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State ex rel. Martin v. Melott: The Separation of Powers and the Power to Appoint

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To the founding fathers the doctrine of separation of powers, the "sacred maxim of free government," prevented the accumulation of all governmental power in the same hands—"the very definition of tyranny."[1] Both federal and North Carolina courts have recognized the doctrine's crucial role in preventing abuses of power.[2] Although the division of power between making, enforcing, and interpreting the law is established, the power to appoint public officials does not fall clearly within any of these divisions. In *State ex rel. Martin v. Melott*[3] the North Carolina Supreme Court examined the relationship between the separation of powers doctrine and the highly coveted power to appoint. The *Martin* court ruled that the general assembly could require the chief justice of the North Carolina Supreme Court to appoint the head of the Office of Administrative Hearings (OAH).

This Note examines the separation of powers doctrine and its incorporation into the federal and North Carolina constitutions. It also examines the evolution of the appointments provision in the North Carolina Constitution. The Note concludes that although the *Martin* court's decision can be reconciled with the separation of powers doctrine, the court's rationale ignores precedent and fails to provide a standard by which to judge future legislation. By concentrating only on the power to appoint, and considering neither the independent principle of separation of powers nor the nature of the appointee's power, the court weakened the system of checks and balances inherent in the separation of powers. This Note suggests a rationale for deciding such cases that recognizes the need for checks on governmental power while accommodating effective government.

In 1985 the North Carolina General Assembly enacted legislation[4] providing that the chief justice of the North Carolina Supreme Court would appoint the director of the OAH.[5] Chief Justice Branch appointed Robert Melott, who took office on January 1, 1986.[6] Governor James G. Martin[7] subsequently filed

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1. THE FEDERALIST No. 47 (J. Madison).

2. *E.g.*, Bowsher v. Synar, 106 S. Ct. 3181, 3186 (1986); Buckley v. Valeo, 424 U.S. 1, 121 (1976); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 613-14 (1952); State *ex rel.* Wallace v. Bone, 304 N.C. 591, 600-01, 286 S.E.2d 79, 84 (1982).

3. 320 N.C. 518, 359 S.E.2d 783 (1987).

4. Act of July 12, 1985, ch. 746, § 2, 1985 N.C. Sess. Laws 1012 (codified at N.C. GEN. STAT. § 7A-752 (1986)).

5. *Martin*, 320 N.C. at 518-19, 359 S.E.2d at 784. The act called for the Speaker of the House and President of the Senate to seek an advisory opinion from the North Carolina Supreme Court on the statute's constitutionality. It also specified that if the supreme court held the appointment provision to be unconstitutional, the appointment was to made by the Attorney General instead of the chief justice. Act of July 12, 1985, ch. 746, §§ 18-19, 1985 N.C. Sess. Laws 1017.

The supreme court declined to issue an advisory opinion. *See In re* Advisory Opinion, 314 N.C. 679, 335 S.E.2d 890 (1985).

6. *Martin*, 320 N.C. at 519, 359 S.E.2d at 784.

7. Governor Martin took office in January 1985.

suit, challenging the constitutionality of the appointment.[8]

Governor Martin claimed that the statute violated three provisions of the North Carolina Constitution.[9] He first argued that the statute violated Clause 8 of Article III, Section 5, which defines the Governor's appointment duties.[10] The Governor also claimed that because the OAH is in the executive branch, the general assembly cannot constitutionally place the power to appoint the OAH head outside the executive branch.[11] The appointment allegedly infringed on his executive powers, thereby violating two general constitutional provisions that provide for the separation of powers[12] and for the Governor's executive power.[13]

The trial court upheld the appointments and denied the Governor's request for relief.[14] Governor Martin bypassed the court of appeals and appealed directly to the supreme court.[15] The supreme court affirmed.[16] All justices hearing the case[17] held that the statute did not violate the appointments provision.[18] A plurality of three justices concluded that the director's appointment was not an executive act, and therefore neither violated the separation of powers principle nor infringed upon the Governor's power.[19]

The two concurring justices' primary concern was the plurality's examination of only the nature of the appointment power.[20] After examining Melott's duties, they concluded that his position was quasi-judicial and within the chief justice's power to appoint.[21] Justice Harry Martin dissented, arguing Melott's duties were administrative, and an appointment from outside the executive branch therefore violated the separation of powers doctrine.[22]

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8. *Martin*, 320 N.C. at 518-19, 359 S.E.2d at 784.

9. *Id.*

10. The appointments clause provides, "The Governor shall nominate and by and with the advice and consent of the majority of the Senators appoint all officers whose appointments are not otherwise provided for." N.C. CONST. art. III, § 5, cl. 8.

11. *Martin*, 320 N.C. at 522-23, 359 S.E.2d at 786.

12. *Id.* at 522, 359 S.E.2d at 786. Article I, Section 6 provides, "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6.

13. *Martin*, 320 N.C. at 522-23, 359 S.E.2d at 786. Article III, Section 1 provides, "The executive power of the State shall be vested in the Governor." N.C. CONST. art III, § 1.

14. *Martin*, 320 N.C. at 519, 359 S.E.2d at 784. Governor Martin had asked the court first for a declaratory judgment that the statute was unconstitutional and second for the removal of Melott in a quo warranto proceeding challenging Melott's right to the office. *Id.*

15. *Id.* The Governor petitioned the supreme court pursuant to Section 7A-31 of the North Carolina General Statutes and Rule 15(a) of the North Carolina Rules of Appellate Procedure, which allow an appellant to bypass the court of appeals at the discretion of the supreme court. *See* N.C. GEN. STAT. § 7A-31 (1986); N.C.R. APP. P. 15(a).

