

ARTICLES

GOVERNMENT EMPLOYEES NEED NOT APPLY: WHY THE STATE SEPARATION OF POWERS DOCTRINE BARS LEGISLATIVE DUAL SERVICE

*Robert Fellner & Colleen McCarty**

INTRODUCTION

Federal and state constitutions both “agree with Montesquieu” that there are but three branches of government—legislative, executive, and judicial—and that each is “invested with a distinctive function.”¹ Most state constitutions, unlike the United States Constitution, however, contain an explicit separation of powers clause.² Moreover, many of those clauses specifically incorporate two parts: the authorization of government power, followed by the appropriate distribution of said power.³ This Article seeks to identify why these state-specific separation of powers clauses should be read to preclude any form of legislative dual service, i.e., government employees simultaneously serving as state legislators.

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¹ G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 333 (2003).

² *Id.* at 337.

³ *See, e.g.*, MONT. CONST. art. III, § 1. The Montana Constitution provides a representative example, which states in relevant part that, “[t]he power of the government of this state is divided into three distinct branches . . .” *Id.* Thus, the separation of powers clause first authoritatively defines the scope of power, then divides it. The implication of the former function is that all governments within the state can only exist if they have a valid claim to exercising one of the three forms of governmental power authorized and delegated by the People.

Most would agree that, if the separation of powers means anything, it means that a prosecutor charged with enforcing the law is forbidden from simultaneously serving as a legislator responsible for writing the law.⁴ But while it is fairly obvious to declare that particular combination impermissible, much uncertainty surrounds where, exactly, the line between permissible and impermissible legislative dual service should be drawn across the board,⁵ with state courts having issued wildly divergent rulings based on nearly identical textual provisions.⁶ This is an issue of particularly significant importance among the many states that have a part-time legislature, where it is common, if not expected, that most legislators will have full-time employment elsewhere.⁷

State courts' radically divergent interpretations of what are essentially identical clauses cannot be justified on a textual basis.⁸ This Article seeks to rectify the unsatisfying disconnect in the case law by offering a construction that is consistent with both the text and purpose of the state separation of powers doctrine as found in state constitutions. Beyond the academic value of such an exercise,⁹ this may also be of value to the several states that have seen the issue of legislative dual service arise but whose respective state supreme courts have yet to issue a ruling providing a clear answer to this question.¹⁰

⁴ See, e.g., GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH 512 (5th ed. 2021) ("In general, no one doubts that prosecuting criminal suspects is an executive branch function.")

⁵ Scott M. Matheson, Jr., *Eligibility of Public Officers and Employees to Serve in the State Legislature: An Essay on Separation of Powers, Politics, and Constitutional Policy*, 1988 UTAH L. REV. 295, 334 (1988) ("Deciding where to draw a line that distinguishes unacceptable from benign simultaneous officeholding, however, is an exceedingly difficult task.")

⁶ Compare *State ex rel. Barney v. Hawkins*, 257 P. 411, 412–13 (Mont. 1927) (defining the term "powers" as implicating only public officers), with *Saint v. Allen*, 126 So. 548, 555 (La. 1930) (holding that all public employees, not merely public officers, exercise "powers" as that term is used in the constitutional separation of powers provision).

⁷ Peggy Kerns & Luke Martel, *Dual Employment: Regulating Public Sector Jobs for Legislators*, 16 NAT'L CONF. OF STATE LEGISLATURES, LEGISBRIEF 1 (2008) ("Many state legislators balance their public office with other employment . . .").

⁸ See *supra* note 6.

⁹ Scott Matheson, Jr., provides a comprehensive overview of the legislative dual service issue but does not attempt to offer a construction that would be applicable to all states. See Matheson, *supra* note 5.

¹⁰ The states of Iowa, Nevada, and Utah are all examples of states where the legislative dual service issue has continually arisen yet evaded judicial review. See, e.g., EDWIN COOK, IOWA LEGISLATIVE SERVICES AGENCY, LEGISLATIVE GUIDE: SEPARATION OF POWERS 5 (2012); Ken Ritter, *Nevada Court Wants Answer to Public Employee-Lawmakers Issue*, ASSOCIATED PRESS (April 21, 2022) <https://apnews.com/article/las-vegas-lawsuits-nevada-legislature-state-e0882ab441873e3e0fa543d271d17c91> [<https://perma.cc/YSB7-BNSB>]; *Jenkins v. Bishop*, 589 P.2d 770, 770 (Utah 1978).

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This Article proceeds as follows. Part I summarizes the existing case law, which reveals three distinct approaches for how courts address the issue of legislative dual service in states with a constitutional separation of powers clause. Part II highlights an underemphasized feature of the explicit separation of powers clauses in state constitutions: the distribution of powers. This explicit distribution of three, and only three, forms of governmental power is relevant because it undermines the claim that legislators can simultaneously serve as lower-level government employees on the basis that such employees do not truly exercise executive power. Part II also defines and explores the nature of governmental power to address the claim that sometimes arises regarding a perceived importance in distinguishing between state and local government employees. As will be shown, such a distinction is not meaningful for the purpose of a separation of powers analysis. Finally, Part III explores the historical evidence of the intent and theoretical understanding of the separation of powers doctrine, which reveals that the Framers viewed the separation of powers doctrine, in part, as a tool to help ensure a truly independent legislature, free from the undue influence of the executive branch. Part III also explores the inherent conflicts of interest associated with legislative dual service. The Article ultimately concludes that for the many state constitutions with separation of powers clauses including (1) an express distribution of powers and (2) an explicit prohibition on persons from belonging to more than one branch of government simultaneously, the best construction is one that prohibits all forms of legislative dual service.

I. THE THREE APPROACHES TO LEGISLATIVE DUAL SERVICE IN STATES WITH EXPRESS SEPARATION OF POWERS CLAUSES

Forty states have express provisions regarding the separation of powers.¹¹ Notably of those, twenty-nine states impose limitations upon persons, not merely the departments,¹² with the Idaho state constitution fairly representative of such clauses:

¹¹ Matheson, *supra* note 5, at 359. The ten states without an express separation of powers clause in their respective state constitution are: Alaska, Delaware, Hawaii, Kansas, New York, North Dakota, Ohio, Pennsylvania, Washington, and Wisconsin. *Id.* at 359 n.275.

¹² Steven G. Calabresi & Joan L. Larsen, *One Person One Office: Separation of Powers or Separation of Personnel*, 79 CORNELL L. REV. 1045, 1155 (1994).

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 powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.¹³

It is not controversial to claim that these clauses bar the same person from simultaneously serving as a legislator and a top executive branch official, such as a governor or attorney general. But whether these clauses also serve to prohibit legislators from simultaneously being employed in any capacity with a state or local government agency remains unclear, both doctrinally and legally.¹⁴ This issue has divided courts and commentators alike since at least the 1868 California Supreme Court case of *People ex rel. Attorney General v. Provines*,¹⁵ and it remains unresolved to this day. The issue remains highly relevant, however, because many state legislatures are part-time and low paying, which means that most state legislators must necessarily “balance their public office with other employment.”¹⁶ In such circumstances, on the one hand, some courts and commentators believe the provision should be construed narrowly to permit government employees to serve in the legislature.¹⁷ Those courts have construed their respective separation of powers clauses narrowly, such that the provisions bar state legislators only from holding a public office—as opposed to mere public employment—in either the executive or judicial branches.¹⁸ Commentators who support this interpretation argue that dual-serving legislators occupying positions below the top executives bring “valuable intergovernmental experience to the lawmaking process.”¹⁹

On the other hand, some courts hold that the separation of powers prohibits state legislators from engaging in all forms of public

¹³ IDAHO CONST. art. II, § 1.

¹⁴ See generally Matheson, *supra* note 5.

¹⁵ See *People ex rel. Att’y Gen. v. Provines*, 34 Cal. 520, 525–34 (1868) (overruling numerous cases—including one decided just two years prior that held that then-California Supreme Court Chief Justice Sanderson was in violation of the separation of powers due to his dual service as Trustee of the State Library—to hold that California’s separation of powers provision, as it applies to the executive department, reaches only seven named constitutional officers).

¹⁶ Kerns & Martel, *supra* note 7, at 1.

¹⁷ *E.g., id.* at 2.

¹⁸ See *infra* Part I.B.

¹⁹ Kerns & Martel, *supra* note 7, at 2.

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employment.²⁰ The legal rationale for this approach is based on the notion that since there is no fourth branch of government, legislators that are simultaneously employed by a non-legislative government body are necessarily exercising the power of another branch of government.²¹ The rationale for this position is based on—in addition to a plain reading of the constitutional text—the desire of the Framers to ensure the executive branch of government could not wield undue influence over the legislature.²² The concern is for “the tendency of concentrated power to overreach and threaten liberty,” an evil for which the separation of powers alone can combat.²³ Finally, there is an inherent conflict of interest associated with legislative dual service, such as when a legislator makes decisions regarding the budget or salary of the executive branch agency where he or she is simultaneously employed, which also supports the view that the separation of powers provision was designed to prohibit all forms of legislative dual service.²⁴

²⁰ The state supreme courts of Louisiana, Mississippi, Nebraska, Oregon, and Indiana have all interpreted their respective clauses in this manner. See *infra* Part I.C.

