

Louisiana's Constitutional Agencies: Plenary Powers or "Constitutional Illusions of Being a Fourth Branch of Government"?

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LOUISIANA'S CONSTITUTIONAL AGENCIES: PLENARY¹ POWERS
OR "CONSTITUTIONAL ILLUSIONS OF BEING A FOURTH
BRANCH OF GOVERNMENT"?²

Table of Contents

Introductory Hypotheticals	876
I. Administrative Agencies—Statutory Conflicts	877
A. The Problem	877
B. The Trend.....	879
II. Avoiding the Constitutional Issue: A PSC Example	879
A. The Case	880
B. The PSC's Powers—Comparing 1921 and 1974 Language	880
C. The Resolution of the Case.....	882
III. The Unavoidable Constitutional Issue: A CSC Example.....	884
A. The Federal Harbinger.....	884
B. The State Court Opinion.....	885
IV. Traditional Objections.....	886
A. Separation of Powers Under The Louisiana Constitution	886
1. Louisiana Constitutional Textual Developments	886
2. Influence of <i>Marbury v. Madison</i>	887
3. An Implied Modification of Separation of Powers.....	888
4. If Agencies Share Some Article V Powers, How Much?	891
5. The Result of the Bright-Line Rule.....	891

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The author wishes to thank Carlos G. Spaht of the Baton Rouge Bar for his helpful discussions of the topic discussed herein. Any defects in the final product, however, are solely the author's.

1. Plenary is defined as "full, entire, complete, absolute, perfect, unqualified." Black's Law Dictionary 1038 (5th ed. 1979). See also *infra* note 24, discussion of the scope of the plenary powers of the PSC as recently announced by the Louisiana Supreme Court.

2. "Cole, J., concurs additionally to note the absurdity of the Commission's plenary authority argument, the continued pursuit of which exhibits constitutional illusions of being a fourth branch of government." *Herman Bros., Inc. v. Louisiana Pub. Serv. Comm'n*, 564 So. 2d 294, 298 (La. 1990) (Cole, J., concurring).

B.	Does Tradition Define Separation of Powers.....	892
1.	The Power of Tradition	892
2.	Separation of Powers and Federal Administrative Agencies.....	892
3.	Tradition Created By Constitutional Changes..	893
C.	Agency Expertise or Lack Thereof.....	893
1.	Other Judicial Concerns	894
V.	Decisions From Other Jurisdictions	895
A.	California	895
B.	North Dakota	897
C.	Connecticut	897
VI.	Public Rights - Private Rights: Any Clues Here?.....	898
A.	Worker's Compensation ALJ System	898
B.	The Challenge—More Than Equal Dignity?.....	899
C.	Defining Public-Rights	899
D.	Why Does It Matter?	900
VII.	Other Constitutional and Statutory Considerations	901
A.	The Constitutional Oath of Office.....	901
B.	The Constitutional Convention	903
C.	The Declaratory Judgment Act—Is It Enough?	903
VIII.	Potential Liabilities Under 42 U.S.C. § 1983	905
	Conclusion	909

INTRODUCTORY HYPOTHETICALS

“Agency” is created by the 1974 state constitution. It is given “plenary power”³ to regulate and to make reasonable rules, regulations and procedures.⁴ The powers are generally regarded as quasi-legislative, quasi-judicial, and quasi-executive in nature.

Hypothetical One:⁵

A statute requires the payment of attorney’s fees arising out of an intervention in an Agency hearing. Upon application by the intervenor for attorney’s fees, Agency refuses on the grounds that the statute is an unconstitutional infringement upon Agency’s constitutional rule-making power.

3. For example, the 1974 Constitution provides:

The [Public Service] Commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.

La. Const. art. IV, § 21(B).

4. E.g., Louisiana Pub. Serv. Comm’n—La. Const. art. IV, § 21 and Civil Serv. Comm’n—La. Const. art. X, § 10.

5. Based upon the facts of *In re Brisset*, 424 So. 2d 1040 (La. App. 1st Cir. 1982), rev’d, 430 So. 2d 79, on remand, 436 So. 2d 654 (La. App. 1st Cir.), writ denied, 441 So. 2d 749 (1983).

Hypothetical Two:

Sole proprietor S applies to Agency for a certificate. The certificate issues. X, a previously absent⁶ child now claims an interest in the certificate. X alleges that the sole proprietorship was a community enterprise⁷ of S's marriage with H and, thus, is partially his by inheritance.⁸ Agency declares that article 59 conflicts with Agency's order, noting that its powers under the constitution⁹ are plenary.

Hypothetical Three:¹⁰

Corporation A is the holder of a certificate for hauling household goods and cement. Sixteen days after B obtains a certificate to haul household goods, A and B make a joint application for a swap of certificates.

A pre-1974 statute¹¹ provides that no certificate shall be transferred unless the owner has substantially operated all rights under its certificate for six months. Agency grants the certificate swap. Upon appeal of the Order by an aggrieved intervenor,¹² Agency responds that legislation cannot permissibly conflict with Agency rules, regulations, or orders adopted pursuant to Agency's constitutional powers.¹³

In each hypothetical the aggrieved party filed suit against Agency and each of its officers in their personal capacity under 42 U.S.C. section 1983¹⁴ for \$10,000,000.00 and attorney's fees.¹⁵

I. ADMINISTRATIVE AGENCIES—STATUTORY CONFLICTS

A. *The Problem*

These hypotheticals suggest some of the scenarios in which a constitutional agency may be faced with a conflict between one of its duly

6. La. Civ. Code art. 47, as amended by 1990 La. Acts No. 989, § 1, states: "An absent person is one who has no representative in this state and whose whereabouts are not known and cannot be ascertained by diligent efforts."

La. Civ. Code art. 54, as amended by 1990 La. Acts No. 989, § 1, states: "One who has been an absent person for five years is presumed to be dead."

La. Civ. Code art. 59, as amended by 1990 La. Acts No. 989, § 1, states: "If the person who is presumed to be dead . . . reappears, he shall be entitled to recover his inheritance in the condition in which it is found from those who succeeded in his default."

7. La. Civ. Code art. 2350.

8. La. Civ. Code art. 888.

9. La. Const. art. IV, § 21.

10. Based upon the facts of *Herman Bros., Inc. v. Louisiana Pub. Serv. Comm'n*, 564 So. 2d 294 (La. 1990).

11. La. R.S. 45:166 (1982).

12. La. Const. art. IV, § 21(E).

13. Adapted from Defendants-Appellees Original Brief, at 8, *Herman Brothers, Inc.*, 564 So. 2d 294.

14. See *infra* note 146 for the text of the statute.

15. 42 U.S.C. § 1988 (1980).

enacted rules, regulations, or procedures and a statute. The problem is complicated by the possibility that the conflicting statute may have been enacted prior to the agency's grant of authority. Furthermore, the specter of a potential suit based upon 42 U.S.C. section 1983 ("1983") looms if the agency makes the wrong decision. Usually a 1983 suit will be brought against the agency officials in their personal capacity for monetary damages, and against the agency officials in their official capacity for injunctive relief.

The underlying issue of the agency's dilemma arises out of the tension inherent in the creation of a quasi-judicial, quasi-legislative, and quasi-executive agency *in* a state constitution in which there is also the traditional expression of a strict separation of powers.¹⁶ This ambiguous constitutional structure raises the essential question of the role, if any, for the constitutionally created administrative agency in determining the constitutionality of statutes. If such agencies are not to have a role, then what is the agency's proper response when faced with a statute that the Agency would otherwise deem unconstitutional because the statute encroaches upon the agency's plenary constitutional grant of authority? However, even this "turf battle" may pale in significance when compared to the potent threat of a 1983 action if the agency acts under an unconstitutional statute.¹⁷

The issues involved here also raise the general policy question of whether increased judicial efficiency obtained by allowing the agency to adjudicate all issues might provide sufficient reason to challenge traditional notions of separation of powers. State courts are faced with the question of how to harmoniously construe constitutional provisions that are statutory in nature, but placed in the state's basic document for political reasons. Could the electors have created "a fourth branch of government"? The answer is clearly that they could. But the questions under the 1974 Constitution of Louisiana are did they, and, implicitly, if they did, will the Louisiana Supreme Court recognize it?

This paper examines how courts in Louisiana have responded to these types of issues when they have arisen in cases involving the Public Service Commission ("PSC") and the Civil Service Commission ("CSC"). Additionally, the paper examines court decisions rendered in other ju-

16. See generally W. Hargrave, *The Louisiana State Constitution* 43-44 (1991); Johnson, *Developments in the Law, 1983-84, Legislation—Procedure and Interpretation*, 45 *La. L. Rev.* 341, 344-53 (1984). Professor Johnson discussed in great detail the conflicts inherent in delegation of legislative powers to statutorily created agencies, but had no occasion to explore the implications of constitutional agencies.

17. See discussion of liability under 42 U.S.C. § 1983 in *infra* text accompanying notes 144-69.

risdictions in similar cases and discusses related cases involving federal constitutional questions.¹⁸ A brief examination will be given to 1983 actions and their relationship to decisions by state agency officers. The paper concludes with some thoughts as to why the power to declare a statute unconstitutional¹⁹ may of necessity inhere in Louisiana's constitutionally-created agencies.

B. The Trend

While an explosion of constitutional agencies is unlikely,²⁰ the same may not be true of statutory agencies. Nonetheless, as the number of administrative agencies increases there is a concomitant increase in the number of occasions in which an agency will perform its adjudicative role. Whether the subject matter is one of public or private rights,²¹ each adjudicative exercise places the interest of a person at risk if the agency is required to apply a statute that is unconstitutional. Thus, agency action will often involve those cases that most clearly have a need for true justice that can be obtained best by exercise of the full power of the law by the agency.

It would serve both the interests of justice and governmental efficiency to firmly and definitively establish the scope of the quasi-judicial powers of agencies, both constitutional and statutory created. Failure to clarify this scope will perpetuate expensive and dilatory litigation in which the real parties in interest suffer real economic losses while agencies and the Louisiana courts skirmish on a constantly shifting legal border.

II. AVOIDING THE CONSTITUTIONAL ISSUE: A PSC EXAMPLE

Certainly one easy way to "handle" the issue if it arises is to find a non-constitutional ground upon which to determine the case on appeal. This is easier when the agency simply ignores the "controlling" statute in making its decision.