16. *Martin*, 320 N.C. at 524, 359 S.E.2d at 787 (plurality opinion).

17. Chief Justice Exum did not participate in the decision, presumably because of his potentially conflicting interest in the outcome. *See id.*

18. *See id.* at 522, 359 S.E.2d at 786 (plurality opinion); *id.* at 525, 359 S.E.2d at 787 (Meyer, J., concurring); *id.* at 528, 359 S.E.2d at 789 (Martin, J., dissenting).

19. *Id.* at 524, 359 S.E.2d at 787.

20. *Id.* at 525, 359 S.E.2d at 788 (Meyer, J., concurring). Justice Whichard joined in Justice Meyer's concurrence.

21. *Id.* (Meyer, J., concurring).

22. *Id.* at 529, 359 S.E.2d at 790 (Martin, J., dissenting).

After deciding that someone other than the Governor could appoint the director, the *Martin* court decided whether the chief justice could do so. The Governor argued that the OAH, an executive agency, could not be headed by the chief justice's appointee without violating the separation of powers.[23] Reasoning from a previous holding, the plurality rejected this argument.[24] Because appointing is not an entirely executive function, it reasoned, the constitution does not require that the appointer be in the executive branch. The general assembly may therefore provide that the chief justice will appoint the director.[25]

The concurring justices reached the same conclusion but on different reasoning. They concentrated on the director's powers, finding them "predominantly judicial," and ruled the chief justice would be exercising judicial power by appointing the director.[26] Justice Martin agreed with the concurring justices' standard, but disagreed with its application by the concurring justices in this case.[27] He held that Melott's powers were administrative and therefore the executive branch must appoint him.[28] Justice Martin observed that though the director has "quasi-judicial" powers, such are commonplace for administrative agencies.[29] He also argued that because the general assembly may not create a new court,[30] the powers of the OAH must not be judicial.[31]

Separating the powers of government is fundamental to American democracy. Though the federal constitution does not refer to the separation of powers, the framers incorporated it by assigning distinct functions to the three branches of government.[32] In so doing, the framers sought to strike a balance between checks on the power of government and effective government.[33] Just as the im-

23. *Id.* at 518-19, 359 S.E.2d at 784.

24. *Id.* at 523-24, 359 S.E.2d at 787 (plurality opinion) (citing *In re* Separation of Powers, 305 N.C. 767, 774, 295 S.E.2d 589, 593 (1982)).

25. *Id.*

26. *Id.* at 525, 359 S.E.2d at 788 (Meyer, J., concurring). Justice Meyer wrote, "I agree . . . that the legislature can constitutionally *delegate* to the Chief Justice of the North Carolina Supreme Court the power to appoint the Director of the Office of Administrative Hearings . . . ." *Id.* (emphasis added). The use of the word "delegate" in this context is troubling. Delegation connotes subordination, which is inconsistent with the parity of the three branches. It also implies that the person delegating can retake the authority if she wishes. "Delegation" is often used to describe the grant of authority to an administrative agency. *See infra* text accompanying note 36. However, it is appropriate in that context because the general assembly created the agency. The constitution created the North Carolina Supreme Court. *See* N.C. CONST. art. IV, § 5.

27. *Martin*, 320 N.C. at 530-31, 359 S.E.2d at 790-91 (Martin, J., dissenting).

28. *Id.* at 531, 359 S.E.2d at 791 (Martin, J., dissenting).

29. *Id.* at 530, 359 S.E.2d at 790. *See also* Cox v. City of Kinston, 217 N.C. 391, 8 S.E.2d 252 (1940) (quasi-judicial powers may be granted to administrative agencies to aid them in executing their assigned responsibilities).

30. *See* N.C. CONST. art. IV, § 1 ("The General Assembly shall have no power to . . . establish or authorize any courts other than as permitted by this Article.").

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

32. *See* Orth, *"Forever Separate and Distinct": Separation of Powers in North Carolina*, 62 N.C.L. REV. 1, 4-5 (1983). For a thorough discussion of the origins and history of the separation of powers doctrine, see Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393 (1922); Sharp, *Classical American Doctrine of the Separation of Powers*, 2 U. CHI. L. REV. 385 (1935).

33. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

peachment, war-making, and spending powers of the Congress diminish the threat of an autocratic executive, fear of a despotic legislature helps explain bicameralism,[34] the independence of the judiciary,[35] judicial review, and presidential veto.[36] A strong executive was intended to promote efficient government and prevent tyranny by a majority.[37]

The founders of North Carolina's Revolutionary government were intent on separating the powers of government. In its instructions to its delegates to the North Carolina Provincial Congress of 1776, Mecklenburg County instructed that they

> endeavor that the Government shall be so formed that [governmental power] shall be divided into three branches distinct from each other, viz: The power of making laws
> The power of executing laws
> The power of Judging.[38]

Accordingly, the North Carolina Constitution of 1776 provided that "the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other."[39]

Though the North Carolina and federal constitutions both provided for the separation of powers, the two constitutions differed in the relative power of each branch. Demonstrating an historic fear of powerful executives,[40] North Carolina constitutions have given more power to the general assembly than to the Governor. For example, under the Constitution of 1776, the general assembly elected both the Governor and the justices of the supreme court.[41] The general political power of the state has been vested in the general assembly, limited only

34. *See* Sharp, *supra* note 32, at 396-98. Sharp quotes John Adams, who wrote in defense of bicameralism, "A single assembly is liable to all the vices, follies, and frailties of an individual .... [A] single assembly, possessed of all the powers of government, would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favor." *Id.*; *see also* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (statute permitting one house of Congress to reverse an administrative decision violates constitutional requirements of bicameral deliberation and of presentment of bills to the President for possible veto).

