarizing *Wallace*, the Justices declared:

[t]he principle of separation of powers was clearly in the minds of the framers of our Constitution; and . . . the people of North Carolina, by specifically including a separation of powers provision in the original Constitution adopted in 1776, and readopting the provision in 1868 and 1970, are firmly and explicitly committed to the principle.<sup>143</sup>

They also quoted from *Wallace* that "the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government which is to make laws."<sup>144</sup> In addition, they noted that another constitutional provision relative to the respective powers of the branches, not germane in *Wallace*, was implicated by the statutes at issue:

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.<sup>145</sup>

In the opinion of the Justices, the power over budget transfers vested in a commission of legislators by the first challenged statute "exceeds [the power]. . . given to the legislative branch by Article II of the Constitution."<sup>146</sup> They also thought the statute violated the principle of separation of powers by encroaching on the Governor's duty to administer the budget. The court thought the second challenged statute, involving federal block grants, violated the principle of separation of powers insofar as it delegated legislative power to, or conferred executive power on, a committee of legislators.<sup>147</sup>

Although the advisory opinion relies principally on *Wallace*, the issues raised by the legislative-executive interaction in the budgetary process are unlike the issue in that case. *Wallace* involved the membership of legislators on an executive branch commission. Although the premise has been questioned in this Article, the court decided that case on the assumption that the EMC

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141. *Advisory Opinion*, 305 N.C. at 780-81, 295 S.E.2d at 596.

142. *Id.* at 773, 295 S.E.2d at 592.

143. *Id.* at 773-74, 295 S.E.2d at 592.

144. *Id.* at 775, 295 S.E.2d at 593 (quoting *Wallace*, 304 N.C. at 608, 289 S.E.2d at 88).

145. N.C. CONST. art. III, § 5(3).

146. *Advisory Opinion*, 305 N.C. at 776, 295 S.E.2d at 594.

147. Although their opinion was not requested on the matter, the Justices also questioned whether the General Assembly could provide for the receipt of block grant funds on the ground that there is "nothing in the Constitution that authorizes the legislative branch actually to receive funds." *Id.* at 779, 295 S.E.2d at 595 (emphasis in original). On the other hand, there is nothing in the Constitution about any branch receiving funds. The role, however, seems closer to the constitutional duties of the General Assembly than to those of other branches. If the power of the purse is to be retained by the legislature, the executive should not be endowed with any funds not approved by the legislature.

performed no legislative functions. The commissions in question in the advisory opinion, on the other hand, were authorized to exercise powers that are indubitably legislative. There can be no doubt that the General Assembly can deny the Governor authority to make budgetary transfers. The first issue for the Justices was whether that power could be delegated to a commission of legislators. Citing *Wallace* and the principle of separation of powers, they resolved that issue in the negative. Delegation of power does not, however, necessarily implicate the principle of separation of powers. When a legislature delegates its plenary power to a group of its members a constitutional issue is raised. Only if that delegation is made to a coordinate branch of government, however, is the issue one involving separation of powers.<sup>148</sup>

The second issue in the advisory opinion did raise a genuine separation of powers problem. In the view of the Justices, the General Assembly had invaded the prerogative of the Governor. But that issue too could have been resolved without referring to the general principle of separation of powers. The North Carolina Constitution specifically charges the Governor with the duty of administering the "budget as enacted by the General Assembly."<sup>149</sup> In this area the general mandate of separation of powers is given concrete expression in another part of the constitution.

### III. CONSIDERATIONS NOT MENTIONED BY THE COURT

Based on its understanding of the history of the principle of separation of powers in North Carolina and encouraged by its perception of strict adherence to that principle by other states, the North Carolina Supreme Court in *Wallace* held unconstitutional the statute adding legislative members to the EMC. Ostensibly relying on *Wallace*, the Justices then advised the state's leaders that two fiscal statutes were unconstitutional. Each premise of the court's opinion in *Wallace* has been challenged. Before a conclusion may be drawn about the value of the decision, however, it is necessary to consider several factors not mentioned by the court.