18. It is not within the scope of this paper to discuss non-constitutional based administrative agencies. Since this is the only type of agency which exists in the federal system, the cases are discussed for purposes of examining certain policies and rationales for purposes of comparison and contrast.

19. "[T]he common phrase 'declared unconstitutional' is not correctly used in this context, for there is no declaration. A court or an administrative agency may refuse to apply a statute in a case before it because it conflicts with the constitution, but that refusal does not suspend operation of the law, repeal it, or erase it from the books." Hargrave, *Developments in the Law, 1982-1983, Louisiana Constitutional Law*, 44 La. L. Rev. 423, 425 (1983).

20. See *infra* note 128 for a list of current constitutional agencies.

21. See discussion of public-rights *infra* in text accompanying notes 111-118.

A. *The Case*

In *Herman Brothers Inc. v. Louisiana Public Service Commission*,²² the PSC reluctantly²³ argued in brief, as an alternative ground for affirming a PSC certificate swap decision, that its order was an exercise of plenary power²⁴ in regulating a common carrier. The PSC then reasoned that if the pre-1974 statute in question²⁵ could not be construed to be in harmony with their order, then the order, being more recent "legislation"²⁶ by the constitutional entity having plenary regulatory and rule making ("legislative") power in this area of the law, must prevail over the conflicting statute.²⁷

B. *The PSC's Powers—Comparing 1921 and 1974 Constitutional Language*

Article IV, § 21(B) POWERS AND DUTIES. The Commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.²⁸

The constitutional language clearly indicates that the PSC has regulatory powers over common carriers and public utilities, as well as

22. 564 So. 2d 294 (La. 1990).

23. "Although we have repeatedly contended that it is not necessary for a resolution of this case to address the constitutional issue, if it is essential to a decision . . ." Defendants-Appellees Supplemental Brief, at 1, *Herman Bros., Inc. v. Louisiana Pub. Serv. Comm'n*, 564 So. 2d 294 (La. 1990).

24. In *Louisiana Consumers' League, Inc. v. La. Public Serv. Comm'n*, 351 So. 2d 128 (La. 1977), a two justice plurality supreme court decided that a PSC rule was invalid because notice to the public prior to its effective date was insufficient. However, it also held that the PSC's rule making powers were not subject to the La. Administrative Procedures Act ("APA"), La. R.S. 49:951-970 (1987), because the constitutional grant of rule making power to the PSC precluded the legislature from impinging on this power through legislation. However, only two justices subscribed to the plurality's reasoning.

In concurring in the result that the rule was invalid, Justices Tate and Calogero expressed the opinion the APA applied. Justice Dennis argued that due process, La. Const. art. I, § 23, and the requirement that the PSC adopt "reasonable" rules supported the result. Justices Summers and Dixon dissented.

Given the results in *Consumers' League* and the changes in the court personnel since the decision, the PSC may wish to avoid the reconsideration of the question of the applicability of the APA to its rule-making powers. It seems likely that were the court to squarely face this question again, the PSC may find the APA imposed upon it.

25. La. R.S. 45:166 (1982).

26. La. Civ. Code art. 2 ("Legislation is the solemn expression of legislative will.").

27. La. Civ. Code art. 8.

28. La. Const. art. IV, § 21(B).

rule-making powers, of a constitutional dimension. The phrase "as provided by law" qualifies only the language providing "other regulatory" and "other duties" that may fall within the PSC's power ambit and was one of the few purposeful changes made in this article at the 1973 Convention.²⁹

In fact, the comments of Delegate Perkins indicated that the new provision was "basically . . . the same provision contained in the 1921 Constitution, but is put in far more general terms."³⁰ If this comment truly reflects the intentions of the framers, it is important because the 1921 Constitution language describing the powers of the Commission stated in part that "[t]he power of the Commission shall affect and include *all matters and things connected with* . . . supervision, regulation and control."³¹

The word "matters" is the same word that was carried forward from the 1921 Constitution into the grant of jurisdiction of district courts in the 1974 Constitution.³² To conclude that the use of the word "matters" in describing jurisdiction of an article V court is intended to convey the same meaning in describing the "quasi-judicial" jurisdiction of the article IV PSC may be speculative. However, there is no denying that each, the article V district court and the article IV PSC, when acting within their respective "judicial sphere" has a comparable range of problems ("matters") and tools (rules, statutes, orders, etc.). Does this "in pari materia" construction necessarily compel the conclusion that the PSC has all article V court powers when acting as a court within the PSC's jurisdiction. Obviously, the answer is no. Could the constitutional provision be read to indicate this result? Obviously, the answer is yes.

One of the few indications since the 1974 Constitution that could give some indication of the meaning of the constitutional language is the fate of pre-1974 statutes that regulate the PSC's "quasi-judicial functions."³³ Even after the 1974 Constitution was ratified, statutory

29. 9 Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 2983, 104th Days Proceedings—December 19, 1973 ("Convention Transcripts"). The words "and . . . as provided as law" were finally adopted in order to assure that the PSC had some absolute constitutional power. The original language of the section stated that the "commission shall regulate all common carriers and public utilities as provided by law."

30. Comments of Delegate Lynn Perkins, Convention Transcripts, *supra* note 29, at 2984.

31. La. Const. art. VI, § 4 (1921) (emphasis added).

32. La. Const. art. V, § 16(A).

33. La. Const. art. X, § 12. Additionally, the CSC is given constitutional rights to issue subpoenas and to administer the Oath in those cases. The PSC has similar powers by virtue of statutes that generally preceded the 1974 Constitution. La. R.S. 45:1184 (1982) (Summons Powers Over Witnesses), La. R.S. 45:1186 (1982) (Contempt Powers).

provisions continue to exist giving the PSC the power to hear complaints for violations of its orders, rules, and regulations. The complaint may be filed by "any person."³⁴ The PSC may make an award of damages to the complainant and order it paid "on or before a named day."³⁵ The lack of statutory changes, repeals, or adverse court ruling as to the statutes' validity when considered in light of the language describing the powers of the PSC suggests that Delegate Perkins' opinion was probably accurate.

Since Louisiana courts had little opportunity to construe the relevant language of the 1921 Constitution in any manner that sheds light on the issues raised in this paper, the most that one might argue from this brief constitutional exegesis is that whatever the words meant in the 1921 constitution, they probably still mean the same thing in the 1974 constitution.

C. *The Resolution of the Case*

The Louisiana Supreme Court chose to decide the case upon a statutory basis, finding that the PSC did not follow the clear words of Louisiana Revised Statutes 45:166.³⁶ The PSC argued that the purpose of the statute was to prevent or suppress traffic in dormant or abandoned certificates.³⁷ The court found that even if preventing or suppressing traffic in dormant certificates were the purpose of the statute, "the statutory language does not except new certificates from the requirement of six months' operation."³⁸ Additionally, the court opined that to issue the certificate upon a showing of "[p]ublic convenience and necessity"³⁹

34. La. R.S. 45:1196 (1982).

35. La. R.S. 45:1197 (1982).

36. The PSC argued the constitutional issue as an alternative argument and did not press the argument at oral argument before the supreme court. When asked by Justice Watson about the constitutional argument, the PSC stated that it did not wish to press the claim unless the court would find that the PSC violated the statute.

In its application for rehearing the PSC specifically raised a challenge to the court's activation "of a serious constitutional issue" when the court stated:

The legislature's lack of power to alter the commission's constitutional jurisdiction does not prevent the legislature from enacting substantive provisions affecting motor carriers.

Herman Bros., Inc. v. Louisiana Pub. Serv. Comm'n, 564 So. 2d 294, 297 (La. 1990).

Given that the court disposed of the case without reaching the constitutional issue, it was no surprise that the court denied the rehearing on this issue.

37. *Id.* at 296.

38. *Id.*

39. La. R.S. 45:164 (1982) provides in part:

[A] certificate of public convenience and necessity, which shall issue only after . . . a finding of public convenience and necessity

and then allow the successful applicant to immediately transfer the same certificate would be "anomalous."⁴⁰

The court reversed and remanded to the PSC. Thus, the PSC and the court receded from the constitutional question, leaving it for another day.⁴¹ What is not clear from this encounter is the rationale or the policy choices underlying the court's decision.

If the court implicitly stated that the statute is valid, then the court has implicitly stated that at least one of the statutes that came into existence after the "constitutional" PSC⁴² is a valid exercise of legislative power in matters arguably committed to the PSC. This suggested analysis immediately calls into question the scope of the powers granted to the PSC in article IV, section 21(B) of the 1974 Constitution which provides in part:

*It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties. . . .*⁴³

The court could construe this granting language literally and provide the basis for the conclusion that the legislature can freely legislate substantively in matters related to the function of the PSC. But this construction would apply only as long as it does not attempt to reduce the PSC's jurisdiction over common carriers or public utilities or attempt to create rules, regulations, or procedures necessary for the PSC to discharge its duties. The often fine line between substantive rules, which apparently the legislature can impose on the PSC, and procedural rules, which appear to be the constitutional grist of the PSC, is evidenced by *Herman Brothers*.

The six month use requirement is a substantive expression of legislative intent, although the PSC and the court may disagree as to what that intent may be. However, the statute additionally addresses matters that are arguably procedural. Did the court decide that on balance the substantive portion was predominant? Was the court swayed by the lack of any "rule, precept or principle of law" that might conflict with the statute?⁴⁴ If the latter, is mere conflict sufficient or is that only the first step of an analysis yet to be developed? This resolution of *Herman Brothers* leaves open the difficult question that will arise when the PSC

40. *Herman Bros.*, 564 So. 2d at 296.

41. Justice Cole's concurrence, however, indicates that at least one court member has little patience for the constitutional authority argument. *Id.* at 298. See also *supra* note 2.

42. See text accompanying *infra* notes 64-67.

43. La. Const. art. IV, § 21(B) (emphasis added).

44. *Herman Bros.*, 564 So. 2d at 298 (Dennis, J., concurring). The only indication of a possible line of demarcation between the legislature's powers and the PSC's power is the result in *Louisiana Consumers' League* discussed in *supra* note 24.

issues an order or enacts a rule, regulation or procedure that directly conflicts with an existing statute, basing its action solely upon its constitutional plenary power to do so.