²¹ See, e.g., *Book v. State Off. Bldg. Comm'n*, 149 N.E.2d 273, 295 (Ind. 1958) (“The members of the Commission are clearly not judicial or legislative officers, hence, they, of necessity, then must fall within the executive department of State Government, and are administrative officers in the sense that they perform functions which usually are and would be performed by administrative officers within the executive department.”); *State ex rel. Spire v. Conway*, 472 N.W.2d 403, 414 (Neb. 1991) (“Although we have neither been directed to nor found any case explicitly stating that the state colleges are part of the executive branch, there are but three branches, and the state colleges clearly are not part of the judicial or legislative branches.” (citing *Swanson v. State*, 271 N.W. 264, 273 (Neb. 1937); *State ex rel. Mortensen v. Furse*, 131 N.W. 1030, 1031 (Neb. 1911)); *Saint v. Allen*, 126 So. 548, 555 (La. 1930) (“It is certain that the highway department is not a part of the legislative department, and it is equally certain that it is not a part of the judiciary department; and hence, as there are not four, but only three, general departments of government, as classified and defined in the Constitution, the highway department must be classified as being in the executive department.”).

²² See Matheson, *supra* note 5, at 311 (citing GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 157 (1969)).

²³ Matheson, *supra* note 5, at 326. While this quote refers to the separation of powers doctrine as applied to the federal government, it is still relevant to serve as a baseline for understanding the role of the separation of powers found in state constitutions, notwithstanding the differences between the States and the federal government. Thus, while the separation of powers doctrine at the federal level was primarily concerned with preventing the federal government from getting too powerful, the Framers also recognized the need to prevent the executive branch from gaining undue influence over the legislative branch by preventing the same person or group of people from wielding both powers simultaneously. This supports an inference that when the framers of the state constitutions sought to restrain the “untrammelled [state] legislature[s]” that arose by the 1830s, the adoption of an explicit separation of powers clause was seen as a viable way to do so. See Tarr, *supra* note 1, at 334 (2003).

²⁴ Matheson, *supra* note 5, at 333–38; *infra* Part III.C.

A. *California—Separation of Powers Did Not Bar Legislative Dual Service Until Voters Amended the Constitution*

California was one of the first states to directly address its separation of powers provision and its dual service implications, although not technically *legislative* dual service.²⁵ Instead, the court considered a dual service claim against the then-chief justice himself, who was serving simultaneously as Trustee of the State Library.²⁶ After Chief Justice Sanderson recused himself, the court, in a unanimous opinion, declared that the chief justice was in violation of the separation of powers clause:

The duties of Trustee, as we have already said, do not appertain to the judicial department of the Government, but in their nature are executive, and consequently cannot be performed either by the Legislature or judiciary, or by any person charged with the exercise of powers properly belonging to the legislative or judicial departments of the State. It therefore follows that the Chief Justice, who is charged, under the Constitution, with the exercise of powers belonging exclusively to the judicial department of the Government, cannot exercise the functions and duties of Trustee of the State Library.²⁷

This holding was unsurprising given the court's separation of powers jurisprudence at the time, which had consistently applied the doctrine vigorously. That jurisprudence of vigorous enforcement began with the 1855 case of *Burgoyne v. Board of Supervisors*,²⁸ where the court invalidated a statute that required the Court of Sessions to provide for the "entire management of the financial business of the counties," on the grounds that the statute violated the separation of powers doctrine by imposing non-judicial functions upon the judiciary.²⁹ In subsequent years, the court would issue numerous decisions affirming what became known as *Burgoyne's Rule*; when in 1866 the court issued its unanimous decision ousting Chief Justice Sanderson from his dual role as Trustee of the State

²⁵ *People ex rel. McCullough v. Sanderson*, 30 Cal. 160, 163 (1866).

²⁶ *Id.* at 163.

²⁷ *Id.* at 168.

²⁸ *Burgoyne v. Bd. of Supervisors*, 5 Cal. 9 (1855), *overruled by People ex rel. Att'y Gen. v. Provines*, 34 Cal. 520 (1868).

²⁹ *Burgoyne*, 5 Cal. at 19, 22.

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Library, it was nothing more than a routine application of precedent.³⁰ Just two years later, however, Justice Sanderson found himself authoring an opinion that overruled not just the eponymous *Sanderson's Case*, but also the court's entire line of separation of powers jurisprudence up to that point in a decision that effectively rendered the separation of powers clause all but nugatory as it pertains to whether the clause prohibits routine government employees from simultaneously serving as state legislators.³¹

In the 1868 case of *Provines*, the California Supreme Court considered the constitutionality of whether a San Francisco Police Judge could simultaneously serve on the San Francisco Board of Police Commissioners.³² The record is not perfectly clear, but it appears that the Police Court was comparable to a modern-day city court,³³ and the San Francisco Board of Police Commissioners was responsible for approving the hiring of new police officers.³⁴ The court was once again required to construe California's separation of powers clause, which, at that time, read as follows:

The powers of the Government of the State of California shall be divided into three separate departments—the Legislative, the Executive and Judicial—and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted.³⁵

After ruling that the same person can serve as both a San Francisco Police Judge and a member of the Board of Police Commissioners,³⁶ the court then chose to define the scope of the separation of powers so narrowly as to render it all but useless when it comes to preventing state or local government employees, other than judges, from simultaneously serving as state legislators. On behalf of a bare

³⁰ *E.g.*, *Sanderson*, 30 Cal. at 168.

³¹ *See Provines*, 34 Cal. at 532–34.

³² *Id.* at 523.

³³ *See id.* (The Police Judge's Court “was created prior to . . . 1862 . . . under the power conferred upon it by the . . . Constitution . . . to create municipal Courts, as a necessary element in the organization of city governments.”); *see also* THE CONSOLIDATION ACT AND OTHER ACTS RELATING TO THE GOVERNMENT OF THE CITY AND COUNTY OF SAN FRANCISCO 76 (A.E.T. Worley ed., 1887).

³⁴ *See Provines*, 34 Cal. at 543 (Sawyer, C.J., concurring specially).

³⁵ *Id.* at 525.

³⁶ *See id.* at 540.

majority³⁷ of the court, Justice Sanderson wrote that the clause only applies to those positions “expressly defined” in the constitution.³⁸ Thus, the majority construed the statement that “no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others” as meaning that judges and state legislators could simultaneously serve in the executive branch as long as they did not serve as one of seven named executive branch officers listed in the constitution—which were the “Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, Attorney General or Surveyor General, all of whom, and none others, in the sense of the Third Article of the Constitution, belong to and constitute the Executive Department of the Government.”³⁹

Californians would later render this decision moot, however, at least as applies to the issue of legislative dual service, when in 1916 voters amended the California Constitution to make expressly clear that no legislator shall simultaneously “hold or accept any office, trust, or employment under this state.”⁴⁰ Thus, the core holding of *Provines* that would allow government employees to simultaneously serve as legislators or judges has no practical application today, which perhaps explains why it has never been formally overruled.

B. States Holding that Only Public Officers Exercise Powers For Purposes of the Separation of Powers Prohibition

The state courts of Montana, Colorado, and New Mexico have all construed their respective separation of powers clauses narrowly to only forbid legislators from simultaneously serving as public officers, distinct from public employees. All three states have essentially identical separation of powers clauses. Montana’s clause reads as follows:

The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly

³⁷ See *id.* at 544 (Sawyer, C.J., concurring specially) (concurring in judgment only and characterizing the court’s existing separation of powers jurisprudence as too settled to justify a re-examination); *id.* at 548 (Rhodes, J., dissenting) (“I am not prepared to overrule a series of decisions almost continuous from *Burgoyne’s Case*, in 1855, to the present time, and therefore dissent from the judgment.”).

³⁸ *Id.* at 533–34.

³⁹ *Id.* at 534.

⁴⁰ *Chenoweth v. Chambers*, 164 P. 428, 429 (Cal. Dist. Ct. App. 1917).

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belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.⁴¹

1. Montana

In 1927, the Montana Supreme Court declared that the phrase “powers properly belonging to,” as then appeared in the state constitution’s separation of powers clause, applied to those who hold a “civil office” only insofar as they were entrusted with some aspect of the sovereign power of the state.⁴² The ruling did not identify any case law or historical evidence to support this finding; it was simply asserted as such.⁴³ Because the subsequent rulings issued by the Colorado Supreme Court and New Mexico Court of Appeals rely so heavily on this case, it is worth a thorough review of the Montana decision, with some background necessary for context. Montana has a part-time legislature that meets for up to ninety days of each odd-numbered year.⁴⁴ *State ex rel. Barney v. Hawkins* was a challenge to the legislative dual service of Grant Reed, who was both a representative in the Montana Legislature and an auditor for the State Board of Railroad Commissioners.⁴⁵ A citizen filed a complaint against Reed and the state agency responsible for paying his salary as auditor, on the grounds that Reed’s legislative dual service violated Montana’s separation of powers clause.⁴⁶ After Reed prevailed at the trial court, the citizen appealed to the Montana Supreme Court.⁴⁷ The relevant part of the court’s framing is reproduced below in its entirety:

The issue on appeal is: Was Reed’s appointment as auditor violative of the state Constitution?

