Louisiana's Legislative Suspension Power: Valid Method for Override of Environmental Laws and Agency Regulations?

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INTRODUCTION

Is the suspension of environmental laws and agency regulations a valid method by which the Louisiana Legislature can restrain the powers it has delegated to the environmental protection agencies of the executive branch? The 1991 Louisiana Legislature proposed eleven concurrent resolutions authorizing the suspension of environmental laws and agency regulations. The legislature passed two of the less controversial provisions after changing one of them from a suspension to a directive for the Department of Environmental Quality (DEQ) to delay implementation of dairy farm runoff regulations for two years. All eleven resolutions were efforts to override provisions of environmental laws or regulations which were objectionable to the legislature or particular interest groups.

The alarming nature of this exercise of legislative power is that it was accomplished without the benefit of a gubernatorial veto.

The legislature has acted under the assumption that the suspension power it is exercising is authorized by the Louisiana Constitution as well as by provisions of the Louisiana Administrative Procedure Act (LAPA). The constitutional suspension power emanates from Louisiana Constitution article III, section 20, which places the power exclusively...
in the legislature. The legislature's constitutional suspension power contained in Louisiana Constitution article III, section 20 reads:

Only the legislature may suspend a law, and then only by the same vote and, except for gubernatorial veto and time limitations for introduction, according to the same procedures and formalities required for enactment of that law. After the effective date of this constitution, every resolution suspending a law shall fix the period of suspension, which shall not extend beyond the sixtieth day after final adjournment of the next regular session.

Additionally, the LAPA authorizes a statutory suspension power as well as nullification power over agency regulations.⁵ Louisiana Revised Statutes 49:969 states: “[T]he legislature, by concurrent resolution, may nullify or suspend any rule or regulation or body of rules or regulations adopted by a state department, agency, board, or commission.” The scope of these provisions is uncertain, however, as they relate to suspensions of laws and agency regulations in general and to environmental laws and regulations in particular.

This paper analyzes whether these constitutional and statutory provisions are broad enough to allow the suspensions of environmental laws and regulations proposed during the 1991 legislative session. In part I, this comment describes the historical and jurisprudential development of the constitutional and statutory suspension power. Part II addresses possible challenges to the validity of the legislature’s present use of the suspension power to override environmental laws and agency rules. Finally, in part III, the author suggests how the Louisiana courts should address the issues and gives possible solutions to this conflict between the legislative and executive branches.

I. Development of the Suspension Power

A. The Constitutional Suspension Power

The constitutional suspension power in Louisiana has not been fully addressed by the Louisiana courts. The suspension power is best understood in light of its historical development beginning with the English Bill of Rights, continuing through the American Revolution, and ending with the suspension power's introduction into the Louisiana Constitution of 1812. Additionally, the few Louisiana court cases which have addressed the suspension power and its exercise give some insight into its scope. Finally, the debates over the suspension power and its continuation

in the Louisiana Constitution of 1974 reveal the modern conceptions of the suspension power.

1. Historical Origins of the Suspension Power

The constitutional suspension power originated in 1812 in Louisiana’s first constitution. The drafters of the Louisiana Constitution of 1812 patterned it after the Kentucky Constitution of 1797 and adopted, as its suspension power section, section 15 of the Constitution of the Commonwealth of Kentucky which is still in force today. The correlative section of the Kentucky constitution is traceable back to the Bill of Rights of the Virginia Constitution of 1776 and from there to the English Bill of Rights of 1689.

The suspension of laws by authority of the legislature enumerated in the English Bill of Rights was a direct result of the reign of James II, and to a lesser extent, that of Charles II. One of the King’s particular abuses of power which the English Bill of Rights sought to correct was “the use of the royal prerogative for the purpose of suspending and dispensing with laws.” James II exercised the suspension power as

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6. La. Const. of 1812, art. VI, § 17: “No power of suspending the laws of this State shall be exercised, unless by the legislature or its authority.”


8. Ky. Const. § 15. “No power to suspend laws shall be exercised, unless by the general assembly or its authority.” This provision’s language is almost identical to that of La. Const. of 1812, art. VI, § 17.

9. Va. Const. of 1776, Bill of Rights, § 7 (as reproduced in Richard L. Perry, Sources of Our Liberties, 11 ABA Standing Committee on American Citizenship 10 (1959)): “That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.”