However, in *Herman Brothers* even if the court would have concluded that the statute was invalid because of the PSC's plenary powers in such matters, the court could still justify the results in the case. The PSC's indifference to the clear words of the statute was not based upon any notion of constitutional supremacy of its own actions over the statute.⁴⁵

Since the PSC made no effort to follow the statute or to declare the statute in conflict with the PSC's power, there was really no question properly before the court on the issue. In fact, the PSC implored the court to avoid wasting the parties' time and effort that would result by remanding to the PSC since six months had passed. Thus, the PSC tacitly affirmed the PSC's belief in the statute's validity. As Justice Lemmon indicated in his dissent, this efficiency argument has some attraction.⁴⁶ In the end, however, this case would have been a weak factual case upon which to base a definitive statement of the agency-legislative-judicial power demarcation.

An earlier case involving the CSC brought the issue squarely before a reviewing court. An examination of the results in that case may shed some light on the PSC's chances of pressing their constitutional claim successfully in the "right" case.

III. THE UNAVOIDABLE CONSTITUTIONAL ISSUE: A CSC EXAMPLE

A. *The Federal Harbinger*

In the federal district court case, *Jackson v. Dept. of Public Safety*, a section 1983 case, the trial court stated that:

The Civil Service Commission, however, could not rule on the constitutionality of the statutes, although it could interpret the statutes at issue (La. Const. of 1974, Article 5, Section 1). (But the constitutionality could be addressed on appeal from the Civil Service ruling which is appealed directly to the Court of Appeal). And, exhaustion of administrative remedies is not a prerequisite to a civil rights suit under § 1983.⁴⁷

45. As has been discussed above in *supra* text accompanying notes 36-43, the PSC's constitutional argument was advanced with only the greatest reluctance as a secondary argument to its statutory justification.

46. *Herman Bros.*, 564 So. 2d at 298 (Lemmon, J., dissenting).

47. *Jackson v. Dept. of Pub. Safety*, 562 F. Supp. 324, 326-27 (M.D. La. 1983), appeal *dism'd*, 755 F.2d 172 (5th Cir. 1985) (citations omitted).

B. *The State Court Opinion*

Within a few months of *Jackson* a state case, *In re Brisset*,⁴⁸ arose. In *Brisset*, the CSC refused to apply a statute requiring the CSC to pay attorney's fees in certain appeals⁴⁹ before the CSC. The CSC opined that the statute was unconstitutional because it attempted to usurp powers granted exclusively to the CSC by the Louisiana Constitution.⁵⁰

On appeal the first circuit determined that the CSC had no power to determine the constitutionality of state statutes,⁵¹ and vacated the CSC's decision to that extent.⁵² The court of appeal "reinstated" the statute without deciding its constitutionality. The Louisiana Supreme Court⁵³ granted writs, and, then, reversed and remanded to the first circuit for a decision on the constitutionality of the statute. On remand, the first circuit stated:

At the outset, this court reaffirms its previous holding in this case with respect to the commission's lack of power to rule on the constitutionality of a state statute. See also La. Constitution 1974, Art. V, Sec. 1.⁵⁴

After the first circuit concluded that the CSC has no such power, the court then found the statute to be a violation of the CSC's constitutional powers.⁵⁵ The court's "argument" is clear. By invoking, as

48. *In re Brisset*, 424 So. 2d 1040 (La. App. 1st Cir. 1982), rev'd, 430 So. 2d 79, on remand, 436 So. 2d 654 (La. App. 1st Cir.), writ denied, 441 So. 2d 749 (1983).

49. La. Const. art. X, § 8. Right of appeal in disciplinary matters or claims of discrimination.

50. La. Const. art. X, § 10.

51. Judge Ponder noted in his concurrence that:

I do express some doubt as to the propriety of the holding that the Civil Service Commission cannot declare an act on the subject of their procedure unconstitutional, *especially without expressing the thought that they can refuse to follow an act they think to be unconstitutional.*

In re Brisset, 436 So. 2d 654, 659 (La. App. 1st Cir. 1983) (Ponder, J., concurring) (emphasis added).

52. La. Const. art. X, § 12.

53. *In re Brisset*, 430 So. 2d 79 (La. 1983).

54. *In re Brisset*, 436 So. 2d at 658. Professor Hargrave points out that *Constant* only addressed the issue of "the extent to which the drafters of the constitution express an intent that is controlling on the courts." Hargrave, *supra* note 19, at 426 n.18.

55.

[W]e now hold that the power vested in the commission under Art. X, Sec. 10(A) of the constitution is exclusive in nature with respect to all aspects to the classified service listed therein. This includes appeals from disciplinary action to the commission. [] As such, L.S.A.-R.S. 42:1451 infringes on the exclusive power granted to the commission by the Louisiana Constitution, Art. X, Sec. 10(A). Therefore, we hold this statute unconstitutional.

In re Brisset, 436 So. 2d at 658-59.

did the court in *Jackson*,⁵⁶ Art. V, section 1,⁵⁷ the clear inference is that the court considers the power to make the determination of the constitutionality of a statute to be the sole province of an article V court.⁵⁸

The difficulty with this implied exclusive province argument is that it is conclusory and does not attempt to address the reasons why the courts are the only bodies that possess this power.⁵⁹

IV. TRADITIONAL OBJECTIONS

A. Separation of Powers⁶⁰ Under The Louisiana Constitution

1. Louisiana Constitutional Textual Developments

In each Louisiana constitution except the 1863 Constitution, the fundamental tripartite structure of government has been explicitly defined in the triad of legislative, executive and judiciary branches dividing among themselves the powers of government.⁶¹ In addition, this division of power is followed by an expression of the traditional doctrine of separation of powers.⁶² Concurrent with this recognition of the basic structure of our government is the recognition of the vesting of the entire judiciary power in a supreme court and inferior courts.⁶³

56. See discussion of *Jackson* in text accompanying supra note 47.

57. "The judicial power is vested in a supreme court, courts of appeal, district courts and other courts authorized by this article." La. Const. art. V, § 1.

58. There is some literal support in the constitution for this conclusion since the Commission is not an "other court authorized by this Article." La. Const. art. V, § 1.

The common understanding of this provision was that the legislature could not divest the article V courts of their jurisdiction. Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 La. L. Rev. 766, 777 (1977).

59. See, generally, Hargrave, supra note 19, at 423-24.

60. One scholar has recently noted that "[w]hile the principle is still an important one, Louisiana in modern times has swayed from a strict separation of powers." W. Hargrave, supra note 16, at 44.

61. La. Const. art. I, § 1 (1812); tit. I, § 1 (1845); tit. I, § 1 (1852); tit. II, § 1 (1864); art. 14 (1879); art. 16 (1898); art. 16 (1913); art. II, § 1 (1921); art. II, § 1 (1974).

The adoption at the 1973 Convention was by a vote of 100-0 for art. II, § 1. W. Hargrave, supra note 16, at 44.

62. La. Const. art. I, § 2 (1812); tit. I, § 2 (1845); tit. I, § 2 (1852); tit. II, § 2 (1864); art. 15 (1879); art. 17 (1898); art. 17 (1913); art. II, § 2 (1921); art. II, § 2 (1974).

The adoption at the 1973 Convention was by a vote of 107-1 for art. II, § 2. W. Hargrave, supra note 16, at 44.

63. La. Const. art. IV, § 1 (1812); tit. IV, § 62 (1845); tit. IV, § 61 (1852); tit V, § 69 (1864); art. 80 (1879); art. 84 (1898); art. 84 (1913); art. VII, § 1 (1921); art. V, § 1 (1974).

On the other hand, the PSC became a constitutional entity in the 1898 Constitution.⁶⁴ In the 1921 Constitution, the PSC appeared in article VI, "Administrative Officers and Boards."⁶⁵ The PSC is now constitutionally based in article IV, section 21 of the 1974 Constitution. Article IV is entitled "Executive Branch." Yet, with the "constitutionalizing" of the PSC in 1898, the PSC's exclusive regulatory authority and rule-making power⁶⁶ were elevated to a nominal par with that of the tripartite branches. Despite this textual opportunity for the type of issues suggested in the hypotheticals to arise, the PSC has until recently steered a course that avoided foundering on the rocks of constitutional adjudication.⁶⁷

2. *Influence of Marbury v. Madison*

The separation of powers question arises in the sense of whether or not the constitutional agency may exercise the judicial power of constitutional adjudication of statutes that are applicable to the agency in its "quasi-judicial" role. In *Marbury v. Madison*,⁶⁸ courts of the United States, and later the states, found inherent in the grant of judicial power, the power to pass on the constitutionality of laws.

However, as one author points out,⁶⁹ the "inherentness" of this power arises out of the courts' role in deciding cases and not out of any special role that the courts have in deciding such a question. It must also be recognized that the legislative and the executive branch also have a part in determining whether or not a statute is unconstitutional. The governor exercises this power by veto of acts of the legislature on grounds of unconstitutionality. The legislature exercises its power in the very act of creating legislation that it deems constitutional by the act of passage.

64. La. Const. arts. 283-289 (1898), under the heading "Railroad, Express, Telephone, Steamboat and Sleeping Car Company Commission."

65. La. Const. art. VI, §§ 3-9 (1921).

66. The PSC granting language has changed little in the successive constitutional versions. See *supra* note 3.

67. In the 1954 *Projet*, the Louisiana Law Institute proposed art. IV, § 19 which provided, in part, that "[t]he legislature shall prescribe the powers and duties of the [PSC]." 2 *Projet of a Constitution for the State of Louisiana with Notes and Studies* 396 (1954).

Comment I noted that "[t]he Institute considered deleting completely the provision for the [PSC], but because of its importance as a *quasi-judicial* and a *quasi-legislative* body the basic provision was retained." 2 *Projet of a Constitution for the State of Louisiana with Notes and Studies* 401 (1954) (emphasis added).

68. 5 U.S. (1 Cranch) 137 (1803); *LeBreton v. Morgan*, 4 Mart. (N.S.) 138 (La. 1826) (the judiciary possesses the power to declare laws contrary to the constitution void, as a necessary power inherent in their office).

69. Hargrave, *supra* note 19.

How then, is the *Marbury* rationale to apply to an agency created by the constitution with powers that include judicial, legislative and executive powers, albeit limited to a particular area of the expertise? The bare assertion that the *Marbury* power is exclusive to courts *ipso facto* would act to limit the agency when exercising its "judicial functions" without discussion of the existence or propriety of such a power in the agency.⁷⁰ The text of the 1974 Constitution arguably supports an interpretation in favor of rather than against the grant of a complete "judicial power" for the agency within the limits of its power ambit.