Section 7 of article 5 of the Constitution is as follows: “No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state; and no member of Congress, or other person holding

⁴¹ MONT. CONST. art. III, § 1; *see also* N.M. CONST. art. III; § 1, COLO. CONST. art. III.

⁴² *State ex rel. Barney v. Hawkins*, 257 P. 411, 412–15, 418 (Mont. 1927).

⁴³ *See id.* at 418 (noting that, with respect to the meaning of “officer” or “office,” the court found only two cases “bearing on the subject in the decisions of this court”).

⁴⁴ MONT. CONST. art. V, § 6; *see also* MONT. CODE ANN. § 5-2-103.

⁴⁵ *Hawkins*, 257 P. at 412.

⁴⁶ *Id.*

⁴⁷ *Id.*

an office (except notary public, or in the militia) under the United States or this state, shall be a member of either house during his continuance in office.”

Article 4 of the Constitution is as follows: “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 powers properly belonging to either of the others, except as in this Constitution expressly directed or permitted.”

The only question for us to decide is: Is the position of auditor, held by Grant Reed, a civil office? For, if it be a civil office, he is holding it unlawfully; and, if it be not a civil office, he is not an officer, but only an employee, subject to the direction of others, and has no power in connection with his position, and is not exercising any powers belonging to the executive or judicial department of the state government. In the latter event, article 4 of the Constitution is not involved. What, then, is a civil office?⁴⁸

Having thus construed the separation of powers doctrine as applying only to public officers, the court then dismissed the complaint against Reed after determining that he was an employee and not an officer.⁴⁹ The court reasoned that Reed could not violate the separation of powers because, as a mere public employee, he had “no powers properly belonging to the judicial or executive department of the state government, for he is wholly subject to the power of the board”⁵⁰

It is noteworthy that the court offered no reasoning to construe the term *powers* so narrowly. This construction is particularly remarkable given that the Montana Constitution, as the court itself noted, has a separate constitutional provision expressly directed at public officers, or those who hold a “civil office under the state.”⁵¹ The presence of the separate dual-officeholding provision severely undermines the Montana court’s narrow construction because it demonstrates that when the framers sought to apply a prohibition

⁴⁸ *Id.* at 412–13.

⁴⁹ *Id.* at 417–18.

⁵⁰ *Id.* at 418.

⁵¹ *See id.* at 413.

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only to officeholders, they knew how to use precise language to that effect. In other words, the fact that the separation of powers clause applies to any “person” is powerful textual evidence that the clause was meant to apply to a broader class of people beyond just officeholders, or those who hold a “civil office under the state.”⁵²

2. Colorado

The Colorado Supreme Court was asked to interpret the state’s virtually identical separation of powers provision in the 1938 case of *Hudson v. Annear*.⁵³ There, the challenge was against two legislators who were each simultaneously serving as a “division chief field deputy of the income tax department of the state treasurer’s office.”⁵⁴ The Colorado court cited to and followed the Montana court’s reasoning almost verbatim.⁵⁵ The Colorado court likewise assumed that the separation of powers clause applied only to public officers, defined as those entrusted with the “sovereign power of the state,” and thus limited its analysis to whether the employment position in the state treasurer’s office held by the dual-serving legislators was that of a public office.⁵⁶ Having determined that the positions were mere employment and not those of a public office, the court dismissed the complaint.⁵⁷

It is notable that at the time of its ruling, the Colorado Supreme Court had at its disposal a second decision from a sister-state court on this precise issue. The Louisiana Supreme Court had in 1930 construed the state’s respective separation of powers clause in a way that held that “power” was triggered by mere employment.⁵⁸ While it is true that the Montana decision would, initially, be seen as having greater value to the Colorado court—because Montana’s separation of powers clause was virtually identical to Colorado’s⁵⁹—it is a conspicuous omission that the Colorado court neglected to mention the one other case so directly on point. Finally, the Colorado court appeared hesitant to make a ruling that would have such far-reaching effects as one holding that the separation of powers clause

⁵² See *id.* at 413.

⁵³ *Hudson v. Annear*, 75 P.2d 587, 588 (Colo. 1938).

⁵⁴ *Id.* at 587–88.

⁵⁵ See *id.* at 589 (quoting *Hawkins*, 257 P. at 417–18).

⁵⁶ See *Annear*, 75 P.2d at 589.

⁵⁷ *Id.* at 590.

⁵⁸ *Saint v. Allen*, 126 So. 548, 555 (La. 1930) (holding that all public employees, not merely public officers, exercise “power” as that term is used in the constitutional separation of powers provision).

⁵⁹ See *supra* note 41.

banned all forms of legislative dual employment, as the below excerpt reveals:

To determine what is constitutional is not committed exclusively to the judicial department. The views of officials of co-ordinate branches of the government are entitled to consideration . . . [W]hy should the judicial department intrude into a situation which concerns only the other two departments, particularly, as here, where they are not in disagreement?⁶⁰

This Article will answer the court's question in Part III.C.

3. New Mexico

The New Mexico Court of Appeals is the third and final state court that has construed its separation of powers provision as applying only to public officers rather than all public employees. The court cited and followed the reasoning of the Montana Supreme Court's *Hawkins* decision, and therefore its entire analysis proceeded on the assumption that the word "powers" as used in its separation of powers clause applies only to "a public officer who is invested with sovereign powers."⁶¹ There is no engagement with the obvious question as to why, if the clause was limited to sovereign power and public officials, none of those limiting words appear in the actual text of New Mexico's separation of powers clause, which instead prohibits legislators from exercising "any powers" properly belonging to either of the two other branches of government.⁶²

C. States Construing the Separation of Powers Clause as Applying to All Public Employees

The state supreme courts of Louisiana, Indiana, Oregon, Nebraska, and Mississippi have all construed their respective separation of powers clauses as being triggered by mere employment.

⁶⁰ *Annear*, 75 P.2d at 589.

⁶¹ See *State ex rel. Stratton v. Roswell Indep. Schs.*, 806 P.2d 1085, 1094 (N.M. Ct. App. 1991) (citing *State ex rel. Barney v. Hawkins*, 257 P. 411, 418 (Mont. 1927)).

⁶² See N.M. CONST. art. III, § 1.

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1. Louisiana

In 1930, the Louisiana Supreme Court held that the phrase “exercise power properly belonging” to one of the three great branches of government was triggered by mere employment.⁶³ The court was asked to consider a challenge against three legislators simultaneously working for the state highway commission.⁶⁴ The court conducted an exhaustive analysis of the purpose of the separation of powers doctrine, citing such luminaries as John Adams, Charles Warren, George Washington, James Madison, and Alexander Hamilton to inform its background understanding of the doctrine and thus the proper construction of Louisiana’s particular text.⁶⁵ Armed with this understanding, the court then considered and rejected the two defenses put forth by the dual-serving legislators. The claim that the state highway department was not part of the executive branch and thus the dual-serving legislators were not exercising executive power was rejected by the court, which explained that as “there are . . . only three[] general departments of government, as classified and defined in the Constitution, the highway department must be classified as being in the executive department,” as it clearly does not reside in either the judicial or legislative branch.⁶⁶

The court next addressed the claim that the separation of powers merely applies to public officers rather than public employees.⁶⁷ The Louisiana Supreme Court reached the opposite conclusion of the Montana and Colorado courts—that were construing, in relevant part, essentially identical text—when it held that:

The language of article 2 of the Constitution, however, leaves no doubt that it is not a law against dual office holding. It is not necessary, to constitute a violation of the article, that a person should hold office in two departments of government. It is sufficient if he is an officer in one department and at the same time is employed to perform duties, or exercise power, belonging to another department. The words “exercise

⁶³ *Saint*, 126 So. at 554–55 (“The words ‘exercise power,’ speaking officially, mean perform duties or functions.”).

⁶⁴ *Id.* at 549.

⁶⁵ *See id.* at 553–55.

⁶⁶ *Id.* at 555.

⁶⁷ *Id.*

power,” speaking officially, mean perform duties or functions.⁶⁸

Thus, the court held that the dual-serving legislators were in violation of the separation of powers doctrine due to their simultaneous employment with the state highway commission.⁶⁹

2. Indiana and Oregon

The state supreme courts of Indiana and Oregon would follow the Louisiana example in also holding that their respective separation of powers clauses barred all forms of legislative dual service. Indiana and Oregon have nearly identical separation of powers clauses; Indiana’s reads:

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 another⁷⁰

In 1948, the Indiana Supreme Court was asked to construe the term *functions* such that it meant sovereign power or sovereign functions, which would make the clause apply to public officers and not to mere employees.⁷¹ Before beginning its analysis of the relevant text, the court first sought to understand the purpose of the separation of powers doctrine and thus turned to the writings of James Madison:

As the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence over the pecuniary rewards of those who will fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.⁷²

The court also cited Supreme Court Justice James Wilson for the proposition that each of the three branches of government “should be

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ IND. CONST. art. III, § 1; *see also* OR. CONST. art. III, § 1.

⁷¹ State *ex rel.* Black v. Burch, 80 N.E.2d 294, 299 (Ind. 1948).