35. *See* Sharp, *supra* note 32, at 393. Professor Sharp suggests that the independent judiciary was the result of the wealthy framers of the constitution wishing to protect their property from an unchecked legislature. *Id.*

36. Sharp, *supra* note 32, at 385.

37. Sharp, *supra* note 32, at 399. "It was the the prevailing view that legislatures were dangerous, and ought not to be too strong, while executives and judges would be likely to protect endangered interests, and ought to be strong." *Id.* For a criticism of the growth in executive power, see Miller, *Separation of Power: An Ancient Doctrine Under Modern Challenge*, 28 ADMIN. L. REV. 299, 313-18 (1976).

38. State *ex rel.* Wallace v. Bone, 304 N.C. 591, 596-98, 286 S.E.2d 79, 82-83 (1982) (quoting 10 COLONIAL RECORDS OF NORTH CAROLINA 870b (W. Saunders ed. 1890)). For more background on concerns about the separation of powers during the writing of the constitution of 1776, see Orth, *supra* note 32, at 3-6.

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

40. *See* H. LEFLER & A. NEWSOME, NORTH CAROLINA: THE HISTORY OF A SOUTHERN STATE 210 (3d ed. 1973).

41. Cunningham v. Springle, 124 N.C. 638, 642-43, 33 S.E. 138, 139 (1899). The constitution was amended in 1835 to provide for the popular election of the Governor. The Constitution of 1868 provided for the popular election of the judiciary. *See* Orth, *supra* note 32, at 6 (discussing predominance of the legislature in the early constitutions of southern states).

by the state and federal constitutions.[42]

In North Carolina most separation of powers litigation has tested the authority of administrative agencies either to promulgate or to enforce rules, or has challenged the authority of the agency to do both.[43] The issue in these cases has been the extent to which a delegation of power by the general assembly to an administrative agency violates the separation of powers doctrine.

Typical of such cases is *Motsinger v. Perryman*.[44] As a defense to a workers' compensation claim, defendant challenged the authority of the Industrial Commission to require insurers to notify the Commission ten days before cancelling a policy.[45] The supreme court held that the commission had violated the separation of powers principle by *making* law instead of simply enforcing it.[46] Though the court held that the general assembly could not delegate its power to make laws, the court observed that "[t]he authority to make rules and regulations to carry out express legislative purposes or effect the operation and enforcement of a law is not an exclusively legislative power, but is rather administrative in its nature and may be delegated."[47] In further defining which powers could be delegated, the court declared that "any power not legislative in character, which the legislature may exercise, it may delegate."[48]

The extent to which the general assembly may delegate to the courts is unclear. The North Carolina Supreme Court has held that it has no power or authority to oversee administrative agencies.[49] Although judicial power and administrative power in one agency could violate the separation of powers doc-

42. Sykes v. Clayton, 274 N.C. 398, 402, 163 S.E.2d 775, 778 (1968); Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968).

43. *See, e.g.*, Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978) (delegation of power to Coastal Resources Commission did not violate separation of powers); Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971) (granting parole board judicial powers is constitutional).

One commentator suggested that the separation of powers should not be a consideration in administrative law. Fuchs, *An Approach to Administrative Law*, 18 N.C.L. REV. 183, 198 (1940) ("The dead weight of alleged separation-of-powers limitations should be cast overboard finally and definitively, bag and baggage.").

44. 218 N.C. 15, 9 S.E.2d 511 (1940).

45. *Id.* at 19, 9 S.E.2d at 514.

46. *Id.* at 20, 9 S.E.2d at 515.

47. *Id.* at 20, 9 S.E.2d at 514-15.

48. *Id.*; *see also*, Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973) ("The General Assembly may neither abdicate its authority to make law nor delegate that authority to other departments of government or subordinate administrative agencies."); Guthrie v. Taylor, 279 N.C. 703, 712-13, 185 S.E.2d 193, 200 (1971) (general assembly may delegate rule-making power, but it must provide standards within which the agency will operate; however, the agency may exercise complete discretion if its authority is derived directly from the constitution), *cert. denied*, 406 U.S. 920 (1972).

Though the constitution defines the legislature's powers, this seldom resolves these claims. One commentator has suggested that "legislation . . . 'consists of an abstract formulation of a general rule' while adjudication 'operates concretely upon individuals in their individual capacity.' " Fuchs, *supra* note 43, at 192 (quoting C. ALLEN, LAW IN THE MAKING 238 (1927); J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 21 (1926)). Fuchs also suggests distinguishing between the powers and the functions of a branch of government. Fuchs, *supra* note 43, at 186.