3. *An Implied Modification of Separation of Powers*

A cursory examination of the 1974 Constitution shows that both the PSC and the CSC are given certain similar constitutional powers to act as a judicial body in determining certain matters.⁷¹ Judicial review is provided by appellate jurisdiction in the district court⁷² and the court of appeal⁷³ respectively.⁷⁴ In either case, the appeal is based upon the

70. *Id.* at 424-25.

71. Public Serv. Comm'n—La. Const. art. IV, § 21(B)—see *supra* note 3. While this language is not as clear as that relating to the CSC's power to decide cases, the language of La. Const. art. IV, § 21(E) Appeals, makes its clear that the PSC is in fact deciding a matter. CSC—La. Const. art. X, § 12(A)—"exclusive power and authority to hear and decide all removal and disciplinary cases. . . ."

72. La. Const. art. IV, § 21(E). The venue for this suit is the district court in the domicile of the PSC, today East Baton Rouge Parish.

73. La. Const. art. X, § 12(A).

74. Professor Hargrave draws some import from the distinction that PSC appeals are to the district court, and CSC appeals are to the court of appeal. He argues that in establishing the right of appeal in the court of appeal, and thus, bypassing the district court, the constitution may have demonstrated a certain respect to the CSC's competence. Hargrave, *supra* note 19, at 426 n.18.

This argument has some force if it is noted that the 1921 constitution granted the right of appeal from the CSC directly to the supreme court on conclusions of law, but that the CSC's conclusions of fact were final. La. Const. art. XIV, § 15(O)(1) (1921). Arguably today this CSC deference would not be possible because of the 1974 provision granting the courts the right of review of "both law and facts" in civil matters. La. Const. art. V, § 5(C)—supreme court and § 10(B)—courts of appeal. See *infra* note 77.

If the 1974 Constitution provisions relating to appeals from the PSC are compared, one can discern a certain respect for the PSC's decisions, also. The appeal is to the district court, and, unlike appeals from the CSC, an express right of appeal to the supreme court is granted. In addition, the statutes that govern the appeal in the district court restrict the court to a review of the record instead of a *de novo* trial, comporting with the district court's role as an appellate court. Thus, it would appear that the main distinction between the two appeal routes is the difference between one judge and three judges, and probably a result of historical accident rather than an expression of greater confidence in one agency than the other.

record developed in the agency hearing, not a trial *de novo*.⁷⁵ In according finality of findings of fact⁷⁶ to the agency record, the courts are in fact giving greater deference to the agency than that which is given to similar findings made by lower courts under Louisiana's system of appellate review of fact.⁷⁷

The treatment of agency decisions in the appellate chain of review also yields some other interesting observations. In the case of either

75. La. R.S. 45:1193 (1982) requires the PSC to file a certified copy of the transcript of all proceedings before the PSC with the court in which the appeal is pending.

La. R.S. 45:1194 (1982) requires that if upon appeal the plaintiff "introduces evidence which is found to be different from that offered . . . before the [PSC], or additional thereto, the court . . . shall send a transcript of such evidence to the [PSC], and stay proceedings . . . [T]he [PSC] shall consider the evidence . . . and shall report its action to the court. . . ."

76. See *supra* text accompanying note 75.

77. The conclusion that the PSC's findings of fact are "final" is based upon the mandatory remand requirement of La. R.S. 45:1194 (1982). Although the issue has not been raised in any cases found by the writer, there is a distinctive difference between the scope of appellate jurisdiction given to the Louisiana Courts of Appeal and the Louisiana Supreme Court.

Art. V, § 5(C) provides, in part, that the scope of review of the supreme court "extends to both law and facts, . . . [e]xcept as otherwise provided by *this constitution*." Art. V, § 10(B) provides, in part, that the scope of review of the courts of appeal "extends to law and facts, . . . [e]xcept . . . as provided by *law in review of administrative agency determinations*. . . ." (emphasis added).

If these provisions are read literally, then the supreme court has power of review over factual determinations over all agencies, regardless of any contrary statute. Conversely, because of the wording of § 10(B), the courts of appeal may be subject to the demands of statutes such as La. R.S. 45:1194 (1982). The appellate jurisdiction of the district court, for purposes of the PSC, is controlled "as provided by law," under Art. V, § 16(B), and, thus, these courts would appear to be bound by La. R.S. 45:1982 (1982) also.

The Louisiana Supreme Court has unrestricted review of law and fact. Art. V, § 5(D). Is La. R.S. 45:1194 (1982) and other such statutes an unconstitutional infringement on the supreme court's power of review of facts. To the extent that such statutes might be read to preclude such review, the answer must be affirmative. To the extent that new evidence might be raised in the supreme court, the statutory requisite of remand to the agency would most likely be either utilized by the court, since its fact finding capabilities are limited in practice, or the evidence would be rejected as an attempt to raise matters not present in the record. Either choice avoids having to find the statute in conflict with § 5(D) and, thus, unconstitutional.

A final question that arises is whether or not the supreme court can reverse an agency factual finding and render judgment adverse to the agency's determination. If an agency decision involves a matter which is committed to the agency by the constitution, e.g., PSC's power to regulate common carriers, arguably the answer will be negative. To find otherwise effectively strips the constitutional agency of its power to act in its area of exclusive control. Conversely, if the decision is made on a subject over which the constitutional agency is granted jurisdiction *by statute*, the supreme court's power to reverse and render is most likely present.

agency, the next level of appeal is the Louisiana Supreme Court.⁷⁸ This latter observation also demonstrates that the constitutional agency is treated as a lower court in a three-level court system. Thus, there is a trial court, i.e., the agency, and a regular appellate route in the article V courts. This structure of the agency chain of adjudication is comparable to the standard civil or criminal chain, i.e., trial court, court of appeal and supreme court. In fact, one is hard pressed to see a meaningful or logical distinction. If any meaningful distinctions exist they revolve around the problems of the exclusive jurisdiction of the Louisiana Supreme Court over the discipline of judges.⁷⁹

However, any such fine distinction must be tested against other policy choices imbedded in the 1974 constitution. An objection to complete agency judicial powers founded in lack of judicial expertise or inability to apply the subtleties of constitutional analysis must address the significance of the ratifiers' decision to retain certain historical courts with full article V power despite the fact that the judges are not required to be attorneys. The 1974 Constitution retained the mayor's courts and justice of the peace courts as article V courts.⁸⁰ However, the 1974 Constitution does not require that the judges of these courts be admitted to the practice of law.⁸¹ The qualifications for these judgeships were left up to the legislature.⁸² Nonetheless, these judges exercise all article V power when acting within the jurisdiction of their respective courts.⁸³ Is it logical to allow these minimal courts to have the potential to pass on constitutionality of statutes while denying the same power to a relatively significant and legally sophisticated entity such as the PSC or CSC, solely on the basis of establishment by article V or lack thereof?

78. La. Const. art. IV, § 21(E) provides a right of direct appeal to the supreme court "by any aggrieved party or intervenor."

La. Const. art. X, § 12(A) provides no right of appeal from the court of appeal to the supreme court, but such a case should fall under the general supervisory jurisdiction of the supreme court making an application for a writ of review possible. La. Const. art. V, §§ 2, 5(A); La. Code Civ. P. art. 2193. In addition, the Louisiana Supreme Court has appellate jurisdiction in "a case . . . if (1) a law or ordinance has been declared unconstitutional . . ." La. Const. art. V, § 5(D).

79. See discussion in *infra* text accompanying note 165.

80. La. Const. art. V, § 20.

81. Compare La. Const. art. V, § 24.

82. La. R.S. 13:2582(A) (Supp. 1990)—Justices of the Peace; Qualifications—"good moral character, a qualified elector, and able to read and write the English language correctly." La. R.S. 33:441(A)(B) (Supp. 1990)—Mayor's Court—"The mayor may try all breaches . . . the board of aldermen may, upon request of the mayor, appoint an attorney . . . as court magistrate."

83. Hargrave, *supra* note 58, at 812.

4. *If Agencies Share Some Article V Powers, How Much?*

The more difficult question that would arise if the Louisiana Supreme Court were willing to concede certain unenumerated "judicial powers" to the agencies is: What are the constitutional and policy bases upon which the court may make the distinction between those powers so recognized and those that it is unwilling to recognize? The bright-line rule of refusing to recognize any attempt by the agencies to breach the separation-of-powers "wall" does have a strong element of certainty. By strictly construing the agencies' grants of plenary authority, the court retains the power to define "plenary." Expansion and contraction remains within the power of the court to be exercised to achieve an integration with contemporaneous political, social, and economic policies as they change.

Any other decision will immediately immerse the court into the never-ending quest of defining the powers implicit in the agency's constitutional grant. A certain corollary will be that the agency or other interested parties will be constantly probing the court's definition of this limit. In the end, the court might choose to balance, *sub rosa*, the risk of this "certain" increase in litigation in a relatively stable area of the law, under the court's control, against the potential benefits of judicial efficiency. There is no doubt that some efficiency inheres in allowing the "trial court," especially one granted conclusive power of fact finding, to consider constitutional issues that arise in the course of its regular "judicial" function.

5. *The Result of the Bright-Line Rule*

The essential question is whether or not there is a judicial role for the constitutionally created administrative agency in the determination of a statute's constitutionality. If the agency has no judicial role, then what is the agency's proper response when faced with an applicable "conflicting" statute that the agency would deem unconstitutional because the statute encroaches on the agency's constitutional grant of authority and raises the potent threat of a 1983 action if the agency acts under an unconstitutional statute? The bright-line rule does not seem to provide an adequate answer for this question unless the courts, state and federal, are willing to grant the agency and its officers immunity from such suit. Perhaps judicially developed immunities will provide an uneasy compromise that will best suit the agencies' desires to have their respective constitutional territories unimpaired by the supreme court while allowing the supreme court to minimize the sharing of article V powers. However, existence of immunities is usually a matter of defense and not a bar to suit. Thus, the agency still faces costly litigation.