⁷² *Id.* at 300.

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free from the remotest influence, direct or indirect, of either of the other two powers.”⁷³ With this background and purpose in mind, the court had little trouble holding that the separation of powers clause was triggered by mere employment with another branch of government:

In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if § 1 of Art. 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the New York and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an employee of an officer, even though he be performing a duty not involving the exercise of sovereignty, may be and is, executing one of the functions of that public office, and this applies to the cases before us.⁷⁴

The court also took note of the Montana decision from 1927, which reached the opposite result, but appeared to consider it having little, if any, persuasive merit.⁷⁵

In 1957, the Oregon Supreme Court would interpret its state’s nearly identical separation of powers provision as broadly as the Indiana Supreme Court did, and there the challenge was particularly noteworthy because the dual-serving legislator was employed as a local public school teacher.⁷⁶ After concluding that the provision of education is an executive branch function,⁷⁷ the court held that the separation of powers clause thus barred the legislator from being simultaneously employed as a public school teacher.⁷⁸ Like the

⁷³ *Id.* (emphasis omitted).

⁷⁴ *Id.* at 302.

⁷⁵ *See id.* (citing *State ex rel. Barney v. Hawkins*, 257 P. 411 (Mont. 1927)).

⁷⁶ *See Monaghan v. Sch. Dist. No. 1, Clackamas Cnty.*, 315 P.2d 797, 799, 806 (Or. 1957), *superseded by constitutional amendment*, OR. CONST. art. XV, § 8(1).

⁷⁷ *Id.* at 805 (“It is through the teacher, not the school district, that the state’s standards of educational excellence are disseminated. When so engaged, they are exercising one of the functions of the executive department of our state government.”).

⁷⁸ *Id.* at 806.

decisions issued by the state supreme courts of Louisiana and Indiana, the Oregon Supreme Court also based this ruling in large part on the extreme importance and purpose of the separation of powers doctrine, as articulated by the Framers of the United States Constitution.⁷⁹ The court illustrated the potential evil associated with legislative dual service as follows:

Our concern is not with what has been done but rather with what might be done, directly or indirectly, if one person is permitted to serve two different departments at the same time. The constitutional prohibition is designed to avoid the opportunities for abuse arising out of such dual service whether it exists or not.⁸⁰

The *Monaghan* decision—which held that the separation of powers clause of the Oregon state constitution prohibits local public school teachers from serving as state legislators⁸¹—was, in fact, the second time the Oregon Supreme Court held that the clause was triggered by mere employment. In an earlier ruling, the court held that the separation of powers clause barred legislators from serving in lower-level government jobs, such as clerk or stenographer for a state agency.⁸²

3. Nebraska

The Nebraska Supreme Court construed the state's separation of powers clause to prohibit legislative dual service as recently as 1991, when the court was asked to declare unconstitutional a state legislator's simultaneous employment as an associate professor at a state college.⁸³ The relevant text of Nebraska's constitutional separation of powers provision reads as follows: "[t]he 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 being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter

⁷⁹ *See id.* at 800, 806.

⁸⁰ *Id.* at 805.

⁸¹ *Id.* at 806.

⁸² *Gibson v. Kay*, 137 P. 864, 867 (Or. 1914) ("[T]he functions of the corporation commissioner and his assistants, including stenographers and clerks, pertain to the administrative department of the government in which a member of the legislative department is forbidden to participate.").

⁸³ *State ex rel. Spire v. Conway*, 472 N.W.2d 403, 408, 416 (Neb. 1991).

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expressly directed or permitted.”⁸⁴ Here, “[t]he specific question” posed to the court was “whether respondent, because he is both a state senator and an associate professor at a state college, is a ‘person . . . being one of these departments’ who exercises ‘any power properly belonging to either of the’ other departments.”⁸⁵ The court held that the phrase “being one of these departments” applied to both public employees and public officials alike.⁸⁶ As to whether a professor is part of the executive branch, the court explained:

Since the Board of Trustees, which governs the state colleges, is part of the executive branch, those who work for those colleges likewise are members of that branch. Respondent, as an assistant professor at the college, is thus a member of the executive branch within the meaning of article II.⁸⁷

The Nebraska opinion closes with the following, telling observation:

The dynamics of power are perhaps best illustrated in this case by the fact that the Board of Trustees’ policy manual on leaves of absence treats employees of the state colleges who hold political offices differently from those who do not. As noted earlier, employees who hold no political office ordinarily may take a leave of absence but once every 4 years; however, employees who hold a political office routinely may take leaves as often as they wish. Nor are political officeholders required to make the prearrangements required of those who hold no political office.⁸⁸

As will be discussed in Part III, one of the problems with legislative dual service is that it can corrupt the legislative process, such that the legislature serves the needs of government rather than the people. Few understand this better than the government agencies who employ dual-serving legislators, given that these dual-serving legislators can serve as super-lobbyists for their employers, as will be discussed in Part III.C.

⁸⁴ *Id.* at 404.

⁸⁵ *Id.* at 408.

⁸⁶ *Id.* at 408, 412.

⁸⁷ *Id.* at 415.

⁸⁸ *Id.* at 416.

4. Mississippi

After dividing the powers of the Mississippi government into the three familiar branches, the state constitution then declares that “[n]o person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others.”⁸⁹

In its first decision interpreting the separation of powers clause, the court described its task as ascertaining “the correct meaning” of the clause, “without regard to whether [its] interpretation be labeled flexible or rigid, liberal or conservative.”⁹⁰ The court was, instead, concerned only with determining “what the people in convention assembled in 1890 intended and . . . what the document they made our supreme law means for us today.”⁹¹ After citing numerous statements from the Framers articulating that the purpose of the doctrine was to keep each branch as separate from another as possible, the court ultimately declared unconstitutional the dual service of numerous legislators in their dual roles in various state agencies or as part of state commissions.⁹² The court would apply a similar construction to the clause in a subsequent case, where the court held that the separation of powers barred a justice court judge from simultaneously serving as a local police officer.⁹³

II. THE EXPLICIT DISTRIBUTION OF THREE FORMS OF POWER MEANS ALL GOVERNMENT AGENTS MUST RESIDE WITHIN ONE OF THE THREE GREAT BRANCHES OF GOVERNMENT

A. The Notion that Only Public Officers Exercise Governmental Power Is Incompatible with Our Constitutional Form of Government

The separation of powers clauses found in most state constitutions do not merely separate power, but they also serve to recognize that those powers so divided are the only governmental powers created by the state constitution.⁹⁴ This is highly relevant for the legislative

⁸⁹ MISS. CONST. art. I, § 2.

⁹⁰ *Alexander v. State*, 441 So. 2d 1329, 1339 (Miss. 1983).

⁹¹ *Id.*

⁹² *Id.* at 1336, 1343.

⁹³ *See In re Anderson*, 447 So. 2d 1275, 1276 (Miss. 1984).

⁹⁴ Nearly all of the twenty-nine states with explicit separation of powers clauses that prohibit any person from belonging to, or otherwise exercising, the powers or functions of more than one branch have clauses of this type, with the following clauses from Idaho, Indiana, Iowa, and Michigan serving as representative examples. IDAHO CONST. art. II, § 1 (“The powers of the government of this state are divided into three distinct departments, the legislative, executive

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dual service issue, and particularly problematic for the public-officer-only rulings issued by the state courts of Montana, Colorado, and New Mexico.⁹⁵ Recall that the Colorado court held that a state legislator could simultaneously serve as a “division chief field deputy” of the state treasurer’s income tax department, because that was a position of mere public employment, not a public office.⁹⁶ Recall also that the Colorado constitutional separation of powers provision begins by declaring that “[t]he powers of the government of this state are divided into three distinct departments.”⁹⁷ In construing “powers” to mean only the so-called sovereign powers wielded by public officers, the court ruled that a legislator may simultaneously serve as an employee of the state treasury department because state treasury agents—as mere employees, rather than officers—do not exercise any of the powers referenced by the state constitutional separation of powers provision.⁹⁸ But this leads to an obvious question: if state treasury tax agents are not exercising one of the three forms of governmental powers authorized by the state constitution, from where, exactly, do they derive their power and authority to act?

It is a defining feature of a constitutional republic that “[a]ll political power is inherent in the people.”⁹⁹ In other words, under “such a government,” the government can only exercise those powers the people chose to distribute to it.¹⁰⁰ Thus, in order to have the

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 powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.”); IND. CONST. art. III, § 1 (“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.”); IOWA CONST. art. III, § 1 (“The powers of the government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.”); MICH. CONST. art. III, § 2 (“The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.”).

⁹⁵ See *supra* Part I.B.

⁹⁶ *Hudson v. Annear*, 75 P.2d 587, 587–88 (Colo. 1938).

⁹⁷ COLO. CONST. art. III.

⁹⁸ *Annear*, 75 P.2d at 590.

⁹⁹ See, e.g., NEV. CONST. art. I, § 2. The Colorado Constitution’s version of this principle is equally strong, stating: “All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.” COLO. CONST. art. II, § 1.