#### A. Constitutional Considerations

Challenges in other states to the composition of bodies comparable to the EMC have included charges of violation of the dual office holding provisions

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148. It has recently been argued that cases of improper delegation of legislative authority to groups of legislators do implicate the principle of separation of powers:

Separation analysis is as proper as analysis based on violation of the specific enactment provisions of a constitution in cases of a legislature's granting of power exercisable only by the whole body to a smaller group of legislators. The primary "enactment clause" ground given for striking down such statutes is that they deprive the chief executive of the ability to exercise his veto authority. Since the veto is an executive prerogative, the legislature has violated the essential separation between the branches.

Powers, *Separation of Powers: The Unconstitutionality of the Arkansas Legislative Council*, 36 ARK. L. REV. 124, 126 n.13 (1982).

Assuming *arguendo* the correctness of this view, it is inapposite in North Carolina where the Governor lacks the veto.

149. N.C. CONST. art. III, § 5(3).

of the respective constitutions.<sup>150</sup> And recent federal litigation has implicated the appointments clause in a similar situation.<sup>151</sup>

### 1. Dual Office Holding

It may be contended that the proper issue in *Wallace* was not separation of powers per se, but the separation of personnel. The desire to prevent the concentration of power in the hands of one person or of a few persons is as old as the principle of separation of powers itself.<sup>152</sup> To prevent the accumulation of offices, each successive constitution of North Carolina has contained a provision against holding more than one office.<sup>153</sup> In pertinent part the provision

150. *Harper v. Schooler*, 258 S.C. 486, 189 S.E.2d 284 (1972), cited in *State ex rel. McLeod v. Edwards*, 269 S.C. 75, 76, 236 S.E.2d 406, 407 (1977) (*see supra* text accompanying note 65); *Book v. State Office Bldg. Comm'n*, 238 Ind. 120, 149 N.E.2d 273 (1958) (*see supra* text accompanying note 76).

151. *Buckley v. Valeo*, 424 U.S. 1 (1976).

152. Instructions to the Orange County delegation to the 1776 N.C. Provincial Congress included the following:

That no person shall be capable of acting in the exercise of any more than one of these branches [of government] at the same time lest they should fail of being the proper checks on each other and by their united influence become dangerous to any individual who might oppose the ambitious designs of the persons who might be employed in such power.

104 COLONIAL RECORDS OF NORTH CAROLINA 870h (W. Saunders ed. 1890), *quoted in Wallace*, 304 N.C. at 597-98, 286 S.E.2d at 83. *See supra* note 14.

The historian of the early constitutions of the Southeastern states observed that they "distinguished between a union or separation of powers organically and personally, for they not only created separate organs for the departments of government but also prohibited the personnel of any one of the departments from exercising the powers belonging to another." F. GREEN, *supra* note 28, at 83.

153. N.C. CONST. of 1776:

XXVIII. That no member of the Council of State shall have a seat, either in the Senate, or House of Commons.

XXIX. That no Judge of the Supreme Court of Law or Equity, or Judge of Admiralty, shall have a seat in the Senate, House of Commons, or Council of State.

XXX. That no Secretary of this State, Attorney-General, or Clerk of any Court of record, shall have a seat in the Senate, House of Commons, or Council of State.

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XXXV. That no person in the State shall hold more than one lucrative office, at any one time:—*Provided*, That no appointment in the militia, or the office of a Justice of the Peace, shall be considered as a lucrative office.

N.C. CONST. of 1776 art. IV, § 4 (amend. 1835):

No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State, or any other State or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the general assembly: *Provided*, That nothing herein contained shall extend to officers in the militia or justices of the peace.

N.C. CONST. of 1868, art. XIV, § 7:

No person shall hold more than one lucrative office under the State at the same time: *Provided*, That officers in the militia, justices of the peace, commissioners of public charities, and commissioners appointed for special purposes shall not be considered officers within the meaning of this section.

N.C. CONST. of 1970, art. VI, § 9:

(1) *Prohibitions*. It is salutary that the responsibilities of self-government be widely shared among the citizens of the State and that the potential abuse of authority inherent in the holding of multiple offices by an individual be avoided. Therefore, no person who holds any office or place of trust or profit under the United States or any department

of the 1970 constitution states: "No person shall hold concurrently . . . any combination of elective and appointive offices or places of trust or profit, except as the General Assembly shall provide by general law."<sup>154</sup> Using the principle that the specific ought to be preferred over the general, it could be argued that the dual office holding provision encompasses separation of powers insofar as it refers to personnel. If that argument were accepted, then the appointing of legislators to the EMC would be constitutional and *Wallace* would be wrongly decided.