49. *See* Burton v. City of Reidsville, 243 N.C. 405, 90 S.E.2d 700 (1956).

trine, the supreme court ruled in *Cox v. City of Kinston*[50] that the general assembly may create a board with both quasi-judicial[51] and administrative power and delegate power to it.[52] In *Cox* the court upheld a statute authorizing the creation of the Kinston Housing Authority, saying, "The legislature has always, without serious question, given quasi-judicial powers to administrative bodies in aid of duties assigned to them .... The performance of quasi-judicial and [administrative] duties by the same board violates no implication of [the separation of powers clause]."[53]

Statutes that purport to authorize legislators to exercise executive powers violate the separation of powers doctrine. In *In re Separation of Powers*[54] the justices of the North Carolina Supreme Court considered statutes that authorized a joint legislative commission to make budgetary decisions.[55] The justices ruled that under the statutes the committee would "administer the budget," a power the constitution gave exclusively to the Governor.[56] This legislative exercise of executive power violated the separation of powers doctrine.[57]

Similarly, a statute authorizing the appointment of legislators to an administrative body has been held unconstitutional. In *State ex rel. Wallace v. Bone*[58]

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50. 217 N.C. 391, 8 S.E.2d 252 (1940).

51. "Quasi-judicial" is a term applied to "the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." BLACK'S LAW DICTIONARY 1121 (5th ed. 1979). One court has held that issuing advisory opinions is not quasi-judicial, because the issuing of the opinion was not the basis of *the issuing board's* official action. Commission on Ethics v. Sullivan, 489 So. 2d 10 (Fla. 1986). For a survey of the criticisms of the term "quasi-judicial," see Note, *The Administrative Hearing Commission and the Separation of Powers: A Solution to an Old Problem*, 49 MO. L. REV. 854, 861-62 (1984).

52. *Cox*, 217 N.C. at 394-95, 8 S.E.2d at 256.

53. *Id.*

54. 305 N.C. 767, 295 S.E.2d 589 (1982). The Governor, the Speaker of the House, and the President of the Senate had requested the North Carolina Supreme Court to issue an advisory opinion on the constitutionality of the statute. *Id.* at 772, 295 S.E.2d at 592. An advisory opinion is not an opinion of the court, but is rather the justices giving their collective, but nonbinding opinions. *In re* Advisory Opinion, 314 N.C. 679, 335 S.E.2d 890 (1985).

55. *In re* Separation of Powers, 305 N.C. at 768-71, 295 S.E.2d at 590-91. The statutes permitted the commission to make budget transfers between agencies up to 10% as needed during the fiscal year and to allocate federal block grants. *Id.*

56. *Id.* at 776-77, 779, 295 S.E.2d at 594, 596. The court relied on Clause 3 of Article III, Section 5 of the North Carolina Constitution, which provides that "[t]he budget as enacted by the General Assembly shall be administered by the Governor."

57. *In re* Separation of Powers, 305 N.C. at 776-77, 295 S.E.2d at 594. The justices also declared that a statute authorizing the joint commission to control block grants was "an unlawful delegation of legislative power." *Id.* at 780, 295 S.E.2d at 596. The justices did not explain why this was unlawful. The delegation of legislative power to a group of legislators would not seem to violate separation of powers, as the power remains in the legislative branch. *See* Orth, *supra* note 32, at 23.

One justification for nullifying this delegation is that it bypassed constitutional checks on arbitrary legislative action, particularly bicameral deliberation and consent. *See supra* note 34 and accompanying text; *see also* Bowsher v. Synar, 106 S. Ct. 3181, 3205 (1986) (Stevens, J., concurring) (statute permitting comptroller general, an official removable only by Congress, to cut federal spending violates the constitutional procedure for law-making). For a criticism of the court's rationale in *In re Separation of Powers*, see Orth, *supra* note 32, at 22-23.

58. 304 N.C. 591, 286 S.E.2d 79 (1982). For an historical backdrop to *Wallace*, see Orth, *Separation of Powers: An Old Doctrine Triggers a New Crisis*, N.C. INSIGHT, May 1982, at 36. Professor Orth documents six incursions by one branch of the government into the domain of another.

two members of the North Carolina Environmental Management Commission (EMC), both of whom were appointed by the Governor, challenged a statute that authorized legislative appointments to the EMC.[59] After examining the duties of the EMC, the court struck the statute, stating "it is crystal clear to us 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 . . . ."[60] The *Wallace* court's primary concern was legislative control of the agency by the appointment *of* legislators to the EMC.[61] The court did not reach the question of whether appointments *by* legislators to the EMC would be constitutional.[62]

The overarching concern of the supreme court in both *Wallace* and *In re Advisory Opinion* was legislative usurpation of executive power. In *In re Advisory Opinion* the legislative incursion was direct: legislators performed executive functions. In *Wallace* the legislative control was less direct because only a minority of the EMC's members were legislators. The Court nevertheless held that the legislators had invaded the Governor's powers.

In addition to violating the general separation of powers doctrine, an appointment may be unconstitutional because it violates a more specific provision for appointments. The appointments provision of the North Carolina Constitution, often reflecting the contemporary political landscape, has evolved over 200 years. Under the Constitution of 1776, for example, the general assembly appointed all of the state's judges and elected the Governor.[63]

During Reconstruction, the federal government imposed the Constitution of 1868.[64] This constitution explicitly gave the Governor the power to fill positions that the general assembly created and barred the general assembly from making the appointments itself.[65] The North Carolina Supreme Court alluded

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59. *Wallace*, 304 N.C. at 591-92, 286 S.E.2d at 79-80. The statute permitted both the Speaker of the House of Representatives and the President of the Senate to appoint two members to the EMC.