B. Does Tradition Define Separation of Powers?

1. The Power of Tradition

In the recent United States Supreme Court case *Burnham v. Superior Court*,⁸⁴ Justice Scalia had the opportunity to discuss the traditional expression of due process in the context of *in personam* jurisdiction. Noting a continuing two-hundred year tradition of the unquestionable right of a forum state to obtain jurisdiction over a person physically present in the forum, he concluded that to do so cannot be so unfair as to violate due process. He cautioned, however, that if enough jurisdictions abrogated this rule, then obtaining *in personam* jurisdiction in this manner might at some point become a violation of due process.

By analogy, the doctrine of separation of powers has a long tradition of keeping in place a constitutional wall between the *traditional* branches of government. But in the two hundred years since the U.S. Constitution, the advent and judicial recognition of the quasi-legislative, quasi-judicial, quasi-executive agency has arguably modified the separation of powers doctrine. A recognition of this modification could allow the courts to recognize the power of such agencies while maintaining the integrity of the doctrine of separation of powers in its traditional sense, i.e., as it applies to the judicial, executive, and legislative branches.

2. Separation of Powers and Federal Administrative Agencies

Federal administrative agencies are not created in the federal constitution. Rather, federal agencies such as the Interstate Commerce Commission, Federal Communications Commission, Food and Drug Administration, and the many others have come by way of a torturous road that has often required the Supreme Court to mark the boundary of the separation of powers doctrine.⁸⁵ These agencies are fundamentally different from Louisiana's constitutional agencies in the source of their power. The former are creations of Congress by statutory law. As such the question is usually whether or not Congress has impermissibly delegated legislative power to an executive agency, and thus, violated the strict separation of powers doctrine. The latter are created by a delegation of power by the ratifiers of the state constitution, concurrently with the ratification of a nominal separation of powers article.

One authority suggests that the focus of the federal courts in this area of dispute should be not be upon the specificity of the delegation by Congress but rather upon an insistence that the delegation provide

84. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2115-16 (1990).

85. See, generally, K. Davis, *Administrative Law Text* § 2.01, at 26-27 (3d ed. 1972).

“protection against unnecessary and uncontrolled discretionary power.”⁸⁶ The proper question should be whether or not the standards promulgated by Congress or the agency guarantee due process for all persons that fall subject to the jurisdiction of the agency.⁸⁷ This suggestion is not unlike a number of the concurring justices in *Louisiana Consumers' League*,⁸⁸ who suggested that Louisiana's Administrative Procedure Act (“APA”) or state due process article are the proper guiding principles over rule promulgation by the PSC.

Despite the similar functions of federal administrative agencies and the Louisiana constitutional agencies, the critical distinction lies in the fact that the PSC and CSC are constitutionally based. For this reason, federal cases shed little, if any, light upon the question at hand.

3. *Tradition Created By Constitutional Changes*

The ratification of the 1921 and 1974 Constitutions in the same era in which administrative agencies became constitutional creatures with quasi-judicial, quasi-legislative, and quasi-executive powers arguably leads to the conclusion that the article II, section 2 expression of separation of powers has been impliedly modified to create a narrow exception for the constitutionally mandated agencies.

Without this exception, the result is as that found in *Herman Brothers*. The agency, unwilling or unable to rule on the constitutionality of a conflicting statute, decides a case apparently in contravention of the clear words of the statute. The case is appealed to the district court. Finally, the Louisiana Supreme Court reverses and remands to the agency with instruction to follow the statute. Had the agency ruled on the constitutionality of the statute in the beginning, an appeal of right by the adversely affected party would probably lie directly in the Louisiana Supreme Court.⁸⁹ There would have been a one-time adjudication of the constitutionality of the statute with the concomitant result, regardless of the outcome, that the parties are more expeditiously moved to a final result.⁹⁰

C. *Agency Expertise or Lack Thereof*

Another argument against the agency's exercise of the power to adjudicate constitutionality of statutes may lie in the idea that agencies are due deference only in matters within the scope of their expertise.

86. *Id.*, § 2.08, at 43.

87. *Id.*

88. See discussion *supra* note 24.

89. La. Const. art. V, § 5(D)(1).

90. After remand and some two years of litigation, the case was settled by compromise.

Inherent in this concept is the idea that pure questions of general law, and especially constitutional law are not within the agency's sphere. Phrased succinctly, the agency has no expertise in these matters.⁹¹

The courts are usually willing to give agencies great latitude in their decision making powers in matters in which the agency has been delegated power by the Constitution or the legislature.⁹² The usual language is "great deference" or "absence of abuse of power by the agency" in matters of findings of fact and in the agency's interpretations of its own rules or regulations or laws relating to its area of expertise. Even the standard of review, generally review upon the record and not *de novo*, is a deference to the agency's decision making role.

As a matter of policy one must ask what risk is incurred if the court recognizes the power of a constitutionally created agency to pass on the constitutionality of statutes. The court is not required to give such determination any weight. On the other hand, there is no reason to think that the agency will not fully and properly perform this task as well as it performs any of its constitutional duties. It seems likely that the court will have an agency decision that will be solidly founded in the law and as fully developed as that which a district court might develop. In fact, given the docket problems in many district courts, the agency decision may even be superior. It would appear that the greatest risk that the interested party may encounter is the deliberative delays that an agency decision may impose. Even this risk may be illusory if a court that is asked to entertain a constitutional question prior to agency action may dismiss the suit as premature.

However, even the risk of administrative delay may be minimized by agency rules that allow prompt adjudication of non-technical issues such as constitutional challenges. This has an added efficiency advantage in that the agency and the parties may avoid the expense of the full-blown agency factual finding that is usually necessary if the case cannot be resolved on the constitutional issue. Otherwise, upon subsequent remand following a court's determination on the constitutional issue agency action may require expensive repetition of the previous factual evidence, compounding the expense of a final agency adjudication.

1. Other Judicial Concerns

It is, however, possible that the agency expertise/separation of powers rubric is a manifestation of other judicial concerns. Arguably, by giving a restrictive interpretation to the agency's powers through tra-

91. See discussion accompanying *supra* notes 80-83 for some suggestion of the level of expertise of certain retained courts.

92. See *supra* note 16.

ditional objections the court is mitigating the potential effects of political influence on elected or appointed agency officers. Additionally, the court may be reacting to the fact that there is no clear "separation of powers" *within the agency*. In fact, the executive, legislative, and judicial functions may well all be exercised by the same persons in an agency.

If due process is the ultimate concern of the court, then the scope of the power that may be implied in the constitutional powers granted to the agency may be circumscribed by narrow construction. As long as the *Louisiana Consumers' League*⁹³ rule stands, the Administrative Procedure Act's structured due process will be unavailable. Without the benefit of the APA but faced with the presumption of administrative regularity and, in some cases, conclusive presumption of finding of fact by a non-article V, quasi-judicial court, the Louisiana Supreme Court may be expected to continue its tendency "to err" on the conservative side, probably without great elaboration of its rationale.

V. DECISIONS FROM OTHER JURISDICTIONS⁹⁴

A. California

California's constitutional posture is unique. In 1978 the voters passed a constitutional amendment that specifically denies the power to administrative agencies, specifically including those created by the constitution or initiative, to declare a statute unconstitutional.⁹⁵ This was an apparent reaction to decisions such as the 1976 case of *Southern Pacific Transportation Co., v. Public Utilities Commission*⁹⁶ in which the California Supreme Court stated that:

93. *Louisiana Consumers' League, Inc. v. La. Pub. Serv. Comm'n*, 351 So. 2d 128 (La. 1977). See *supra* discussion note 24.

94. The Model State Administrative Procedure Act § 5-112(1), 14 U.L.A. 152 (Supp. 1984), apparently would allow review of challenges to facial constitutionality only, and further narrows review to cases in which state law prohibits the agency from passing on the validity of the statute. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 *Geo. Wash. L. Rev.* 1 (1984).

95. Cal. Const. art. III, § 3.5:

Sec. 3.5.

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

96. 134 Cal. Rptr. 189, 191, 556 P.2d 289, 291 (1976).

The Legislature has limited the judiciary from interfering with the commission by restricting review to the Supreme Court and by additionally restricting review to determining "whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State." . . . Public Utilities Code section 1732 provides corporations and individuals may not raise matters in any court not presented to the commission on petition for rehearing, reflecting, when read with the judicial review sections, legislative determination that all issues must be presented to the commission. *Under the broad powers granted it, the commission may determine the validity of statutes.*⁹⁷

Cases after the 1978 amendment have had little problem applying the amendment given its clarity.⁹⁸ In fact, the courts have even expanded the section beyond its literal words. In deciding whether or not to extend section 3.5 to include a city ordinance the court, in a style that would give a warm glow of familiarity to any civilian, found that the language and legislative intent of section 3.5 would support such an extension.⁹⁹

In another case, the plaintiffs objected to a requirement of administrative exhaustion. The plaintiffs observed that the remedies they are required to seek in the agency are based upon an unconstitutional statute. Thus, they contended that since article III, section 3.5 prohibits the agency from declaring the statute unconstitutional, exhaustion of administrative remedies would be futile.¹⁰⁰ The court, finding that in fact the lower court did not base its ruling on the doctrine of administrative exhaustion, pretermitted this interesting question.

The amendment was raised in another case in an attempt to prevent an administrative agency from deciding whether or not to apply an

97. *Id.* (emphasis added).

98. *Regents of Univ. of Cal. v. Public Employment Relations Bd.*, 139 Cal. App. 3d 1037, 1041-42, 189 Cal. Rptr. 298, 301 (1983); *Fenske v. Board of Admin.* 103 Cal. App. 3d 590, 595, 163 Cal. Rptr. 182, 185 (1980).

99. While an ordinance is not a statute in every sense, it is a legislative enactment by the city's duly authorized legislative body. The purpose of article 3, section 3.5, is to deny administrators the power to refuse to enforce measures duly enacted by the authorized legislative body on the basis of the administrator's own assessment of the measure's constitutionality and in the absence of a final judicial determination of unconstitutionality. That purpose suggests the rule's applicability a fortiori to an "arbitrator" acting as an ad hoc administrative agency pursuant to municipal legislation.

Westminster Mobile Home Park Owners' Assoc. v. City of Westminster, 213 Cal. Rptr. 640, 645 (Cal. App. 1985) (citations omitted).