10. English Bill of Rights of 1689 (as reproduced in Sir Edward Creasy, The Rise and Progress of the English Constitution 317-26 (16th ed. 1892)). The introduction reads as follows:

Whereas the late King James II., by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom:

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without the consent of Parliament.

Id. at 317. This section further states:

“‘That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.”

Id. at 319.

11. Dispensing is the power to make exceptions to a law as well as the power to pardon violators. Richard L. Perry, Sources of Our Liberties, 7 ABA Standing Committee on American Citizenship 28 (1959).

12. Id.
an extension and broadening of what the English had long recognized as the legitimate exercise of the dispensation power.\textsuperscript{13}

The Stuart kings created the suspension power by authorizing all persons to treat particular laws as non-existent. Charles II, sympathetic to the Catholic Church, used the dispensing and suspension power to create a greater tolerance for religion. In a Declaration of Indulgence in 1672, he suspended the penal laws relating to non-conformity in religious matters. The declaration was not well received by Parliament, and it passed legislation forbidding suspension of laws relating to religious matters and later passed less tolerant laws. Charles circumvented this action by not enforcing laws against Catholics and thus prudently achieved his policy of religious tolerance.\textsuperscript{14}

James II was not as cautious as his brother, Charles II, and attempted to appoint Catholics to high office. To achieve this end, he issued his own Declarations of Indulgence in 1687 and 1688. These were much more expansive than those of 1672. James legalized his broad use of the dispensing power by dissolving Parliament and having judges loyal to him uphold his use of the dispensing power. By the time James II fled the country after the royal army collapsed in the face of the march of William of Orange in 1688, James II had granted the liberty to worship in public to Catholics and Protestant dissenters and suspended religious tests. In the Revolution Settlement with William of Orange, a re-established Parliament condemned the suspension and dispensing power as used by Charles II and James II, asserted the supremacy of Parliament over the divine right claimed by the kings, and put the suspension power and other rights in the hands of Parliament.\textsuperscript{15} The English Bill of Rights created by Parliament became an important source of many of the rights and liberties later enjoyed by Americans.

The Bill of Rights in the Virginia Constitution of 1776 contained the same general philosophy of individual rights found in the English Bill of Rights.\textsuperscript{16} One of the guarantees to safeguard individual rights found in Virginia's first constitution was a grant of the suspension power to the legislature, as opposed to the executive in section 1 of the Bill of Rights. This constitutional article asserted the ideas of Thomas Jefferson that the executive authority was subordinate to the legislature and, more ideally, in the hands of the representatives of the people.\textsuperscript{17} Thus, the Virginia Constitution of 1776 embodied the Jeffersonian idea

\begin{footnotes}
\item[13] Id.
\item[14] Id. at 28-29.
\item[15] Id. at 27-29. See also Creasy, supra note 10, at 299-350.
\item[16] Perry, supra note 9, at 2.
\end{footnotes}
of a subordinate executive, and drafters that followed transferred the idea from this source to other state constitutions.\textsuperscript{18}

The Louisiana Constitution of 1812 contained no separate and official "Declaration of Rights" article, but placed the protection for civil rights under various headings.\textsuperscript{19} In 1812, the suspension power found in the Bill of Rights of the Kentucky Constitution of 1797 was transferred to the "General Provisions" article (article VI) of Louisiana's first constitution.\textsuperscript{20} The Louisiana Constitution of 1812 Article VI section 17 reads: "No power of suspending laws of this state shall be exercised except by the legislature, or by its authority." This language remained unchanged until a 1962 amendment to the 1921 constitution added procedural qualifications for passage of a valid suspension similar to those found in the present constitution.\textsuperscript{21} The provision apparently had been almost completely ignored by constitutional revisionists until the Louisiana Constitutional Convention of 1973. Although limited, the jurisprudential history of the suspension power in Louisiana gives some insight into the possible limits and uses of the power before the adoption of the present constitution.

2. Jurisprudential History and Development

There are few cases since 1812 addressing the Louisiana legislature's exercise of the suspension power, and they are not conclusive on the limits of the suspension power and provide only limited insight into how the exercise of the power should be evaluated. However, the available jurisprudence does reveal how the courts have looked at the suspension power in the past and helps predict how the power will be evaluated in the future.