¹⁰⁰ *Saxby v. Sonnemann*, 149 N.E. 526, 528 (Ill. 1925) (“In a representative government all powers of government belong ultimately to the people in their sovereign corporate capacity. Under such a government the people may distribute, for the purposes of government, the

“power to act,” a government agency and its agents must have a “primary connection to” one of the three forms of governmental power authorized by the state constitution.¹⁰¹

But we need not turn to general principles of constitutional government to see that this is true; the record before the Colorado Supreme Court in *Annear* confirms as much. There, the dual-serving legislators were appointed by the State Treasurer to work for the Treasurer’s State Income Tax Department.¹⁰² The State Treasurer, in turn, had the power to grant such appointments by enabling legislation, which stated that “[t]he State Treasurer may delegate to any such person so appointed, such power and authority as he deems reasonable and proper for the administration of this act.”¹⁰³ Thus, there are two independently sufficient bases for demonstrating that employees of the state tax department are exercising executive power. There is no uncertainty regarding the type of power exercised by the Colorado State Treasurer—as an explicitly identified constitutional member of the executive branch,¹⁰⁴ the State Treasurer necessarily exercises executive, and only executive, power. Consequently, as one cannot delegate what one does not have, any of the employees appointed by the Treasurer were necessarily exercising that part of the Treasurer’s executive power so delegated to them.

Second, it is a foundational principle of state constitutional law that the executive power extends to those responsible for helping to “put the laws enacted by the legislature into effect.”¹⁰⁵ Thus, even if the enabling statute did not make explicit that the appointed tax

various powers thereof.”); *see also* *Stolberg v. Caldwell*, 402 A.2d 763, 769 (Conn. 1978) (“Since all the powers initially residing in the people were granted to these three departments of state government, no additional powers remained to be distributed.”).

¹⁰¹ *Comm’n on Ethics v. Hardy*, 212 P.3d 1098, 1107 (Nev. 2009) (citing *Galloway v. Truesdell*, 422 P.2d 237, 243 (Nev. 1967)) (holding that a governmental entity created by the Legislature “cannot be considered an independent agency because it must have a primary connection to and derive its power to act from one of the three branches of Nevada government”).

¹⁰² *Annear*, 75 P.2d at 587–88.

¹⁰³ *Id.* at 587.

¹⁰⁴ COLO. CONST. art. IV, § 1 (“The executive department shall include the governor, lieutenant governor, secretary of state, state treasurer, and attorney general . . .”).

¹⁰⁵ *In re C.S.*, 516 N.W.2d 851, 859 (Iowa 1994) (citing 16 AM. JUR. 2D *Constitutional Law* § 303, at 818 (1979)); *see also* *Alexander v. State*, 441 So. 2d 1329, 1338 (Miss. 1983) (“We begin our analysis . . . by defining executive power as the power to administer and enforce the laws as enacted by the legislature and as interpreted by the courts.” (citing *Quinn v. United States*, 349 U.S. 155, 161 (1955))); *McCarty v. Walker*, 622 S.W.3d 162, 164 (Ark. 2021) (“The executive branch has the power and responsibility to enforce the laws as enacted and interpreted by the other two branches.”); *Rampton v. Barlow*, 464 P.2d 378, 383 (Utah 1970) (“It will be enough to say that the legislative branch should make the law, the judicial branch should be confined to interpreting it and all other power must of necessity be vested in the executive branch . . .”).

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agents were exercising only that (executive) power delegated to them by the State Treasurer, they would still be considered executive branch agents given that their primary function was to help “carr[y] out and enforc[e] the laws enacted by the Legislature.”¹⁰⁶ The decisions limiting separation of powers to public officers only, therefore, create an inherent contradiction. On the one hand, we have the proposition that government can only exercise those powers delegated to it by the people through a written constitution, which consists of three, and only three, forms of power. On the other, there is the consensus that executive power is defined as encompassing those tasked with administering, carrying out, or otherwise helping to enforce the laws enacted by the legislature. In holding that only public officers exercise the governmental power authorized by the state constitution, the rulings discussed in Part I.B., therefore, contain the implication that government employees are not exercising any executive power, or any of the powers delegated by the people to its government, which would require most of the government itself to be extraconstitutional. These rulings also suggest that even when a purely executive official, like a state treasurer, directly delegates its power and authority to agents, those agents receive something other than executive power. Such logical contradictions highlight the error of the reasoning at work in the Montana, Colorado, and New Mexico court rulings discussed in Part I.B.

B. Stress Testing the Public-Officer-Only Approach Reveals Its Deficiencies

In addition to producing the kinds of inherent contradictions outlined above, the refusal to recognize that public employees exercise governmental power also produces arbitrary outcomes that are plainly violative of the separation of powers doctrine. Distinguishing between public officers and public employees can be murky, and it is typically a fact-intensive inquiry that depends on the unique law and circumstances of each case.¹⁰⁷ The key principles relied on by the Montana court and its progeny, however, stress that a public officer exists when the “officer’s duties [are] prescribed by law,” and when the officer is “independent in the exercise of them,

¹⁰⁶ See, e.g., *Galloway*, 422 P.2d 237, 242 (Nev. 1967) (“The executive power extends to the carrying out and enforcing the laws enacted by the Legislature.”).

¹⁰⁷ See, e.g., *State ex rel. Stratton v. Roswell Indep. Schs.*, 806 P.2d 1085, 1094 (N.M. Ct. App. 1991).

and not subject to orders from a superior as to the nature or discharge of his duties.”¹⁰⁸ Further, when the New Mexico Court of Appeals followed this test, it held that public school administrators were not public officers primarily because “[t]hey do not establish policy for the local school districts or for the state department of education.”¹⁰⁹

Under such a test it is entirely plausible to argue that deputy district attorneys, deputy attorneys general, and all other non-elected prosecutors are mere public employees rather than public officers for purposes of a separation of powers analysis.¹¹⁰ One could similarly argue that police officers should be classified as public employees as well, given that police officers do not set policy and are not independent in the exercise of their authority, but are instead subject to the control and direction of supervisors.¹¹¹ So classified, this would allow for police officers and prosecutors to simultaneously serve as legislators without violating the constitutional separation of powers prohibition, on the grounds that neither police officers nor prosecutors exercise governmental power. This classification is untenable as prosecutors and police officers are plainly part of the executive branch and, as such, exercise executive power.¹¹² Thus, the public-officer-only construction of the nature of governmental power fails because it would permit plainly executive branch officials, such as police officers and prosecutors, to simultaneously serve as legislators—withstanding an explicit, textual prohibition against members of one branch from exercising any powers or functions of another branch. Moreover, the public-officer-only construction would require adopting the fiction that prosecutors do not wield any form of governmental power, despite the universal acknowledgment elsewhere that prosecutors wield “immense” and “tremendous”

¹⁰⁸ *State ex rel. Barney v. Hawkins*, 257 P. 411, 414 (Mont. 1927).

¹⁰⁹ *Roswell Indep. Schs.*, 806 P.2d at 1094.

¹¹⁰ In Nevada, for example, deputy district attorneys are not elected, and are explicitly defined in statute as being subordinate to the elected district attorney. *See* NEV. REV. STAT. ANN. § 252.070 (LexisNexis 2023) (“[D]istrict attorneys may appoint deputies, who are authorized to transact all official business relating to those duties of the office set forth in NRS 252.080 and 252.090 to the same extent as their principals and perform such other duties as the district attorney may from time to time direct. The appointment of a deputy district attorney must not be construed to confer upon that deputy policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed.”).

¹¹¹ *See Walck v. City of Albuquerque*, 875 P.2d 407, 410 (N.M. Ct. App. 1994) (“[A] police officer is under the control of the chief of police, is not autonomous, and is not independent. We thus conclude that a police officer is not vested with sovereign power and, absent such power, is considered a public employee.”).

¹¹² *See, e.g., In re Anderson*, 447 So. 2d 1275, 1276 (Miss. 1984) (“It is elemental that . . . police officers and other law enforcement officials are members of the executive branch.”); *see also supra* note 4.

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amounts of power.¹¹³ This absurd result and the contradiction it produces further serve to highlight the deficiency of the public-officer-only construction put forth by the court opinions discussed in Part I.B.

C. The Flaws in the Public-Officer-Only Construction Stem from a Refusal to Apply Plain Text

The court opinions discussed in Part I.B all proceed from the same assumption that only public officers may exercise the governmental powers of the state. But, as shown above in Parts II.A and II.B, this claim is clearly untenable.

Relying as they do on a flawed premise, the reasoning and holdings of the court opinions discussed in Part I.B are necessarily erroneous.¹¹⁴ Indeed, all the problems with the public-officer-only construction outlined above ultimately stem from those courts' refusal to apply the constitutional text as written. As a reminder, all courts that adopted the public-officer-only construction did so by following the separation of powers analysis put forth by the Montana Supreme Court, an analysis "that distinguished between a public officer who is invested with sovereign powers and an ordinary employee who is not."¹¹⁵

The Montana Supreme Court rejected the claim that the dual-serving legislator at issue there violated the separation of powers doctrine because the offending legislator's dual role as a mere government employee did not bestow upon him any "part of the sovereign power of the state."¹¹⁶ The Colorado Supreme Court likewise upheld legislative dual service where the employment position did not involve any "exercise of the general sovereignty inherent in [an] executive office."¹¹⁷ Finally, the New Mexico Court of Appeals, following the Montana court decision nearly verbatim, held that it is a "requirement" for those alleging a separation of

¹¹³ See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 177 (2019), for a collection of academic work that describes prosecutors as wielding a "tremendous," "immense," or "awesome" amount of power, which includes similar claims from prosecutors themselves.