60. *Id.* at 608, 286 S.E.2d at 88. The court relied on the purpose of the EMC, as stated in N.C. GEN. STAT. § 143B-282 (1987), to "promulgate rules and regulations to be followed in the protection, preservation, and enhancement of the water and air resources of the State." The court then gave a litany of the specific powers of the EMC. *Wallace*, 304 N.C. at 607, 286 S.E.2d at 87-88.

61. *Id.* at 608, 286 S.E.2d at 88. "The legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality." *Id.*

62. The court did not comment on the 49 other boards and commissions on which legislators serve pursuant to statute. *See id.* The court did, however, acknowledge, "North Carolina has recognized and benefitted from cooperative efforts between the branches of its government. The best examples of this are various study commissions on which legislators and non-legislators, including persons from other branches of government, have served." *Id.* The EMC's active enforcement of the law, rather than its being a *study* commission, was a basis of the court's decision. *Id.* For the legislative response to *Wallace*, see Heath, *The Separation of Powers in North Carolina*, POPULAR GOV'T, Fall 1982, at 19, 22-23; Sawyer, *The Separation of Powers in North Carolina—A 1984 Update*, POPULAR GOV'T, Winter 1984, at 29.

63. *See supra* note 41 and accompanying text.

64. *See* 2 R. CONNOR, NORTH CAROLINA: REBUILDING AN ANCIENT COMMONWEALTH 325 (1929).

65. The 1868 constitution provided that:

> The Governor shall nominate, and by and with the advice and consent of a majority of the Senators-elect, appoint all officers whose offices are established by this Constitution, *or*

to this provision in *People ex rel. Cloud v. Wilson*,[66] and noted that the constitution empowered the Governor to make appointments absent a specific constitutional provision to the contrary.[67]

The end of Reconstruction returned the Democrats to power, bringing constitutional reform and a shift of power from the Governor back to the general assembly.[68] The new appointments clause did not specifically bar legislative appointments, and it did not specifically provide for the Governor to fill offices created by law.[69] Interpreting this provision, the supreme court ruled that the Governor's power to fill positions created by statute could be limited by statute.[70]

The North Carolina Constitution was largely rewritten in 1970. The new appointments clause reads, "The Governor shall nominate and by and with the advice and consent of the majority of the Senators appoint all officers whose appointments are not otherwise provided for."[71] No appellate court in North Carolina has interpreted this provision, and it is unclear whether this revision makes a substantive change. On one hand, dropping the requirement that an appointment be of officers "whose offices are established by the Constitution"[72] seems to broaden the Governor's power under the provision. On the other hand, retaining the phrase "whose appointments are not otherwise provided for" suggests approval of the previous judicial interpretation of that phrase, which permitted the general assembly to provide for appointments through statutes.[73]

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which shall be created by law, and whose appointments are not otherwise provided for, *and no such officer shall be appointed or elected by the General Assembly.*

N.C. CONST. of 1868, art. III, § 10 (emphasis added).

66. 72 N.C. 155 (1875).

67. *Id.* at 158. The *Cloud* court considered the constitutionality of a statute which called for elections to fill vacant judgeships. *Id.* at 155-56. Cloud was appointed to the vacancy by Governor Holden, a Republican, who was later removed from office by a predominantly Democratic general assembly. *Id.* In striking the statute, the court relied primarily on provisions which authorized the Governor to fill judicial vacancies, but the court also referred to "other parts of the Constitution" which empowered the Governor to appoint absent a contrary constitutional provision. *Id.* at 158.

68. *See* R. CONNOR, *supra* note 64, at 343.

69. The appointments clause, as amended in 1875, read, "The Governor shall nominate, and by and with the advice and consent of a majority of the Senators-elect, appoint all officers whose offices are established by this Constitution and whose appointments are not otherwise provided for." N.C. CONST. of 1868, art. III, § 10 (1875).

70. Salisbury v. Croom, 167 N.C. 223, 226, 83 S.E. 354, 355 (1914); State *ex rel.* Cherry v. Burns, 124 N.C. 761, 765, 33 S.E. 136, 137 (1899). Commenting on the changes wrought by the 1875 amendments, the *Salisbury* court wrote:

> It will thus be noted that the inhibition on the legislative power to appoint to office is removed and the inherent power of the Governor to appoint is restricted to constitutional offices and where the Constitution itself so provides. Accordingly, it has since been the accepted view that, in all offices created by statute . . . the power of appointment . . . is subject to legislative provision as expressed in a valid enactment.

Salisbury, 167 N.C. at 226, 83 S.E. at 355.

In Cunningham v. Sprinkle, 124 N.C. 406, 33 S.E. 138 (1899), the court determined whether a reference to the agriculture board in the constitution made it a constitutional office. In holding that it did not, the court stated that the provision " '[t]he General Assembly shall establish a Department of Agriculture' " did not establish the board; it simply directed the general assembly to do so. *Id.* at 409, 33 S.E. at 139 (quoting N.C. CONST. of 1868, art. III, § 17 (1875)).

71. N.C. CONST. art. III, § 5, cl. 8.

72. *See supra* note 69.