Johnson v. Duncan & Al.'s Syndics\textsuperscript{22} was the Louisiana Supreme Court's first decision on the legislative exercise of the suspension power. The case involved a directive of martial law declared by General Andrew Jackson in 1815 during the Battle of New Orleans, as well as a legislative act suspending "all proceedings in any civil case."\textsuperscript{23} First, although the

\textsuperscript{19} La. Const. of 1812; Hargrave, supra note 7, at 2. Professor Hargrave makes little reference to the suspension provision of the constitution and fails to make any specific comments upon the interpretation of the suspension power.
\textsuperscript{20} La. Const. of 1812, art. IV. Louisiana is the only state with a constitution containing a limitation of the suspension power which is not contained within a "Bill of Rights." Until the 1973 Louisiana Constitutional Convention moved the suspension section into the Legislative Branch article, the provision had always been contained in the General Provisions article.
\textsuperscript{21} La. Const. of 1921, art. XIX, § 5 (1962).
\textsuperscript{22} Johnson v. Duncan & Al.'s Syndics, 3 Mart. (o.s.) 530 (La. 1815).
\textsuperscript{23} Id. at 530.
court said the issue was moot, it addressed the validity of whether the martial law directive suspended civil court proceedings. Analogizing the suspension provision of the Louisiana Constitution of 1812 to Congress’ exclusive right to suspend the writ of habeas corpus,\textsuperscript{24} Justice Martin stated: “The proclamation of Martial Law, therefore, if intended to suspend the functions of this Court or its members, is an attempt to exercise powers thus exclusively vested in the Legislature.”\textsuperscript{25}

Justice Martin further justified the exclusive authority of the legislature to suspend laws based on the English Parliament’s power of suspension, and the insufficiency of the monarch’s authority to do so. He said the purpose for vesting the suspension power in the legislature is that:

[in the legislature,] the power is safely lodged without the danger of its being abused. [The legislature] may repeal the law on which the safety of the people depends; but it is not their own caprices and arbitrary humours, but the caprices and arbitrary humours of the other men which they will have gratified, when they shall have thus overthrown the columns of public liberty.\textsuperscript{26}

Martin concluded that the declaration of martial law was invalid since the legislature had not exercised its power, and he further declared that “the power of repealing a law and that of suspending it (which is a partial repeal) are Legislative powers.”\textsuperscript{27}

In addressing the suspension of court proceedings by the legislature, the court first established that the suspension power is “a power which the Legislature cannot exercise without a limitation”\textsuperscript{28} and that the limits are found in the state and federal constitutions. He next analyzed the issue by suggesting that the legislature’s action in closing the courts was an impairment of the obligation of contracts. Martin first made a statement of facts concerning the disruption that had occurred by the British invasion and the call to arms made upon the citizens of Louisiana to defend the state. In deciding that the suspension had not impaired the obligation of contracts, Martin declared:

I presume that in any time obnoxious to the due administration of justice, it is the duty, and within the power, of the Legislature, to pass laws to avert or diminish the consequences of the general calamity, and a law called for by such circumstances, and fairly

\textsuperscript{24} U.S. Const. art. I, § 9, cl. 2.
\textsuperscript{25} Johnson, 3 Mart. (o.s.) at 533.
\textsuperscript{26} Id. at 535.
\textsuperscript{27} Id. at 534.
\textsuperscript{28} Id.
intended to meet the exigency of the day could not be properly classed [as improper].

Justice Martin limited the exercise of the suspension power to emergency situations and presumably evaluated the "totality of the circumstances." This reasoning was further expanded by Justice Derbigny when he considered the "reasonableness" of the legislative action. He stated that "if the delay fixed by the Legislature in their discretion was not unreasonable, they have done nothing more than they had a right to do, and the law must be obeyed." The "reasonableness" standard was used 120 years later by the supreme court in determining the legitimacy of the suspension power during the Great Depression of the 1930s.

After *Johnson*, the Louisiana Supreme Court did not address the issue of legislative suspension again until it heard two Depression-era cases: *Metropolitan Life Insurance Company v. Morris* and *State ex rel. Porterie v. Grosjean*. In *Metropolitan Life Insurance Company v. Morris*, the Louisiana Supreme Court validated the legislature's suspension of judicial sales of mortgaged real estate and sales under foreclosure. The court indicated that this particular exercise of power was valid since it did not impair the obligation of contracts but did not explain what limits exist on the power. The court imposed the same standards of constitutional validity on the legislature for exercise of the suspension power as it would have for any other legislative act. As long as the act is not repugnant to the constitution, it is a valid exercise of the suspension power.