¹¹⁴ Indeed, the weakness of the officer-only construction advanced by the Montana Supreme Court in *Hawkins* was recognized by one of the three judges on the panel in the New Mexico court case of *Roswell Independent Schools*. See *Roswell Indep. Sch.*, 806 P.2d 1085, 1104–05 (Hartz, J., specially concurring) (describing *Hawkins* as "unpersuasive" because the "court's analysis consists of merely announcing its conclusion" that only public officers exercise governmental powers, while failing to "discuss the purpose of [the] separation-of-powers doctrine.").

¹¹⁵ See, e.g., *id.* at 1094 (majority opinion).

¹¹⁶ *State ex rel. Barney v. Hawkins*, 257 P. 411, 417 (Mont. 1927).

¹¹⁷ *Hudson v. Annear*, 75 P.2d 587, 589 (Colo. 1938).

powers violation to demonstrate that the dual-serving legislator holds an office with another branch of government, because only officers are “vested” with the “sovereign powers” of the state.¹¹⁸ But the clauses these three courts were interpreting did not bar legislators from exercising just the sovereign power of the State; they instead prohibited legislators from exercising “any” of the power or powers “properly belonging to either of the other[]” two branches of government.¹¹⁹ Construing the phrase “any powers” as used in this context to mean only sovereign powers violates “a canon of statutory construction universally accepted by common-law courts . . . not to insert what has been omitted.”¹²⁰ This error of inserting limiting text where none appears explains why the public-officer-only construction leads to the contradictions outlined above. The respective state constitutions, after all, did not create and distribute only the sovereign powers of the State, but instead created and distributed all the powers of the government itself.¹²¹

D. The Distinction Between Employment Within a State or Local Agency Should Have No Bearing on The Separation of Powers Analysis

To make explicit that which Part II.A merely implies, local government employees can only exercise those forms of governmental power expressly delegated to them by the people in their respective state constitutions and, as such, are similarly bound by the constitutional separation of powers doctrine. It is true that political subdivisions are distinct from state departments, and this distinction is relevant when it comes to issues like sovereign immunity.¹²² The decision by a state legislature to designate one of its creations as either a state or local agency, however, should have no bearing on the question of which of the three forms of governmental power that entity will exercise. Instead, courts should look to the purpose for which the governmental entity was created to answer that question.¹²³

¹¹⁸ *Roswell Indep. Schs.*, 806 P.2d at 1094.

¹¹⁹ See *supra* note 41 and accompanying text.

¹²⁰ *City of San Buenaventura v. McGuire*, 97 P. 526, 528–29 (Cal. Ct. App. 1908) (Beaty, C.J., dissenting from the denial of a petition for rehearing).

¹²¹ See *supra* note 94; discussion *supra* Part II.A.

¹²² The principle of sovereign immunity applies to States and formal state agencies, but not to political subdivisions, such as municipalities. *Alden v. Maine*, 527 U.S. 706, 756 (1999).

¹²³ See, e.g., *Comm’n on Ethics v. Hardy*, 212 P.3d 1098, 1107–08 (Nev. 2009) (holding that every governmental entity “must have a primary connection to and derive its power to act from one of the three branches of . . . government,” and that determining which of the three great

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When the legislature creates a governmental entity to help administer, carry out, or otherwise enforce the laws enacted by the legislature, that entity necessarily wields the executive power of government, regardless of whether the legislature chose to make it a state or local entity.¹²⁴ Similarly, when a state legislature creates municipal courts, which are “primarily city, not state entities,” those municipal courts nonetheless exercise the judicial power of the state.¹²⁵ To hold otherwise would suggest that when a state legislature creates a local governmental entity, that entity exercises some extraconstitutional power. But as Part II.A demonstrates, the people only authorized three forms of governmental power to be exercised by their state governments. And it is a basic principle of delegation doctrine that the state cannot delegate that which it does not have.¹²⁶ Thus, as the United States Supreme Court has repeatedly explained, “[t]he principle is well settled that local ‘governmental units are “created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.””¹²⁷ Consequently, a legislator who simultaneously works for a local government will still trigger the separation of powers prohibition found in their respective state constitution, precisely because their local government employer may only exercise such governmental powers of the state as were entrusted to them. As such, any argument that local governments do not derive their authority and power to exist from the state constitution, such as would permit legislative dual service at the local government level, is entirely without merit.

branches of government a particular agency falls within requires analyzing the nature of the agency and the “purpose for which it is created”).

¹²⁴ See, e.g., *Galloway v. Truesdell*, 422 P.2d 237, 242–43 (Nev. 1967) (explaining that “[t]he executive power extends to the carrying out and enforcing the laws enacted by the Legislature,” which is implicated by even purely “ministerial functions,” such as those fact-finding tasks necessary to determine whether an applicant is entitled to a marriage officiant license).

¹²⁵ *Nunez v. City of N. Las Vegas*, 1 P.3d 959, 962 (Nev. 2000) (holding that municipal courts are “not an extension of the state for purposes” of sovereign immunity, while recognizing that municipal courts, by necessity, must enjoy the same “powers of all constitutionally created [state] courts”).

¹²⁶ See, e.g., *Pub. Util. Dist. No. 1 v. State*, 342 P.3d 308, 320 (Wash. 2015) (“While a state can delegate its . . . powers to its political subdivisions, it cannot delegate powers it does not have.”).

¹²⁷ *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607–08 (1991) (quoting *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967)); see also *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 362 (2009) (“Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.’ They are instead ‘subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.’ State political subdivisions are merely . . . department[s] of the State.” (first quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964); then quoting *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923))).

III. WHY THE FRAMERS OF STATES WITH EXPLICIT CONSTITUTIONAL SEPARATION OF POWERS CLAUSES SOUGHT TO PROHIBIT LEGISLATIVE DUAL SERVICE

The best construction of the separation of powers clauses is one that prohibits all forms of legislative dual service. This construction is most consistent with both the plain text as well as the theory and original purpose of the separation of powers doctrine, particularly as it pertains to state constitutions. It is uncontroversial to note that the separation of powers functions to preserve the independence of each branch of government,¹²⁸ as well as to prevent one person or group of people from simultaneously wielding multiple powers of government.¹²⁹ Thus, in states with an express separation of powers clause, the doctrine serves a third, closely related purpose: ensuring that the legislature remains a truly representative body that serves the needs of those who are governed, rather than serving the needs of government itself.¹³⁰ Consequently, a construction of states' explicit separation of powers clauses that forbids all forms of legislative dual service is more consistent with the purpose of those clauses, and the design of our constitutionally limited and representative form of government generally, than the alternative.

A. Separation of Powers as a Tool to Help Ensure the Legislature Reflects the Will of the People, Rather Than Its Government

There is nothing more fundamental to the system of representative government than the notion that the legislature represents and serves the will of the people. If that becomes perverted, such that the legislature serves the government, rather than the people, the entire edifice collapses. What was once fairly described as a free society instead becomes a system wherein there are just rulers and those who are ruled over. It should hardly be surprising then, that preventing this outcome was of paramount concern to the Framers of the United States Constitution. That the separation of powers was designed, in large part, to help prevent this outcome is not

¹²⁸ Indeed, this fact is even recognized in states without an explicit separation of powers provision, like Ohio, where the doctrine is instead "implicitly embedded in the entire framework" of those sections of the constitution that define and grant powers to each of the three great branches of government. *State v. Bodyke*, 933 N.E.2d 753, 763 (Ohio 2010) ("The [separation of powers] doctrine was a deliberate design to secure liberty by simultaneously fostering autonomy and comity, as well as interdependence and independence, among the three branches." (quoting *Norwood v. Horney*, 853 N.E.2d 1115, 1148 (Ohio 2006))).

¹²⁹ See *infra* note 163.

¹³⁰ See discussion *infra* Part III.A.

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disputed.¹³¹ The only real question is whether it was intended to serve as merely a prohibition on dual office-holding, or something more. “Gordon Wood argues . . . that [the] separation of powers had a more precise significance than simply [the] abolition of multiple officeholding.”¹³² The American colonists were concerned with the executive’s ability to wield undue influence among legislators, thereby producing a legislature that served the needs of the executive, rather than that of the people.¹³³ One of the main ways the executive “sought to manipulate” the legislature was by offering individual legislators executive appointments, which would understandably help to align those legislators’ interests with that of the crown.¹³⁴

Once courts recognize that one of the functions of the separation of powers doctrine is to prevent executive branch manipulation of the legislature, there is simply no coherent basis for drawing the public-officer-employee, or any other function-based distinction, in its application. A low-level executive branch employee faces the same incentives to put the interest of their executive branch employer ahead of the public at large as would a high-ranking executive branch officer. Indeed, it is possible that the low-level employee might face even stronger perverse incentives, given they have more to gain by using their legislative influence to lavish benefits upon their executive branch employer. The special treatment¹³⁵ they can expect to receive from their executive branch employer is also likely to be more valuable to a low-level employee than a high-ranking official, who may already be accustomed to such perks. In other words, executive branch employees in the legislature pose the same kind of problems as public officers would, as those lower-level employees still have an incentive to use their legislative power in a way that would benefit their executive branch employer.