## 2. Appointments Clause

Also arguably relevant to the issue in *Wallace* is the executive's appointment power. The appointments clause of the federal constitution<sup>155</sup> was recently relied upon by the United States Supreme Court in *Buckley v. Valeo*<sup>156</sup> to invalidate a Federal Election Commission that included two members appointed by the Speaker of the House and two members appointed by the President pro tempore of the Senate.<sup>157</sup> By the current Constitution of North Carolina the Governor is likewise empowered to make appointments to the executive branch: "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."<sup>158</sup> In contrast to the interpretation of the federal constitution, however, the corresponding section of the North Carolina Constitution of 1868, as amended,<sup>159</sup> was interpreted to mean that the Governor's appointment power could validly be subjected to legislative provision.<sup>160</sup> There was also authority under the 1868 constitution, as amended,

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thereof, or under any other state or government, shall be eligible to hold any office in this State that is filled by election by the people. No person shall hold concurrently any two offices in this State that are filled by election of the people. No person shall hold concurrently any two or more appointive offices or places of trust or profit, or any combination of elective and appointive offices or places of trust or profit, except as the General Assembly shall provide by general law.

(2) *Exceptions.* The provisions of this Section shall not prohibit any officer of the military forces of the State or of the United States not on active duty for an extensive period of time, any notary public, or any delegate to a Convention of the People from holding concurrently another office or place of trust or profit under this State or the United States or any department thereof.

154. N.C. CONST. art. VI, § 9.

155. U.S. CONST. art. II, § 2, cl. 2:

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

156. 424 U.S. 1, 126 (1976).

157. The Speaker and President pro tempore were to make their appointments upon the recommendations of the majority and minority leaders of the respective chambers. Neither could appoint two members of the same political party. Appointments had to be confirmed by both Houses of Congress. *Id.* at 113.

158. N.C. CONST. art. III, § 5 (8).

159. N.C. CONST. of 1868, art. III, § 10 (1875).

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

that the General Assembly possessed the power to fill executive offices created by statute.<sup>161</sup> Until the North Carolina Supreme Court provides an authoritative interpretation of the present appointments clause, it must be assumed that it means what the previous clause was held to mean. If that assumption is correct, a statute providing for the appointment by the legislature of members of administrative agencies like the EMC would not be violative of the appointments clause. *Wallace*, it has been observed, only excludes legislators from service on such bodies. Legislative appointees, even if they are not legislators, may well believe their chief loyalty to be to the General Assembly rather than to the Governor.

If the appointments clause of the current North Carolina Constitution were given the same construction as the analogous clause of the federal constitution, however, the issue in *Wallace* would have shifted dramatically. Rather than centering on the permissibility of legislators' serving on administrative agencies, the issue would have been whether the General Assembly could appoint any members, whether legislators or not, to an executive branch body. By analogy to *Buckley*, the answer would have been in the negative.<sup>162</sup>

### B. Other Considerations

Judicial interpretation of the constitution may involve considerations of public policy. These considerations may be openly expressed or merely implied. There are hints in *Wallace* that the court was concerned about implications of the legislative actions that were before it for review. First, the court may have been concerned about the implications for the executive branch. In the course of reviewing the state's commitment to separation of powers, the court referred to the lack of an executive veto: "ours is one of the few states, if not the only state, in the Union that does not provide its governor with the power to veto enactments of the legislature."<sup>163</sup> The implication might be that a contrary result in *Wallace* would imperil the integrity of the office of the Governor. If the General Assembly could constitutionally provide for the appointment of legislators to administrative agencies, then something akin to parliamentary government<sup>164</sup> could result. The Joint Legislative Committee

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161. *State ex rel. Cherry v. Burns*, 124 N.C. 761, 33 S.E. 136 (1899); *Cunningham v. Sprinkle*, 124 N.C. 638, 33 S.E. 138 (1899); *State Prison v. Day*, 124 N.C. 362, 32 S.E. 748 (1899); *State ex rel. Ewart v. Jones*, 116 N.C. 570, 21 S.E. 787 (1895). See also *State ex rel. Osborne v. Town of Canton*, 219 N.C. 139, 13 S.E.2d 265 (1941). Counsel for plaintiff in *Wallace* conceded that "[u]nder North Carolina constitutional law, the legislature may amend the statutes establishing the [EMC] to provide for the legislative branch to appoint any or all of the [EMC's] members . . . . It may not, however, appoint its own members to sit on the [EMC]." Plaintiff Appellants' Brief at 22, *State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982).