The court's reason for emphasizing the "police power" could be related to one or both of the issues it addressed, and this creates a problematic ambiguity. The first issue was the interference with the obligation to contract and the other was the suspension power. The court did not clearly separate the two, and it is difficult to determine to which issue the "police power" is being directed. In its justification of the legislature's action, the court emphasized the "emergency brought about by depressed economic and financial conditions" of the "Depression." The court then went on to illustrate that the legislature had set out detailed conditions, upon which the court based its finding that "those conditions [had] brought on a public emergency." The court

29. Id. at 545.
30. Id. at 557.
32. Metropolitan, 181 La. 277, 159 So. 388.
33. Porterie, 182 La. 298, 161 So. 871.
34. Metropolitan, 181 La 277, 159 So. 388.
35. Id. at 288, 159 So. at 392.
36. Id.
was thus satisfied that the legislature had adequately justified its acts. These statements by the court appear to have been directed at an exercise of the suspension power, but could as easily have been a valid justification for the legislature's interference with the obligation to contract.

In finding a valid suspension and thus the creation of an impairment to obligations to contract, the Louisiana court quoted Chief Justice Hughes' opinion from *Home Building and Loan Association v. Blaisdell.* There, Chief Justice Olsen, in his concurring opinion, stated: "while emergency does not create power, emergency may furnish the occasion for the exercise of power." The Louisiana Supreme Court further added that "the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society." The court's two statements are very interesting because the court may have been implying a standard for exercise of the suspension power that requires: 1) an emergency and 2) a protection of a basic interest of society and not that of particular individuals. If this standard is being applied to the suspension power and not the police power as a valid impairment of the obligation to contract, it could be interpreted as imposing a strict standard for the legitimate exercise of the suspension power. Consequently, it appears that the court would require that any use of the suspension power meet both prongs of this two-part test before it would be justified.

The second of these Depression-era cases was *State ex rel. Porterie v. Grosjean.* In *Grosjean,* the Louisiana Supreme Court found that the delegation of the power to the governor to suspend certain fuel taxes was valid. The court first looked at whether the delegation was proper and determined that the constitutional language "by authority of the legislature" justified a delegation of the suspension power. The court also limited the governor's exercise of the delegated suspension power to situations that were also valid exercises for the legislature and seemed to imply that some limitations must exist. The court emphasized the fact that the governor could only exercise the power under the "conditions, circumstances, and emergencies" specified by the legislature. The court used this statement to justify the governor's sus-
pension because he did not consider factors outside of those enumerated by the legislature. This limitation prevented arbitrary discretion by the governor in using the suspension power. The court's statement may also imply a duty upon the legislature to enumerate its reasons for exercising the suspension power when it is used and therefore eliminate any doubt as to the legislature's intentions. Justice Odom's dissent, in which he disagreed only with the delegation of the power to the governor, hinted at the enumeration of reasoning aspect when he conceded that "the Legislature might authorize the suspension of a law in case a certain event should take place and authorize its suspension during the existence of specifically designated conditions or emergencies." However, Justice Odom failed to indicate what that "certain event" might be and seemed reluctant to say that the circumstances of this case were such an event.

Since these two Depression-era cases, the Louisiana Supreme Court and lower appellate courts have decided no cases involving the legislature's exercise of the suspension power. This expanse of time leaves doubt as to how the Louisiana courts will handle the suspension power when faced with the issue of its validity in the near future. The modern views regarding the constitutional suspension power were expressed during the debates of the Constitutional Convention of 1973.

3. The Constitutional Convention of 1973

In 1973, Louisiana held a constitutional convention which "attempted to bring Louisiana into the mainstream of American state constitutionalism." The result of the 1973 convention was the Louisiana Constitution of 1974 and a substantial re-evaluation of the suspension power embodied in previous constitutions. The delegates appear to have been undecided on the exact function of the suspension provision. A number of delegates expressed reservations as to whether the legislature needed this power.