¹³¹ See Matheson, *supra* note 5, at 311 (“Accordingly, when the Americans in 1776 spoke of keeping the several parts of the government separate and distinct, they were thinking of insulating the judiciary and particularly the legislature from executive manipulation.”).

¹³² Matheson, *supra* note 5, at 310–11.

¹³³ Matheson, *supra* note 5, at 311 (citing WOOD, *supra* note 22, at 157) (explaining that the colonists’ conception of separation of powers reflected a desire to prevent “the royal governors[] [from] using their power to influence and control . . . the representatives of the people in the legislature”).

¹³⁴ Matheson, *supra* note 5, at 311 (quoting WOOD, *supra* note 22, 157) (“The chief magistracy . . . sought to manipulate the representatives of the people by appointing them to executive or judicial posts . . .”).

¹³⁵ See *State ex rel. Spire v. Conway*, 472 N.W.2d 403, 416 (Neb. 1991) (describing special treatment dual-serving legislator received from his executive branch employer); see also discussion *infra* Part III.C.

Indeed, the public-officer-only construction would, in theory, allow for a single executive branch agency to employ every single member of the legislature without running afoul of the separation of powers doctrine. A narrow construction that permits legislative dual service of this kind should thus be viewed with extreme skepticism, given that it would allow for the same kind of executive branch manipulation¹³⁶ of the legislative process that the colonists sought to prevent when they adopted the separation of powers doctrine.

B. A Narrow Construction Is Incompatible with the Supreme Importance of the Separation of Powers Doctrine

The importance of the separation of powers doctrine to our system of government is difficult to overstate. This is why, at least when it is discussed in abstract terms, courts seem to uniformly recognize that they have an obligation to vigorously enforce the separation of powers doctrine,¹³⁷ come what may.¹³⁸ The Supreme Court of West Virginia, for example, when called to interpret the scope of the state's constitutional separation of powers provision, described the doctrine's purpose, and the court's role in enforcing it, as follows:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial; That the functions appropriate to each of these branches of government *shall be vested in a separate body of public servants*, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches

¹³⁶ See discussion *infra* Part III.C.

¹³⁷ See, e.g., *Galloway v. Truesdell*, 422 P.2d 237, 243 (Nev. 1967) ("All Departments must be constantly alert to prevent such prohibited encroachments lest our fundamental system of governmental division of powers be eroded. To permit even one seemingly harmless prohibited encroachment and adopt an indifferent attitude could lead to very destructive results. . . . There must be a fullness of conception of the principle of the separation of powers involving all of the elements of its meaning and its correlations to attain the most efficient functioning of the governmental system, and to attain the maximum protection of the rights of the people.").

¹³⁸ See, e.g., *In re Op. of the Justs.*, 19 N.E.2d 807, 818 (Mass. 1939) (explaining that the limitations imposed by the separation of powers, "though sometimes difficult of application, must be scrupulously observed" (citing *In re Legnard's Est.*, 162 N.E. 217, 223 (Mass. 1928))).

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shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.¹³⁹

It is thus reasonable to ask whether the cases discussed in Part I.A and I.B are consistent with this theoretical framework. If not, were those narrow conclusions justified by unique, state-specific understandings of the separation of powers doctrine at issue in those cases? The cases in Part I.B make almost no reference to theory or purpose, so their narrow holdings cannot be justified on unique, state-specific historical intent. The California Supreme Court case of *Provines*, as discussed in Part I.A, does, however, look at the doctrine's theory and purpose.¹⁴⁰ And, in so doing, the court demonstrated that legislative dual service is violative of the separation of powers doctrine, notwithstanding the fact that the court would ultimately construe the state's separation of powers clause so narrowly as to render it functionally meaningless.¹⁴¹ As discussed in Part I.A, the California Supreme Court in 1868 construed its separation of powers clause so narrowly such that, as to the executive branch, it would only apply to seven individually named constitutional officers.¹⁴² That this is a plainly erroneous construction of the separation of powers clause can be demonstrated in a variety of ways. The most obvious is the text itself, which prohibited, at the time of the *Provines* decision in 1868, "any person charged with the exercise of powers properly belonging to one branch" from exercising "any function appertaining to" another branch.¹⁴³ There is no purpose for such broad language if the prohibition applies only to the seven executive branch officials identified in the state constitution. That such a narrow construction is plainly flawed can also be demonstrated by comparing its result with the intent of the separation of powers clause as articulated by the *Provines* court. The

¹³⁹ *State ex rel. State Bldg. Comm'n v. Bailey*, 150 S.E.2d 449, 453 (W. Va. 1966) (emphasis added) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 190–91 (1880)).

¹⁴⁰ *See People ex rel. Att'y Gen. v. Provines*, 34 Cal. 520, 536–37 (1868) (discussing how framers of American constitutions relied on separation of powers principles to avoid the abuses of the English system, which vests both the executive and judicial power in the King).

¹⁴¹ *See id.* at 533–34, 537.

¹⁴² *See supra* note 39 and accompanying text.

¹⁴³ *Provines*, 34 Cal. at 525; *see also* CAL. CONST. art. 3, § 3 (currently providing that "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").

Provines court described the purpose of the separation of powers doctrine as follows:

Hence the rule that there should be one department to make the law, one to declare the law, and another to execute the law; and, to secure so far as possible all the advantages of such a rule, the further rule that each department should be composed of different persons¹⁴⁴

Yet the holding of the *Provines* court allows the same person to both write and execute the law, in plain violation of the rule the court correctly recognized it was bound to uphold.¹⁴⁵ Because the *Provines* court held that the executive branch consisted only of the seven officers listed in the constitution,¹⁴⁶ that ruling means that deputy attorneys general, district attorneys, and all other prosecutors could simultaneously serve as judges or legislators. Thus, the *Provines* court's holding would allow the same person to execute the law as prosecutor while simultaneously writing or declaring the law as a legislator or judge, in plain violation of what the *Provines* court acknowledged was the very purpose of the separation of powers doctrine.

The *Provines* court would then claim that its narrow construction was justified because “the framers of American Constitutions were content with checks upon the [higher grade officers,] leaving the [inferior or subordinate officers] as we consider, to be regulated by the Legislative Department.”¹⁴⁷ Had the court been forced to consider the issue of legislative dual service—whether government employees can simultaneously serve in the state legislature—as opposed to judicial service, it may not have been so hasty to render the separation of powers clause all but meaningless. While it may have seemed harmless to allow the same person to hold multiple positions with one local government agency, on the theory that the legislature retains ultimate control and oversight over that local government agency, that safeguard does not exist for the issue of legislative dual service, in which the legislature *itself* is composed of the employees of the very governmental agencies the legislature is ostensibly tasked

¹⁴⁴ *Provines*, 34 Ca. at 537.

¹⁴⁵ *See id.* at 534.

¹⁴⁶ *Id.* at 534 (“That is to say, no judicial officer shall be Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, Attorney General or Surveyor General, all of whom, and none others, in the sense of the Third Article of the Constitution, belong to and constitute the Executive Department of the Government . . .”).

¹⁴⁷ *Id.* at 537.

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with regulating in a neutral and impartial manner. Thus, even by the *Provines* court's own reasoning, government employees should be barred from serving in the legislature. It is antithetical to say that these lower-level government employees and agencies will be regulated by the legislature if the legislature is comprised of the very government employees it is supposed to be regulating.

C. All Forms of Legislative Dual Service Should Be Prohibited

The colonists were concerned that allowing the chief magistrate to curry favor with individual legislators by rewarding them with executive branch appointments would lead to a legislature that served government, rather than the people.¹⁴⁸ That is precisely the same problem with having government employees simultaneously serve as state legislators. The primary area in which the people can exercise their oversight and control over government is via their representatives in the legislature. Is it not natural, then, that there would be at least the appearance of bias, if not actual bias, when the legislature debates whether to raise taxes to increase an agency's funding, if individual legislators are employed by that same government agency and thus stand to benefit from higher taxes and higher government spending? Or consider simply good government laws, like public records laws that increase transparency in government. Government agencies frequently oppose these laws because of the added cost and burden associated with processing records requests.¹⁴⁹ The legislature cannot adequately represent the people if it is comprised of government employees who are being asked to vote for increased transparency in government when such transparency would mean an increased workload for them in their government jobs. While certainly less severe in degree than the corrupting influence the chief magistrate sought to wield over state legislatures in the late 1700s, these are the same type of concerns that led the colonists and the Framers to seek to ensure that the legislature was "free from the remotest influence, direct or indirect, of either of the other two" branches of government.¹⁵⁰ The court

¹⁴⁸ *Supra* notes 131–34 and accompanying text.

¹⁴⁹ See, e.g., Michael Scott Davidson & Anita Hassan, *Nevada Agencies Flout Public Records Laws. A Bill Before the Legislature Could Change That*, LAS VEGAS REV.-J., (May 31, 2019, 6:18 AM), <https://www.reviewjournal.com/news/politics-and-government/2019-legislature/transparency-bill-aims-to-end-agency-breaches-of-public-records-laws-1676273/> [<https://perma.cc/SDA6-RZGJ>].