162. The Governor had himself appointed legislators to 45 positions on 32 bodies similar to the EMC. Orth, *Separation of Powers: An Old Doctrine Triggers a New Crisis*, 5 N.C. INSIGHT, No. 1, 36, 38 (May 1982). After the decision in *Wallace*, the Attorney General advised all legislators, "regardless of how or by whom appointed," to resign their appointments. *Id.* A decision based on the appointments clause rather than on the principle of separation of powers would have permitted the Governor to name legislators to executive branch bodies.

163. *Wallace*, 304 N.C. at 599, 286 S.E.2d at 83.

164. In a parliamentary government like Great Britain's executive power is exercised by a

to Review Federal Block Grant Funds makes clear that this would not be a mere argumentum ad horrendum.<sup>165</sup>

Second, the court may even have been concerned about the integrity of the judicial branch. For purposes of its argument about the architecture of separation of powers, it is understandable why the court would mention that the judicial power is vested in the third branch. It is less understandable why the court quoted the entire text of article IV, section 1:

The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.<sup>166</sup>

Perhaps the court was concerned lest the increase of legislative power weaken the independence of the judiciary. In this connection it may be noted that the General Assembly in 1981 gave the Joint Legislative Commission on Governmental Operations control over the expenditure of funds for judicial personnel.<sup>167</sup> Concern about this development had been expressed in professional circles shortly before the decision in *Wallace*.<sup>168</sup>

If the court in *Wallace* were shaping its interpretation of the separation of powers clause in response to these concerns, it may well have reasoned that the General Assembly already possessed adequate powers to perform its constitutional role. The legislature may create administrative agencies, add to or subtract from their powers, or eliminate them altogether. It may alter any administrative rule unless vested rights have accrued. Without adding its own members to administrative agencies, it may nonetheless maintain close oversight. It may, of course, enact whatever budget seems appropriate. In the final analysis, the court may have been moved by these unexpressed considerations of what might be called constitutional morality rather than by the legal arguments it ostensibly relied on.

#### IV. CONCLUSION

The result in *Wallace* is not supported by the reasons given. Conse-

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cabinet composed of members of the legislature who are individually and collectively responsible to the legislature. See W. Wilson, CONGRESSIONAL GOVERNMENT 95 (1885).

A distinguished group of Americans is currently considering the possibility of recommending that the leaders of Congress be allowed to serve in the Cabinet. Cutler & Dillon, *Can We Improve Our Constitutional System?*, Wall St. J., Feb. 15, 1983, at 32, col. 3.

165. Of course, unless the appointments clause of the North Carolina Constitution of 1970 is interpreted to prohibit it, the General Assembly could provide for the appointment of members of administrative agencies by the General Assembly—as long as it appointed none of its own members.

166. *Wallace*, 304 N.C. at 596, 286 S.E.2d at 82.

167. An Act to Authorize Additional Judicial Officials Throughout the State, to Increase Legal Counsel Fees and to Provide for Other Related Matters, Act of July 10, 1981, ch. 964, § 20, 1981 N.C. Sess. Laws (Reg. Sess.) 1491. But see N.C. GEN. STAT. 7A-102(a) (1981).

168. Snapp, *A Closer Bench and Bar*, 32 N.C.B.A. BARNOTES, No. 7, at 4 (Nov.-Dec., 1981).

quently, to the extent that it relies on *Wallace*, the advisory opinion is inadequately supported. The historical argument concerning separation of powers in North Carolina is based on a partial statement of the facts. The decisions of foreign courts are of questionable relevance. The duties of the EMC are not stated in full. The dual office holding provision of the state constitution is ignored. Even if *Wallace* is to be understood as premised on unexpressed considerations of public policy, it is doubtful that these considerations are adequately vindicated by the result. While under the current interpretation of the separation of powers clause, legislators may not serve on administrative agencies, the appointments clause, as presently understood, does not preclude the legislature from appointing its own nominees to such bodies as long as they are not current members of the legislature.