An example of the delegates' reservations is illustrated by Delegate Nunez, who, in analyzing the purpose of the suspension section, asked the question: "[D]o you really believe this is needed?" Delegate Casey

44. Id. at 323, 161 So. at 879. (Odom, J., dissenting).
45. The opinion gives no indication of what "conditions and emergencies" would allow the governor to exercise the delegated suspension power. Justice Odom reasons in his dissent that the "conditions and emergencies" were not spelled out, and that there was, therefore, an arbitrary delegation of power. Id.
46. Hargrave, supra note 7, at 1.
48. Id. at 461.
responded: "I would say in nine hundred and ninety-nine thousand times out of a hundred thousand [sic], you probably don't need this, but there's that one small, little, minute instance where it would certainly be helpful to have available."

In further support of Delegate Casey's statement, a number of delegates spoke of the exercise of the suspension power to rectify mistakes made by the legislature originally in a particular piece of legislation. The reasons delegates forwarded, justifying the use of the suspension powers, were to address emergency situations, to address unconstitutional sections of legislation, and to prevent injustices and other undesirable consequences. The major concerns of the delegates involved possible abuses of the power by the legislature through its exercise of an almost unlimited restraint to pass suspensions when compared to the passage of bills.

The delegates introduced a number of amendments to the suspension power clause to limit its use. The first proposal was to limit the power by making it subject to the gubernatorial veto power. The delegates specifically introduced this proposal to address the problem of possible violations of the separation of powers doctrine by use of the suspension power. When introducing the amendment, Delegate Avant stated: "[The suspension provision] is a provision that is capable of permitting the grossest kind of mischief. It is completely inconsistent and at odds with the theory of checks and balances that is incorporated into the constitution." However, the delegates defeated the amendment. The delegates specifically rejected the gubernatorial veto in the final version of the section.

Delegate Perez advanced the second proposal for limiting the suspension power. This proposal addressed the concern that a number of delegates expressed regarding the unlimited length of time for which a suspension could be valid. The convention eventually adopted the proposal, and it became part of the suspension section; it reads: "[E]very resolution suspending a law shall fix the period of suspension, which shall not extend beyond the sixtieth day after final adjournment of the next regular session." The stated purpose of the amendment was to

49. Id.
50. Id. at 460. The delegates talk about a Lead Paint Law that was suspended due to the inability of the paint industry to comply with absurd provisions for its institution, a suspension of safety glass standards for the construction industry which could not be met due to the unavailability of glass meeting the new standards, and a suspension to correct a failure to grandfather real estate license test applications already accepted under repealed classroom hour requirements (Extraordinary Session 1972 La. House Concurrent Resolution No. 24).
51. Id. at 454, 456.
52. Id. at 454.
53. Id. at 455-61.
allow the suspension to be valid only long enough to "give the legislature the opportunity, or a member of the legislature the opportunity at the next session [after the suspension] to be able to offer a bill which would either repeal the [problematic] law or amend the law, but would give the legislature the authority during the interim period, the authority to suspend."  

5 The third proposal for limiting the suspension power addressed Delegate Arnette's concern over the possibility that the legislature might pass "secret laws." 56 The delegates adopted a proposal which allows exercise of the suspension power "only by the same vote and, except for . . . time limitations for introduction, according to the same procedures and formalities required for enactment." 57 The delegates interpreted this proposal as the essential equivalent of the reading and promulgation requirement for a bill that prevents the passage of "secret legislation." The requirement allows the legislature to debate an issue, and it also allows the public to know about a legislative proposal and to express its opinions. 58

Other portions of the discussion which took place during the constitutional convention addressed the advantages and disadvantages of the suspension section. Delegate Triche was the most outspoken opponent of the suspension section. His major concern was that the legislature had done violence to the original intent inherent in the suspension powers adopted in 1812. He stated that he believed the original intent was to limit the government's power and "guarantee . . . the people of [Louisiana] against rule by executory edict, to prevent the governor from declaring emergency or martial law, to prevent the executive from suspending laws by executive order and rule by edict, and . . . that's all it meant." 59 He further stated that during special sessions the legislature had "through the years subverted and misused" the suspension power to suspend laws that had been erroneously written or were obnoxious but were not repealable by bill because they were not matters within the session call. Delegate Triche finished his speech by urging the delegates to vote against the section because "[the convention delegates]  

55. Comments of Delegate Perez, Convention Transcripts-22nd Days, supra note 47, at 455.  
56. Comments of Delegate Arnette, Convention Transcripts-22nd Days, supra note 47, at 458.  
59. Comments of Delegate Triche, Convention Transcripts-22nd Days, supra note 47, at 459. This contention is supported by both the origins in the English Bill of Rights and by the Louisiana Supreme Court's decision in Johnson v. Duncan & Al.'s Syndics, 3 Mart. (o.s.) 530 (La. 1815) discussed supra at text accompanying notes 25-30.  
60. Comments of Delegate Triche, Convention Transcripts-22nd Days, supra note 47, at 459.
ought not to allow cursory, ill-thought-up and hasty suspension of laws.”