¹⁵⁰ *Monaghan v. Sch. Dist. No. 1, Clackamas Cnty.*, 315 P.2d 797, 800 (Or. 1957) (quoting 1 THE WORKS OF JAMES WILSON 367 (James DeWitt Andrews ed., 1896)).

rulings discussed in Part I.C all seem to recognize this fact. As the Oregon Supreme Court explained, “[t]he constitutional prohibition is designed to avoid the opportunities for abuse arising out of such dual service whether it exists or not.”¹⁵¹ The court then cited with approval a hypothetical example put forth by the circuit court judge to illustrate the concern with permitting a local public-school teacher to simultaneously serve as a state legislator:

Conceivably the school board could say to its employee who is serving in the legislature, “You must vote in favor of certain bills that are advantageous to us and which increase our authority. If you do we will increase your salary and if you do not you will be penalized in your position in certain respects.” Would this relationship not then tend to concentrate power in the branch of the government by which the member of the legislature was employed and to the detriment of the legislative branch?¹⁵²

This concern is not merely hypothetical, however. An example of one dual-serving legislator in Nevada, which has a separation of powers clause functionally identical to the ones found in Oregon and Indiana,¹⁵³ includes the admission that he supported a specific piece of legislation for his local government employer in exchange for a promised pay raise and promotion.¹⁵⁴ The openness of that particular legislator, former Nevada State Assemblyman Wendell Williams, serves as confirmation not only of the Oregon Supreme Court’s

¹⁵¹ *Monaghan*, 315 P.2d at 805 *superseded by constitutional amendment*, OR. CONST. art. XV, § 8(1).

¹⁵² *Id.*

¹⁵³ *Compare* NEV. CONST. art., III § 1, cl. 1 (“The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.”), *with* OR. CONST. art. III, § 1 (“The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches shall exercise any of the functions of another, except as in this Constitution expressly provided.”), *and* IND. CONST. art. III § 1 (“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.”).

¹⁵⁴ Michael Squires, *Embattled Assemblyman: Williams: City Deal Arranged*, LAS VEGAS REV.-J. (Nov. 22, 2003), https://web.archive.org/web/20060103095243/http://www.reviewjournal.com/lvrj_home/2003/Nov-22-Sat-2003/news/22647591.html [<https://perma.cc/PE8Z-RY8Y>].

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concern, but also something identified by the Nebraska Supreme Court—that the employing executive branch agency could treat its dual-serving legislators on its payroll much more favorably than regular employees.¹⁵⁵ Notably, Williams remained employed by the City of Las Vegas despite a litany of scandals and incidents of misconduct, which included racking up huge charges on the city’s phone bill for personal calls, showing up to work so infrequently that his supervisors moved his office next to theirs to discourage his chronic absenteeism,¹⁵⁶ and submitting falsified timecards to collect thousands of taxpayer dollars for work never performed.¹⁵⁷

While everyone would like to receive preferential treatment from their respective state legislators, this is a uniquely important benefit for local government agencies, which are governed by the legislature in a much more direct and comprehensive way than is private enterprise. Indeed, when the Williams scandal was prominent in Nevada, former Las Vegas Councilwoman Lynette Boggs McDonald readily acknowledged that there was an unspoken policy to try and get as many legislators on the government payroll as possible because of the “added value” they provided to the city.¹⁵⁸ This is the modern-day equivalent of allowing the royal governor to unduly influence legislators with executive appointments. Here, it is a local government or other executive branch agency offering legislators a well-paying job in exchange for the “added value” the dual-serving legislator can provide to their executive branch employer. This form of manipulation is only superficially dissimilar from that executive branch manipulation of the legislature that the colonists universally condemned.¹⁵⁹

With a better understanding of legislative dual service, this Article returns to the question posed by the Colorado Supreme Court in its *Annear* decision discussed in Part I.B.2: “why should the judicial department intrude into a situation which concerns only the other

¹⁵⁵ See *supra* Part I.C.3.

¹⁵⁶ Steve Sebelius, *Williams Farce*, LAS VEGAS REV.-J. (Oct. 19, 2003) https://web.archive.org/web/20060104060754/http://www.reviewjournal.com/lvrj_home/2003/Oct-19-Sun-2003/opinion/22389854.html [https://perma.cc/7TPH-BRK9].

¹⁵⁷ Steven Miller, *The Lawmakers vs. the Law: Part IV*, NEV. POL’Y RSCH. INST. (May 11, 2011), <https://www.npri.org/commentary/the-lawmakers-vs-the-law-part-iv/> [https://perma.cc/V78F-332U].

¹⁵⁸ Michael Squires, *Las Vegas Personnel Issues: Williams Hangs on Amid Storm*, LAS VEGAS REV.-J. (Nov. 28, 2003) https://web.archive.org/web/20060103095359/http://www.reviewjournal.com/lvrj_home/2003/Nov-28-Fri-2003/news/22678479.html [https://perma.cc/4GZF-PE73].

¹⁵⁹ See *supra* note 5 at 311 (“Accordingly, when the Americans in 1776 spoke of keeping the several parts of the government separate and distinct, they were thinking of insulating the judiciary and particularly the legislature from executive manipulation.”).

two departments, particularly, as here, where they are not in disagreement?”¹⁶⁰ The question suggests that the separation of powers only serves to prevent one branch of government from unduly trampling or usurping the power and authority of another branch. In other words, with no interbranch conflict, why should courts get involved? But this is not the only function of the separation of powers doctrine. Separation of powers is not only about protecting individual branches of government from having their power usurped by another branch; it exists equally to protect the people from the tyranny that results when the legislative and executive powers are united in the same body.¹⁶¹ Further still, separation of powers is designed to prevent the legislature from being corrupted to serve the needs of other branches of government, rather than representing the people themselves.¹⁶²

As shown above, the executive branch would be delighted to have its agents simultaneously wield the legislative power. Legislative dual service is a problem of concentrated governmental power, a problem that threatens the very foundation of a representative government and a free society.¹⁶³ Consequently, it is emphatically the duty of the judiciary to prevent such an outcome by “ensuring that the organization of government conforms to the [state] constitution.”¹⁶⁴

CONCLUSION

The best construction of the separation of powers clauses found in the constitutions of the states that include (1) an express distribution of powers and (2) an explicit prohibition on persons from belonging to more than one branch of government simultaneously is one that prohibits all forms of legislative dual service. The reasoning of the few courts that have held otherwise is indefensible. Their conclusions are wholly inconsistent with the theory and purpose of the separation of powers clauses. They violate the rules of statutory construction by inserting limitations into the text where none exist.

¹⁶⁰ *Hudson v. Annear*, 75 P.2d 587, 589 (Colo. 1938).

¹⁶¹ *See infra* note 163.

¹⁶² *See supra* notes 131–134 and accompanying text.

¹⁶³ *See, e.g.*, THE FEDERALIST NO. 47 (James Madison) (Madison quotes the “celebrated” Montesquieu for the proposition that “[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.”).

¹⁶⁴ *See Dodge v. Dep’t of Soc. Servs.*, 600 P.2d 70, 72 (Colo. 1979) (The Colorado Supreme Court recognized that the judiciary’s obligation to help “ensur[e] that the organization of government conforms to the constitution” is of such “great public concern” as to justify general taxpayer standing. (quoting *Colo. State Civ. Serv. Emps. Ass’n v. Love*, 448 P.2d 624, 627 (Colo. 1968))).

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They suggest that government employees are exercising something other than one of the three forms of power authorized by state constitutions, which would make such employees and most of the government itself extraconstitutional. They would allow for an executive branch agency to employ every single member of its state's legislature, without violating the separation of powers doctrine. These rulings, and their attendant inconsistencies and problematic implications, stand in stark contrast to the rulings issued by the state supreme courts that have interpreted their nearly identical provisions to bar all forms of legislative dual employment. These decisions directly engage in the history and purpose of the doctrine—as well as grapple with the plain text rather than circumventing it altogether—and are thus legally sustainable.

It is imminently desirable and consistent with the purpose of the separation of powers to bar all government employees from simultaneously serving as legislators. Dual service dilutes, if not destroys, the very foundation upon which the entire concept of representative government rests, i.e., that the legislature reflects the will of the people, rather than the government. It is manifestly the duty of the judiciary to construe the supreme law as it is written, and this duty must not be avoided merely because of a disagreement with the wisdom of the law. While departing from the plain text or adopting constructions that effectively rewrite terms such as *any functions* to mean only *sovereign functions* is always improper, to do so when it comes to a topic like the separation of powers, which has been described as “probably the most important single principle of government,”¹⁶⁵ is particularly unjustifiable. Courts should construe their state's respective separation of powers clauses to give full effect to the doctrine's purpose and the precise words that appear in the state constitutions, as written and ratified by the people. After all, “[t]o what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”¹⁶⁶

¹⁶⁵ Galloway v. Truesdell, 422 P.2d 237, 241 (Nev. 1967).

¹⁶⁶ Marbury v. Madison, 5 U.S. 137, 176 (1803).