73. *See supra* note 70 and accompanying text. The North Carolina Supreme Court has not

Martin is significant because it is the first case interpreting the appointments clause of the 1970 constitution. As such, it may be a standard by which subsequent disputes between branches of government will be resolved. Specifically, by reaffirming that the phrase "unless otherwise provided" means "unless otherwise provided by constitution *or statute*," *Martin* establishes that the general assembly may designate who will make appointments, absent a specific provision to the contrary.[74] The plurality's broad declaration of the appointment power's mobility between branches further suggests little scrutiny of such legislative enactments in the future.[75]

The court also reaffirmed that the Constitution of 1970 made few substantive changes. The court's silence on the dropping of the phrase "whose offices are established by this Constitution" suggests the court is hesitant to recognize changes in the 1970 constitution even though revised language suggests otherwise.[76] Perhaps the most significant aspect of the case is the court's very limited view of the separation of powers doctrine as an independent bar to certain legislative acts.[77] Indeed, the court's language suggests the doctrine is no bar to the general assembly's creating an appointment power outside the executive branch.[78]

The precedential value of the *Martin* holding is unclear because of its lack of a majority opinion. Though all six justices rejected the Governor's appointments clause argument, the justices split three-to-three on the proper emphasis of their separation of powers inquiry.[79] The plurality asked if the power to appoint was a purely executive power; the other justices examined the appointee's

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been consistent on the extent to which substantive changes were made in the Constitution of 1970. In North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982), the court ruled that "[the 1970 constitution] was not a fundamentally new constitution. It was an extensive editorial revision . . . . The evils sought to be remedied were obsolete language, outdated style, and illogical arrangement . . . . Important and significant substantive changes were not included in the new document submitted in 1970." *Id.* at 636-37, 286 S.E.2d at 95. However, in Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976), the supreme court ruled that the 1970 revisons had wrought substantive changes by enlarging the original jurisdiction of the supreme court. *Id.* at 325, 222 S.E.2d at 428.

74. *See supra* notes 5-18 and accompanying text.

75. Differences among the appointment provisions of state constitutions make generalizations of their case law difficult. Many state constitutions provide that the Governor will make appointments unless the constitution provides otherwise. *See, e.g.*, KY. CONST. § 76 ("He [the Governor] shall have the power, except as otherwise provided in this Constitution, to fill vacancies by granting commissions . . . ."). In most such states, making appointments is considered an executive function that neither the legislature nor judiciary may exercise. *See* Legislative Research Comm'n *ex rel.* Prather v. Brown, 664 S.W.2d 907, 923-24 (Ky. 1984).

In states where constitutions permit the legislature to specify how appointments are to be made, most courts scrutinize statutes to ensure that the legislature is not encroaching on executive or judicial perogatives. *See In re* Opinion of the Justices, 300 Mass. 596, 14 N.E.2d 465 (1938); State *ex rel.* Hadley v. Washburn, 167 Mo. 680, 67 S.W. 592 (1902) (en banc); Matheson v. Ferry, 641 P.2d 674 (Utah 1982). The *Hadley* court found that legislative appointments of one who executed the laws, though apparently authorized by the appointments provision, violated the separation of powers doctrine. *Hadley*, 167 Mo. at 694, 67 S.W. at 594. However, some courts, viewing the power to appoint as neither legislative or executive, do not scrutinize such legislative enactments. Sarten v. Snell, 87 Kan. 485, 125 P. 47 (1912).

76. *See supra* notes 69-71 and accompanying text.

77. *See supra* notes 23-25 and accompanying text.

78. *See supra* notes 23-25 and accompanying text.

79. *See supra* notes 26-27 and accompanying text.

power. Justice Martin's disagreement with the concurring justices on how to apply their test permitted Justice Webb's opinion to garner a plurality.

The court's interpretation of the current appointments clause is consistent with its interpretation of the appointments clause in the 1875 amendments to the Constitution of 1868. Though the 1970 amendment apparently increased the Governor's power to appoint,[80] the court correctly repeated its holding that the "unless otherwise provided" clause permits the general assembly to assign that power elsewhere.[81] The clear intent of the 1875 revisionists—to permit the general assembly to designate how appointments are made—should be given effect absent a clear change in the 1970 constitution.[82]

The court's analysis of the Governor's separation of powers claim, however, is inconsistent with its previous decisions. The Governor had asserted that because Melott's responsibilities were *administrative*, the general assembly's placement of the power to appoint outside the executive branch violated the separation of powers doctrine.[83] The court responded by stating that because the power to appoint is not exclusively executive, the general assembly could give the power to whomever it wished.[84]

The *Martin* court's concentration on the appointments provision, divorced from the separation of powers provision, is inconsistent with *Wallace*.[85] The *Wallace* court did not hold that the legislative appointments to the EMC violated any *specific* constitutional provision.[86] Instead, the appointments violated only the general separation of powers clause. *Martin*'s implicit requirement that a specific power be infringed is irreconcilable.[87]

As Justice Meyer wrote in his concurring opinion, the focus should be on the "*powers and duties exercised by the person appointed.*"[88] Justice Meyer continued:

> If the nature of the powers and duties to be exercised by the appointee are primarily executive in nature, the separation of powers provision of our constitution is violated [by granting the power to the chief justice]. If they are primarily judicial in nature, the separation of powers provision is not violated.[89]

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80. *See supra* note 76 and accompanying text.

81. *Martin*, 320 N.C. at 523, 359 S.E.2d at 785. *See supra* note 73 and accompanying text.

82. For a discussion of the motives behind and effects of the 1875 amendments, see *supra* note 70 and accompanying text. For a discussion of the intentions of the drafters of the 1970 constitution, see *supra* notes 71-73 and accompanying text.

83. *Martin*, 320 N.C. at 522-23, 359 S.E.2d at 786.

84. *Id.* at 523-24, 359 S.E.2d at 787.