100. *Barenfeld v. Los Angeles*, 162 Cal. App. 3d 1035, 1039, 209 Cal. Rptr. 8, 10 (1984).

amended statute retroactively based upon constitutional grounds. The court, however, in *Allen v. Board of Administration*¹⁰¹ affirmed an administrative trial judge's ruling that the Board may determine whether or not the application of an amended statute would be constitutional.¹⁰²

It is interesting to observe how adeptly the California courts moved from the incredible position taken in *Southern Pacific* to the mainstream position of holding a tight rein on agency adjudication of statutory constitutionality. What is more interesting to note is that separation of powers entered the discussion in support of the former position and not the latter. The *Southern Pacific* court expressly premised its position upon the legislature's act of limiting the judiciary from interfering with the commission by restricting review. However unlikely it may seem, arguably, the *Southern Pacific* rationale could be made in Louisiana based upon the specific language of section 21 of article 4 as it relates to judicial review. The question then becomes whether our legislature and electorate would also revolt.

B. North Dakota

In a more traditional approach to the problem, in *First Bank Of Buffalo v. Conrad*,¹⁰³ the North Dakota Tax Commission, a statutory commission, was asked to declare the very law which it administered unconstitutional and refused to do so. The reviewing court cited *Buckeye Industries, Inc. v. Secretary of Labor*¹⁰⁴ for the proposition that:

No administrative tribunal of the United States has the authority to declare unconstitutional the act which it is called upon to administer.¹⁰⁵

The court then noted that its examination of the North Dakota Administrative Agencies Practice Act,¹⁰⁶ disclosed that no authority has been given, expressly or implicitly, to the administrative agencies to declare any law unconstitutional. Thus, the decision of the tax court rendered under the statute was affirmed.

C. Connecticut

Connecticut, when facing the question in a case involving a statutory commission followed the majority rule, but with some opposition. *Cal-*

101. 187 Cal. Rptr. 192 (Cal. App. 1982).

102. *Id.* at 195.

103. 350 N.W.2d 580 (N.D. 1984).

104. *Id.* at 585, citing 587 F.2d 231 (5th Cir. 1979).

105. 350 N.W.2d at 585 (citations omitted).

106. N.D. Cent. Code §§ 28-32-01 through -19 (1983). See also *supra* note 94.

*dor, Inc. v. Thornton*¹⁰⁷ follows the traditional separation of powers analysis in a case that raised the question of the constitutionality of a statute that allegedly violated the establishment clause of First Amendment to the United States Constitution in a case before the Board of Mediation and Arbitration.¹⁰⁸

One justice, however, voiced a strong dissent to the board's failure to adjudicate the constitutionality of the statute in question.¹⁰⁹

*The majority appears to rely upon the separation of powers doctrine as precluding the delegation of "judicial power" outside the court system. A decision by a nonjudicial authority upon other legal questions, the propriety of which the majority opinion does not challenge, is an exercise of judicial power of the same kind as that involved in resolving a constitutional question. Not only is the distinction made by the majority wholly unprecedented, but it is also thoroughly impractical in the adjudication processes of arbitrators and public agencies where constitutional issues frequently arise.*¹¹⁰

VI. PUBLIC RIGHTS—PRIVATE RIGHTS: ANY CLUES HERE?

A. Worker's Compensation ALJ System

A recent attempt to establish an administrative law judge ("ALJ") system for the adjudication of worker's compensation claims was held to be an unconstitutional attempt by the legislature to divest the article V district courts of their original jurisdiction by legislation rather than constitutional amendment. This judicial rebuff in *Moore v. Roemer*¹¹¹ was followed by a successful constitutional amendment to article V, sections 10(A) and 10(B) and 16(A) in 1990 to legitimate the ALJ system.¹¹²

Moore, however, is clearly distinguishable from the constitutional agency question that is the subject of this paper in that the worker's

107. 191 Conn. 336, 464 A.2d 785 (1983).

108. The Board is composed of two panels of three members each. One member is represents labor, another employees, and the last represents the public in general. Conn. Gen. Stat. § 31-91 (1987). Powers of the Board include the power to "enter any establishment in which a strike or lockout exists in order to examine payrolls and other records and to inspect conditions affecting relations." Conn. Gen. Stat. § 31-95 (1987). The Board generally arbitrates or mediates in labor disputes. Conn. Gen. Stat. §§ 31-91 to -100 (1987).

109. *Caldor, Inc.*, 191 Conn. at 351-53, 464 A.2d at 794-95 (Shea, J. dissenting).

110. *Id.* (footnote omitted) (emphasis added).

111. *Moore v. Roemer*, 567 So. 2d 75 (La. 1990).

112. 1990 La. Acts No. 1098, § 1.

compensation system is and has always been a statutory, rather than a constitutionally based system. As such it is easier for the court to make the argument, without regard to the merits of the argument, that a statutory change to create the ALJ system and concomitantly divesting article V district courts of original jurisdiction in these matters cannot amend the constitutional grant of jurisdiction enjoyed by the district courts. But does the court's rationale give any useful clues to the present question?

B. The Challenge—More Than Equal Dignity?

Undoubtedly, the court has "thrown down the gauntlet" to the legislature by forcing a constitutional amendment before recognizing that any of the district court's original jurisdiction has been divested. Was the ALJ system devised for the worker's compensation system greatly different in principle than the judicial powers of the PSC or the CSC? Surely, the ALJ system will be subject to the APA, unlike the PSC and CSC.

The lesson of *Moore* might be that the court is willing to surrender or share jurisdiction only by virtue of an act of equal dignity with that which granted the jurisdiction and no less. The *Moore* court relied heavily on the distinction between public-rights and private rights. The court noted that unlike the unemployment compensation system which employs a permissible statutory ALJ system, the worker's compensation system "is not a matter of public law."¹¹³

C. Defining Public-Rights

The state argued that "it is appropriate for the Legislature to relegate worker's compensation and other matters of public law to adjudication by procedures established by the legislature which are different from the original jurisdiction in the district courts."¹¹⁴ The court refused to endorse this quote from *Marine Shale Processors* as appropriate to the workers' compensation ALJ system. It held instead that worker's compensation is not a matter of public law.

The court noted that with respect to the worker's compensation system that while (1) the Legislature does define relationships, rights and duties from which the parties are not free to derogate, the ensuing litigation (2) adjudicates a dispute between private parties to which the government is not a party, and (3) results in a money judgment affecting only those parties.¹¹⁵ The court additionally noted that the government

113. *Moore*, 567 So. 2d at 81.

114. *Id.*, citing *Marine Shale Processors, Inc. v. State of Louisiana, Dept. of Env'tl. Quality*, 551 So. 2d 643 (La. App. 1st Cir.), cert. denied, 553 So. 2d 465 (1989).

115. *Moore*, 567 So. 2d at 81.

is not involved in the private insurance based compensation system unlike the unemployment compensation system¹¹⁶ where "the government operates the system and pays the benefits,¹¹⁷ allocating the costs thereof by various criteria to all employers in the state."¹¹⁸

D. *Why Does It Matter?*

The public-rights/private-rights distinction has grown out of a turbulent history in the United States Supreme Court as the Court struggled with the power of Congress to create non article-III courts and to give the article-III courts appellate or concurrent jurisdiction in the matters over which these other courts had jurisdiction.¹¹⁹ Can *Moore* be read as adopting in principle the public-rights analysis with its expansive interpretation in *Schor*?¹²⁰ Is this a criteria by which the legislature may rightfully divest the courts of jurisdiction? If so, then crucial questions arise as to the nature of the constitutional agencies under this analysis.

The PSC and CSC each have adjudicatory functions that closely resemble those that the *Moore* court ascribed to the unemployment compensation system. They also have adjudicatory functions that closely resemble the private rights model, e.g., *Herman Brothers*. On balance, the PSC more closely fits the public-rights model because of its broad regulatory powers the effect of which oftentimes is to create something akin to a public monopoly.

However one might classify either of these agencies, there does seem to be an inconsistency reflected between *Moore* and *Herman Brothers*. The former suggests that the public-rights doctrine reflected in mere legislative acts may be sufficient in some cases to alter significantly the jurisdiction given to district courts by the state constitution. The latter denigrates the PSC's meek assertion that its constitutionally based powers

116. La. R.S. 23:1621-1635 (1985).

117. This portion of the court's opinion misapprehends the nature of the unemployment compensation statutes. That system is in fact funded by an employer contribution system, collected by taxes and assessments. The collections are accounted for on an individual basis for each employer in a separate account. La. R.S. 23:1491-1494 (1985). Services rendered by the state under programs such as Aid to Families With Dependent Children, La. R.S. 46:231 et seq. (1982), more closely resemble the public-rights model.

118. *Moore*, 567 So. 2d at 81.

119. *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582, 69 S. Ct. 1173 (1949). In a controversial plurality opinion, Mr. Justice Jackson opined that article I gave Congress the power to authorize article III courts to adjudicate non-article III claims. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S. Ct. 3245 (1986). The court approved of an article I tribunal that would have exclusive jurisdiction over certain traditional common-law claims. Mr. Justice Brennan, dissenting, deplored the incremental demise of the important functions of article III courts.

120. See *supra* note 119.

may preempt the legislature (and probably the courts) in certain limited matters.

Nonetheless, *Brisset* still seems to define the current limit on the implied article-V impingement that the court is willing to allow by a constitutionally based agency. It remains to be seen whether or not the private/public-rights distinction will provide the constitutional agencies an acceptable basis upon which the Louisiana Supreme Court is willing to modify the separation of powers doctrine reflected in the 1974 constitution.

VII. OTHER CONSTITUTIONAL AND STATUTORY CONSIDERATIONS

As noted earlier, the 1974 Constitutional provisions relative to the PSC are remarkably unchanged from previous constitutions.¹²¹ There is nothing in the provisions that would exclude the PSC's ability to refuse to apply a statute on the grounds that it conflicts with the PSC's constitutional grant of authority. However, the absence of a restriction on the exercise of an unenumerated right is a poor substitute for constitutional foundation for its exercise.

A. *The Constitutional Oath of Office*

One might argue that the constitutional oath,¹²² taken by every official, would require that PSC members refuse to apply a statute that they deem in good faith to be unconstitutional. In the 1959 case of *Smith v. Flournoy*,¹²³ the supreme court made it clear that taking the oath did not allow the officer to question the constitutionality of the laws with which he is entrusted to administer. In *Smith* a voter registrar refused to obey a statute requiring certain ministerial functions claiming that the statute unconstitutionally subjected her to criminal sanctions. The court rejected the argument and required compliance.