85. *See supra* notes 58-62 and accompanying text.

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

87. *In re* Separation of Powers, 305 N.C. 767, 295 S.E.2d 589 (1982), did not weaken *Wallace's* applicability here. In *In re Separation of Powers*, the justices held that because a statute encroached upon the Governor's budgetary powers under Article III, it violated the separation of powers. *Id.* at 776-77, 295 S.E.2d at 594. The ruling implied that an encroachment upon a specific power is *sufficient* to violate the principle of separation of powers, but did not imply that such an encroachment is *necessary*. *See supra* notes 54-57 and accompanying text.

88. *Martin*, 320 N.C. at 525, 359 S.E.2d at 788 (Meyer, J., concurring).

89. *Id.*

Wallace supports Justice Meyer's objection to the plurality's rationale. In holding the appointment of the legislators to the EMC unconstitutional, the *Wallace* court wrote "the duties of the EMC are administrative or executive in character and have no relation to the function of legislative branch of government, which is to make laws."[90] Although the issue in *Wallace* clearly differs from that in *Martin*, both cases turn on the need to consider the appointee's powers when judging the constitutionalty of appointments. Similarly, the justices in *In re Separation of Powers* focused on the appointees' powers when reviewing the propriety of appointing legislators to a commission with executive powers.[91] The justices reaffirmed *Wallace*, basing their decision on the appointees' authority and the need to limit legislative control of the executive branch.[92]

Justice Meyer's concurring opinion in *Martin* implicitly recognized that an appointment could violate the separation of powers provision without violating the appointments clause. Justice Meyer did not differ with the plurality's interpretation of the appointments clause. Nevertheless, he opined that in certain circumstances, the appointee's functions could make an otherwise valid appointment invalid. Because neither the appointments clause itself nor the plurality's interpretation of the clause incorporates the appointee's function, Justice Meyer must have been alluding to the general separation of powers doctrine.[93]

The court's unsupported remark that "[t]he appointment of someone to execute the laws does not require the appointing party to execute the laws"[94] is utterly inconsistent with the separation of powers in the federal constitution.[95] The United States Supreme Court has recognized that maintaining the power to appoint the officials within each branch is crucial to each branch's independence.[96]

In discussing the general assembly's grant of authority to the chief justice to appoint the OAH director, the court did not address the constitutionality of *requiring* the chief justice to make such appointments. While the question has not been presented in North Carolina, the United States Supreme Court has ruled that Congress may not impose executive or administrative duties on a

90. *Wallace*, 304 N.C. at 608, 286 S.E.2d at 88. The *Martin* plurality considered *Wallace*, but held it to be inapposite because it concerned appointing legislators to commissions rather than the general assembly designating who would appoint. *Martin*, 320 N.C. at 523, 359 S.E.2d at 786.

91. *In re* Separation of Powers, 305 N.C. at 776, 295 S.E.2d at 594.

92. *Id.* at 776-77, 295 S.E.2d at 594. Interestingly, the *Martin* court cited *In re Separation of Powers*, which held the general assembly could not interfere with the Governor's administration of the budget, for the proposition that the Governor's powers were limited to "executing laws." *Martin*, 320 N.C. at 523, 359 S.E.2d at 787 (quoting *In re* Separation of Powers, 305 N.C. 767, 774, 295 S.E.2d 589, 593 (1982)).

93. *Martin*, 320 N.C. at 527, 359 S.E.2d at 789 (Meyer, J., concurring).

94. *Id.* at 523, 359 S.E.2d at 787.

95. Myers v. United States, 272 U.S. 52, 163 (1926) ("The power to appoint and remove executive officers is an exercise of executive power."); *see also* Bowsher v. Synar, 106 S. Ct. 3181, 3188 (1986) (Executive power may not be exercised by one whom Congress could remove because "the structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."). *But cf.*, Humphrey's Executor v. United States, 295 U.S. 602 (1935) (only the President may remove or appoint officials, but Congress may create standards for removal if officials' functions are "quasi-legislative").

96. *Bowsher*, 106 S. Ct. at 3188; *Myers*, 272 U.S. at 163.

judge.[97] Justice Meyer's assertion in *Martin* that Melott's duties were "*predominately* judicial"[98] does not resolve the issue entirely, because Melott's duties were partially administrative.

Justices Martin and Meyer differ on whether the OAH was judicial or administrative, and both make strong arguments. The statutory definition of OAH's duties includes functions that are administrative as well as those normally considered judicial.[99] Some functions are not clearly within either branch.[100] However, because a statute must be *clearly* unconstitutional before the court will strike it,[101] the court properly upheld the statute.

The concurring opinion's emphasis on the powers that the appointee will exercise is more consistent with the court's earlier cases.[102] Furthermore, the plurality's analysis stops after establishing that the power to appoint has not been misplaced. By concentrating on the power to appoint, the plurality refuses to give the separation of powers doctrine an independent existence. Under this analysis, violating this principle is an epithet for one branch's encroachment on the specific powers of another.

Though the court's conclusion is defensible, its rationale poses several problems. The most serious difficulty is that it undermines the independent strength of the separation of powers principle, the purpose of which is to prevent the weakening of one branch of government. By narrowly viewing this doctrine, the court diminishes an important check on unbridled power.

The decision also offers no guidelines for future legislation. By concentrating on the power to appoint, which it views as neither legislative nor executive, the court permits the general assembly to grant to any person, or to keep to itself, all appointments not provided for in the constitution. This power opens the door for legislative hegemony, threatening the integrity of the executive and judicial branches. Weakening the separation of powers doctrine may also dimin-

97. *See* United States v. Ferreira, 54 U.S. (13 How.) 40, 51 (1852).

98. *Martin*, 320 N.C. at 526, 359 S.E.2d at 788 (Meyer, J., concurring).

99. For example, the director is responsible for codifying and publishing all administrative rules, as well as hearing testimony, applying rules of evidence, and regulating discovery. *See* N.C. GEN. STAT. § 150B-33 (1987).

100. The director of OAH is the chief administrative law judge. N.C. GEN. STAT. § 7A-751 (1986). Whether one considers this a judicial or executive position may turn on the relative emphasis one gives the words "law judge" and "administrative." *See* Note, *supra* note 51, at 859 (Some courts rely on procedural similarities between the agency and the courts in assessing whether or not the agency violates the separation of powers doctrine.).

101. *See* Glenn v. Board of Educ., 210 N.C. 525, 187 S.E.2d 781 (1936). In a dispute between the Governor and general assembly, why should a presumption favor the general assembly? One could argue that the relative weakness of the Governor behooves the court to compensate in order to check legislative abuses. By simply abandoning its strong presumption in favor of legislative acts when the Governor alleges they violate the separation of powers, the court could promote parity. One answer is that the general assembly is vested with all political power in the state except when limited by the constitution. This reflects the notion that the general assembly more accurately represents popular will. *See supra* note 42 and accompanying text; *see also supra* note 40 and accompanying text (documenting the historical fear of a strong executive). While this was undoubtedly true when the general assembly appointed the Governor, it is less evident with a popularly elected Governor. Indeed, one could argue that because only a small fraction of the electorate votes for any one legislator, the Governor is more attuned to the popular will.

102. *See supra* text accompanying notes 83-87.

ish the effectiveness of government.[103] Each branch, in order to perform its duties effectively, depends on appointees to execute their duties consistent with its policies.[104] Therefore, the selection of the appointee is crucial to each branch's effectiveness.

A better approach would accommodate the competing policy demands of effectiveness and an effective check on excessive power. Because the need to provide effective checks and balances is the foundation of the constitution and transcends any particular provision, the separation of powers provision should also be seen to transcend any other particular provision. Under this view, acts that encroach on the general powers of one branch would be struck even though they violate no other specific provision. Although this view was implicit in *Wallace* and in the *Martin* concurrence,[105] the failure to state it explicitly may explain the *Martin* plurality's departure from it.

While the separation of powers should have an independent identity, the power to appoint should be viewed as a tool which each branch employs in performing its constitutional duties.[106] Under this rationale, the appointment of an official with executive powers would be an integral component of the appointer's executive power. An appointment of this official by someone outside the executive branch would therefore place executive power outside the executive branch. Thus understood, a court reviewing an appointment would focus on whether the powers of the appointee were a subset of the powers of the appointer.[107] If the appointer and appointee exercised different types of power, then the appointment would fail. The result would be that each appointee would be appointed by one in her own branch.

This formulation seeks to preserve the integrity of each branch by preventing cross purposes between appointer and appointee. By relating the power to appoint to the delegation of authority, one avoids the anomaly of an appointee and his more powerful superior pursuing different objectives.[108] The scheme also insulates each branch from the winds of political or policy change in other branches.[109] By forcing either deliberation between the branches or an electoral consensus, the risk of one branch's political agenda undermining that of another is diminished. This result is also more consistent with each branch's ultimate accountability to the electorate. Finally, such a model would guide the general

103. *See* L. TRIBE, CONSTITUTIONAL LAW § 2-2 (1988).

104. *Myers*, 272 U.S. at 163-64.

105. *See supra* note 93 and accompanying text.

106. *See Myers*, 272 U.S. at 163. The *Myers* Court ruled that the separation of powers limits the power of Congress to interfere with appointments of executive officers. "Otherwise, it would be impossible for the President to ensure that the laws be faithfully executed." *Id.* at 163-64.

107. State *ex rel.* Hadley v. Washburn, 167 Mo. 680, 691, 67 S.W. 592, 594 (1902) ("[Everyone] who lawfully exercises any State governmental function is able to trace the sources of his authority to one of the three departments there named. The power, whatever its character, can be exercised only by or under the authority of the separate magistracy to which by the Constitution it is assigned.").

108. *See supra* note 104 and accompanying text.

109. *See* Miller, *Separation of Powers: An Ancient Doctrine Under Modern Challenge*, 28 ADMIN. L. REV. 299, 303 (1976) (In the liberal state "social change—what some call progress—can come about only by moves in concert by the three branches.").

assembly and courts on the legitimacy of appointments. Though the "subset" test is no doubt easier to state than to apply,[110] it focuses on factors relevant to the independence of each branch and discounts the power to appoint as an independent constitutional prerogative.

In upholding the statute in *Martin*, the plurality concentrated on the power to appoint and ignored the independent role of the separations of power doctrine as a check against the abuse of power. This rationale departs from the court's previous cases and weakens a constitutional safeguard against the abuse of power. Furthermore, the court's decision offers no rationale by which appointment cases can be decided consistently. A rationale which reverses the emphasis of the plurality would better serve the conflicting interests of or between effective yet controlled government.

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110. In a case like *Martin*, in which the appointee's duties are not a proper subset of any one branch, a court would need to determine the branch into which the appointee's duties predominantly fall.