In *Damerson-Pierson Co. v. Bryant*,¹²⁴ the court elaborated on the role of the oath:

In the performance of their duties, public officers are governed by the existing law, including statutes, constitutional provisions,

121. See supra note 3.

122. La. Const. art. X, § 30 provides that:

Every official shall take the following oath or affirmation:

I, . . . , do solemnly swear (or affirm) that I will support the constitution and laws of the United States and the constitution and laws of this state and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as . . . , according to the best of my ability and understanding, so help me God.

123. *Smith v. Flournoy*, 238 La. 432, 115 So. 2d 809 (1959).

124. 245 La. 208, 157 So. 2d 886 (1963).

and judicial construction placed thereon by the courts, and their oath to obey the constitution does not impose on them the duty or obligation to determine whether a statute is constitutional before they obey it. Accordingly, officers must obey a law found on the statute books until, in a proper proceeding, the courts have passed on its constitutionality, but this rule has exceptions. . . .

* * *

Laws are presumed to be constitutional until the contrary is judicially established; the officers upon whom have been imposed the duty of executing those laws are without authority to oppose their execution, however clear it may appear to them that the statutes contravene the Constitution.¹²⁵

However, the distinction that arises when considering the PSC and the CSC is that each has certain positive, absolute *constitutional* powers. Thus, one must question whether there exists a hierarchy in the PSC and CSC officers' two-fold duty to uphold the constitution and statutes. Does the positive constitutional power require the officer to uphold the constitution over the statutes? It would seem that an expansive reading of such powers does. This result clearly distinguishes those cases in which an officer possesses only statutory powers. This analysis harmonizes the proposed PSC/CSC power and the result in *Smith* and *Bryant*.¹²⁶

At a minimum, the oath might be considered only to create a standard for the acceptable performance of office sufficient to avoid a challenge for malfeasance of office.¹²⁷ Such a narrow application of the oath constitutional provision gives it independent meaning without the consequences of the more expansive reading suggested in the previous paragraph. Indeed, it is difficult to believe that any rational framer or

125. Citations omitted.

126. *Id.* at 222, 157 So. 2d at 891. *Smith*, no doubt, leaves agency officers in quandary. The application of a statute seems to raise the specter of an action in damages against the officer in his personal capacity under 42 U.S.C. § 1983 (1989). If the officer stays his action, seeks a declaratory judgment and the statute is declared unconstitutional, then exposure is minimal. However, if the statute is upheld, then the refusal may result in personal liability. If the officer applies the statute, seeks a declaratory judgment and the statute is declared unconstitutional, then the state has probably effectively lost the cost of performance, which in the case of large social programs may be substantial. Only if the statute is upheld will his application of the statute result in no personal liability or loss to the state.

127. *State v. Perez*, 464 So. 2d 737 (La. 1985). The supreme court stated that "this oath imposed a specific duty upon [the defendants] not to obstruct or interfere with the execution of those laws." Cited in *W. Hargrave*, *supra* note 16, at 182.

ratifier would have *every* agency officer passing on constitutionality of statutes.¹²⁸

The middle ground, that of the more direct application of the oath provision by a constitutionally created agency that has a developed mechanism for record development and judicial review, may not be an unreasonable interpretation of the oath article. The difficulty with this suggestion is the lack of significant historical or textual support in the constitution itself upon which the court could make this distinction.

B. *The Constitutional Convention*

The records of the 1973 Constitutional Convention are silent as to any intent the framers may have had regarding the power of a constitutionally created agency to declare statutes unconstitutional.¹²⁹ This result comports with the fact that the language concerning the powers of the PSC is virtually unchanged from that of the 1921 Constitution.¹³⁰ Additionally, there was no change in the PSC or CSC appeal route between the two constitutions. However, this lack of framer's intent in the agency creation articles is dispositive of nothing since the prohibition of this agency power seems to arise from the judiciary's interpretation of the separation of powers doctrine, rather than the agency creation articles.¹³¹

C. *The Declaratory Judgment Act—Is It Enough?*

One possible alternative to a constitutional battle is to allow the parties to seek a declaratory judgment of the constitutionality of the application of a particular statute on an *ad hoc* basis.¹³² An action for

128. The 1974 Constitution includes many other agencies: art. 4, § 5(E)—Pardon Board; art. VI, § 16—Local Public Agencies, § 17—Historic Preservation Commissions; § 19—Special Districts, Boards, and Agencies; § 38—Levee Districts; § 43—Port Commissions; art. VII, § 7—Interim Emergency Board; § 8—State Bond Commission; art. VIII, § 3 (1974, amended 1979)—BESE Board; § 5—Board of Regents; § 6—Board of Trustees for State Colleges and Universities; § 7—Boards of Supervisors for LSU & Southern Universities; § 9—Parish School Boards; art. IX, § 7—Wildlife and Fisheries Commission; § 8—Forestry Commission.

129. See *supra* text accompanying notes 29-30.

130. See *supra* text accompanying note 30.

131. The 1974 Constitution contained a "repealer" article in La. Const. art. XIV, § 18(B):

Laws which are in conflict with this constitution shall cease upon its effective date.

What is not clear is whether agencies can avail themselves of implied repeal without court sanction. Nonetheless, it would seem that an implied repeal which results by operation of law is a distinctively different creature than an affirmative decision of unconstitutionality by the agency.

132. La. Code Civ. P. arts. 1871-1876.

a declaratory judgment is an ancillary proceeding which is time consuming and expensive. Also, declaratory judgments¹³³ may be used by a combative opponent of potential agency action as a dilatory tactic.¹³⁴ While *Herman Brothers* did not involve an action for declaratory judgment, it demonstrates by analogy the inefficiency and associated cost of adjudicating constitutional issues prior to reaching the merits of a claim. In *Herman Brothers* the net result of the legal battle going to the supreme court was that on June 28, 1990, over two years later, the parties were back in the same position as they were when the application for transfer was filed on January 5, 1988. This is not judicial efficiency.¹³⁵

Aside from the problem of judicial inefficiency if the declaratory judgment is used, several code provisions could impede one's ability to obtain a declaratory judgment. Louisiana Code of Civil Procedure article 1871 restricts the use of the declaratory judgment action to "[c]ourts of record within their respective jurisdictions."¹³⁶ Article 1872 further limits the action to rights, status, or other legal relations affected by a statute.¹³⁷ While the court is not limited by the express scope described in article 1872, article 1875 does express the general scope of the action. It limits the action to "any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty."¹³⁸

133. See *infra* discussion at note 139.

134. La. Code Civ. P. art. 863(D) (1989) sanctions may curtail such practice, but the extent to which the courts are willing to use this relatively new power is yet unclear.

Another interesting possibility for limiting such dilatory tactics may be the holding reflected in *Penalber v. Blount*, 550 So. 2d 577 (La. 1989), in which the Louisiana Supreme Court recognized that an attorney may be held personally accountable for his intentional tortious conduct in the course of litigation that affects a third person. The *Penalber* holding may ultimately be of less importance than one might initially guess. If the plaintiff alleges an intentional tort on the part of the attorney, the attorney's insurer will raise the intentional act exception common to most professional malpractice policies. It seems unlikely that the wise plaintiff will give-up a claim against the attorney's insurance coverage for negligent acts in order to avail himself of the intentional act *Penalber* action. However, even this choice is complicated by the general rule that an attorney owes no duty to avoid negligent conduct that may injure a third person.

Additionally, it is an open question whether a frivolous declaratory judgment action or appeal of that action or a violation of an ethical rule (Title 37, chapter 4 appendix, Articles of Incorporation of the Louisiana State Bar Association, Art. 16) will fall under the *Penalber* rule. The Scope statement of the Preamble of the American Bar Association Model Rule of Professional Conduct, upon which Louisiana's rules are modeled, states that "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached."

135. See *supra* note 90 for the final disposition of *Herman Bros.* on remand to PSC.

136. La. Code Civ. P. art. 1871.

137. La. Code Civ. P. art. 1872.

138. La. Code Civ. P. art. 1875.

A textual argument might be based in article 1871 that no court has jurisdiction over the matters within the constitutional agencies' exclusive powers. Thus, no declaratory judgment can be rendered since the court is without jurisdiction.¹³⁹ An additional impediment is that under article 1872 neither rules, regulations, nor orders fall in that class of legislative or juridical acts contemplated by the Declaratory Judgment Act.¹⁴⁰ Article 1875 relaxes these otherwise limiting articles by requiring that the declaration need only resolve an "uncertainty." This construction is in harmony with the mandate of Code of Civil Procedure article 1881 that the Declaratory Judgment Act is remedial and is to be "liberally construed."

Liberal construction aside, a court must still be able to find that it has jurisdiction before liberal construction becomes an issue.

Jurisdiction raises the fundamental question of whether or not the potential codal impediments would be allowed to stand in light of the clear grant of judicial power in article V of the 1974 Constitution.¹⁴¹ This is the same question raised by the statutory provision providing that the factual findings of the agency are conclusive and non-reviewable.¹⁴² The question then becomes whether these codal and statutory limitations are impermissible impingements on the powers of the courts or are they statutory implementations of the modified separation of powers that arguably arise out of a reading *in pari materia* of the 1974 Constitution Articles III, IV, V, and X.

Additionally, one must ask whether or not the judicial revival of the 1983 action as a remedy for constitutional torts, a remedy which does not require a plaintiff to exhaust state remedies, may force the agencies to refuse to apply unconstitutional statutes without adverting to the Declaratory Judgment Act.

VIII. POTENTIAL LIABILITIES UNDER 42 U.S.C. § 1983

A suit by any interested party seeking a declaratory judgment of the constitutionality of a particular statute is an option to exercise in the traditional "separation of powers" scheme. However, the plaintiff will usually encounter the procedural impediment of the dilatory exception of prematurity¹⁴³ based upon the failure to exhaust administrative

139. La. Code Civ. P. art. 1: "Jurisdiction is the legal power and authority of a court to hear and determine an action . . . and to grant relief to which [the parties] are entitled."

La. Code Civ. P. art. 2002: "A final judgment shall be annulled if it is rendered: . . . (3) By a court which does not have jurisdiction over the subject matter of the suit."

140. La. Code Civ. P. arts. 1871-1878.

141. See *supra* note 57.

142. See *supra* text accompanying note 75.

143. La. Code Civ. P. art. 926(1).

remedies. On the other hand, an appeal from the agency decision will generally be an appeal based upon the record made in the agency. The standard of review in the appellate court will usually be "abuse of discretion." Either way, the claimant is fighting an uphill battle that at best leads back to the agency for a second try. It is this road that "goes uphill in both directions" that may convince claimants in certain situations to avail themselves of the power of section 1983 after the agency acts.

Section 1983 provides a primary federal remedy¹⁴⁴ in damages and equitable relief for the deprivation of any federally granted right¹⁴⁵ by a person acting under the color of law.¹⁴⁶ The remedy has been held to apply against states,¹⁴⁷ and local political subdivisions of the state.¹⁴⁸

Because of the protection afforded states against an unconsented suit by the United States Constitution in the eleventh amendment,¹⁴⁹ actions against the state under 1983 take the form of a suit against the state officer in his official capacity for equitable relief¹⁵⁰ and in his personal capacity for money damages.¹⁵¹ The question that will arise in the case of the suit against the official in his personal capacity will be whether or not he has an immunity to the suit.

The cases considering the constitutionality of the state officer's action usually raise the issue of deprivation of property without procedural due process. Where the deprivation occurs by way of a random and

144. "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961).

145. *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502 (1980).

146. 42 U.S.C. § 1983 (1990) provides that:

Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

As to the meaning of "under color of law," see Note on 42 U.S.C. § 1983 in P. Bator, D. Meltzer, P. Mishkin, and D. Shapiro, *The Federal Courts and the Federal System* 1240 (3d ed. 1988) [hereinafter *Federal Courts*].

147. *Monroe*, 365 U.S. 167, 81 S. Ct. 473.

148. *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978).

149. *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890). But see *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273 (1989) and *Delmuth v. Muth*, 109 S. Ct. 2397 (1989).

150. In seeking prospective injunctive relief against a state official exercising some ostensible unconstitutional power, the eleventh amendment is not offended because the equitable action is aimed at the person, not the state. This is the "fiction" of *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908).

151. By suing the state officer in his individual capacity for money damages, conflict is again avoided with the eleventh amendment while the compensatory purpose of § 1983 is served.

unauthorized intentional conduct of the official, an adequate state law remedy in tort may suffice for purposes of due process and obviate any 1983 liability.¹⁵² However, where the deprivation occurs by way of established state procedure, e.g., an administrative procedure or hearing, the post-deprivation hearing cannot satisfy the requirements of procedural due process.¹⁵³ Violations of specific provisions of the Bill of Rights, as incorporated into the fourteenth amendment, and violations of substantive due process, however, are subject to 1983 action regardless of the procedural due process used to accomplish the deprivation.¹⁵⁴

Some persons possess absolute immunity for their actions.¹⁵⁵ The "absolute" judicial immunity has been breached on those occasions that the plaintiff could show that a judge was acting "in the clear absence of jurisdiction,"¹⁵⁶ or that he was not performing a "judicial act."¹⁵⁷ Others enjoy qualified immunities for their official actions.¹⁵⁸ It is this class of qualified immunity into which the administrative agency officer will likely fall when his actions in choosing to enforce or not to enforce a statute are called into question via a 1983 action.

Recognizing that the administrative agency may operate in a "quasi-executive, legislative, or judicial mode," will the court then be willing to extend the appropriate immunity to the officer's act? If the administrative agency issues a rule or regulation as a result of or in conjunction with an enforcement proceedings, is this a judicial or executive function? The question is more than academic to the officer involved if a 1983 suit arises and he wishes to rely upon an absolute immunity. Because the qualified immunity is necessarily a mixed question of fact and law, the officer cannot avoid the suit, as he might with absolute immunity.¹⁵⁹

152. *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981).

153. *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194 (1984).

154. *Davidson v. Cannon*, 474 U.S. 344, 106 S. Ct. 668 (1986) (J. Stevens concurring).

155. *Attorneys General—Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949); *Judges—Bradley v. Fisher*, 80 U.S. (13 Wall) 335 (1871); *Legislators—U.S. Const. Art. I, § 6*; *President and his aides—Nixon v. Fitzgerald*, 457 U.S. 731, 102 S. Ct. 2690 (1982).

156. This is to be distinguished from acting in excess of jurisdiction. A criminal judge that convicts a person of a "crime" which the legislature has not defined is acting in excess of jurisdiction. A judge that tries a matter outside of the jurisdiction of his court is acting in clear absence of all jurisdiction. In the former case the judge is absolutely immune and in the latter he has no immunity. P. Ball, *When the Defendant is the Judge*, 12 *Lawyer's Liability Rev.* 1 (1989).

157. *Federal Courts*, supra note 146, at 1295.

158. *Harlow v. Fitzgerald*, 457 U.S. 800, 816-18, 102 S. Ct. 2727, 2737-38 (1982) (government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would know).

159. The following comments made regarding the necessity of absolute immunity for judicial officers is equally applicable to legislative officers for analogous policy reasons.

The rationale of the necessity of the absolute immunity arises out of the fact that suits for damages are brought against the officer in his individual capacity with the full intention that any judgment will be paid by him personally. In *Gregoire v. Biddle*,¹⁶⁰ Judge Learned Hand observed that

[I]t is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

In the case of officers of Louisiana's constitutionally created agencies, the members of the PSC are elected to six year terms¹⁶¹ and the members of the CSC are appointed by the governor for six year terms.¹⁶² The PSC members are subject to removal by impeachment¹⁶³ and the members of the CSC are subject to removal by the governor for cause.¹⁶⁴ However, in neither case is there a supervisory structure over these officers akin to the powers exercised by the Louisiana Supreme Court under its supervisory powers and through the Judiciary Commission.¹⁶⁵

When compared by way of methods of election, removal, and supervision in comparison with the state's judges, the PSC and CSC officers that might desire to don the cloak of judicial absolute immunity might have an uphill fight to convince a federal court judge that they too need this absolute protection when acting in their judicial capacity¹⁶⁶ in order to preserve their independent decision-making process.¹⁶⁷

However one may react initially to the suggestion, perhaps there is justification in fact for absolute immunity in the case of PSC or CSC officers. The courts routinely give agency decisions the presumption of

160. 177 F.2d 579, 581 (2d Cir. 1949).

161. La. Const. art. IV, § 21.

162. La. Const. art. X, § 3. However, six of the seven nominations are provided by a group of "politically independent" colleges and universities and the last slot is filled by a person elected by the civil service employees themselves.

163. La. Const. art. X, § 24.

164. La. Const. art. X, § 5.

165. La. Const. art. V, § 25.

166. In *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538 (1988), the Supreme Court reaffirmed that the determination of immunity is made by a functional approach. Immunity attaches without regard to the identity of the actor. The test to determine whether or not an act is "judicial," requires an analysis of: (1) whether the act is a function normally performed by a judge, and (2) whether the actor deals with the parties in the judicial capacity.

167. In *Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985), the court reflected that it was better to have a few wrongs go unredressed than for the judiciary to be constantly harassed by suits brought by disappointed litigants.

regularity, generally agency's conclusions of fact are considered conclusive and agency's interpretations of its own rules, regulations, orders, and governing statutes are accorded great deference. In according finality of findings of fact to the agency record, the courts are in fact giving greater deference to the agency than is given to the lower courts under Louisiana's system of appellate review of fact.¹⁶⁸ Arguably, since the courts and the Constitution are treating the agency as a court, then the appropriate immunity should be applicable.¹⁶⁹

In the likely instance that the agency officer is unable to present a convincing case for the absolute immunity, then it would appear that many of the actions that are possible in the regular business of the agency may open the possibility that the officer will face the specter of a 1983 suit. As discussed above, the United States Supreme Court has held that procedural due process cannot overcome a violation of a federal constitutional right or a violation of substantive due process. Thus, it would appear the agency as primary and sometimes exclusive enforcer of certain rights would arguably be both correct and justified in deciding constitutionality of the applicability of statutes in the exercise of its constitutionally mandated powers and duties in an effort to avoid 1983 liability.

CONCLUSION

Few high courts, with the exception of the dissent in *Caldor*,¹⁷⁰ have seriously considered the possibility of an agency power to refuse to apply a statute on the basis of it being in conflict with a constitutional provision. Rather, the traditional rejection of such power is made with perfunctory references to separation of powers, inherent power of courts, or lack of expertise in constitutional matters.

In the one instance in which a supreme court found such power in agencies, the initiative process led to a constitutional amendment to prohibit such power in agencies.¹⁷¹ However, the California cases that triggered this reaction seem to have recognized the power in all administrative agencies, constitutional or statutory, without limitation or qualification. At the same time the cases recognized restricted review by the

168. See *supra* note 77.

169. This suggestion is not without problems. I am not suggesting that the agency officers be classified as judges since that would invoke the immediate conflicts of article V supervisory control by the Louisiana Supreme Court, as well as other constitutional, and statutory conflicts. Perhaps I am suggesting that necessarily a new class of persons be created which have an immunity which varies with the capacity in which they act. Be that as it may, since the question is not within the scope of this paper, it will be left along side of that vast wasteland of unanswered questions that adjoins any law school.

170. *Caldor, Inc. v. Thornton*, 191 Conn. 336, 464 A.2d 785 (1983).

171. See *supra* text accompanying notes 94-102.

courts. The reaction was probably predictable. However, it does not diminish the suggestion that such a power would be proper within the scope of separation of powers for a constitutionally created agency that has a developed mechanism for record development and complete judicial review.

A textual argument exists that in the concurrent framing of article II, section 2 and the article IV, section 21, and article X of the Louisiana Constitution, the latter two articles mandating a quasi-judicial, quasi-legislative, and quasi-executive agencies, the framers intended to modify or surrender separation of powers in favor of the agencies to a limited extent. The fiction of delegation of legislative powers as a justification of agencies otherwise simply cannot support the treatment of the agency decisions as decision of trial courts.¹⁷²

An appropriate answer to the fundamental question must begin with an open appraisal of the constitutional power possessed by the PSC and CSC. Then, if the conclusion remains that the constitutional agency has no power to refuse to apply a statute that it deems in good faith to be in conflict with Agency's constitutional mandate, the court should provide sound textual and policy bases for what would appear to be an otherwise tenuous decision. Finally, the supreme court must consider the nature of immunity that is proper for these agency officials if they must enforce all statutes, 1983 risks aside.

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172. See generally Johnson, *supra* note 16.