Delegate Drew made one of the strongest arguments in favor of the adoption of the suspension power. He assured that during his two sessions in the legislature he had only seen the “power to suspend laws used to the advantage of the public . . . and not to [its] detriment.” He related examples of the most recent exercises of the suspension power such as the lead paint bill mentioned previously. In urging the delegates to adopt the resolution, Delegate Drew stated: “This is something that serves the benefit of the people. I trust that it will never be abused. I have not seen it abused to this date . . . .”

Although the delegates adopted the suspension section, the lively debate generated during its introduction gives a good deal of insight into how the delegates perceived the suspension power. The delegates had some reservations about the possible abuses of the power and the utility of the section. They addressed some of these reservations in the proposed amendments, and the final version reflects the desire to put limits upon the suspension power. However, the Convention Transcripts do not reveal exactly the extent and limit of the power and do not mention the present use of the power as a mechanism to oversee environmental agency actions.

B. The Statutory Suspension and Nullification Provision

The Louisiana Administrative Procedure Act (LAPA) grants the legislature the statutory authority to “suspend” or “nullify” state agency regulations. Louisiana Revised Statutes 49:969 says: “[T]he legislature,
by concurrent resolution, may nullify or suspend any rule or regulation or body of rules or regulations adopted by a state department, agency, board, or commission." The suspension authorization is a legislative assertion of the constitutional suspension power. However, the provision also allows for the nullification or complete repeal of agency regulations. The nullification power causes the statute to resemble what has been commonly referred to as a "legislative veto." The provision provides "for review of the exercise of the rulemaking authority delegated by the legislature to state agencies." This relatively new phenomenon is found in the LAPA and was adopted in 1980.

The legislative veto concept was first introduced by President Hoover and adopted by Congress in 1932. Congress provided for 295 veto provisions in 196 statutes between 1932 and 1975. The idea has now spread to most of the state legislatures. The adoption by the states corresponds with the introduction of the procedure into the Model State Administrative Procedure Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1961. Although legislative participation is now part of the agency review process, the states have adopted veto provisions that allow wide variation in the amount of legislative participation in the review process. The legislative veto provisions adopted by the states range from the Texas approval resolution, which has no effect upon the validity of an agency rule, to provisions similar to Louisiana Revised Statutes 49:969 which allows complete nullification.

In 1982, Professor Force noted that the legislative veto and oversight sections of the Louisiana Administrative Procedure Act were patterned after sections 3-202 to 3-204 of the Model State Administrative Procedure Act and described them as "represent[ing] an important new development means). La. Const. art. III, § 10(A) requires a quorum for the legislature to "transact business," and could be used to invalidate La. R.S. 49:968 on grounds similar to Opinion of the Justices and Brown.

67. Robert Force & Lawrence Griffith, The Louisiana Administrative Procedure Act, 42 La. L. Rev. 1227, 1289 (1982). A "legislative veto" is the ability of the legislature to veto agency regulations in a manner similar to a gubernatorial veto such that the regulation/rule does not go into effect if rejected.
71. Id. at 147-48.
in state administrative procedure. He further indicated that the "full range" of legal issues relating to the legislative veto had not been completely addressed but was a concern of the National Conference of Commissioners of Uniform State Laws in the re-drafting of the Model State Administrative Procedure Act in 1981. Sections 3-202 to 3-204 of the 1981 Model State Administrative Procedure Act were the result of a compromise between the proponents and opponents of the legislative veto.

The Louisiana Legislature incorporated the legislative veto provision in 1980. The legislature may have indicated a desire to bring the Louisiana Administrative Procedure Act into alignment with the 1981 draft of the Model State Administrative Procedure Act, but this also corresponds historically with the passage of the Louisiana Environmental Procedure Act in the previous legislative session. The timing of the passage of both pieces of legislation may be coincidental, but could be a significant factor in looking at the events surrounding the passage of the legislative veto in Louisiana and could indicate a desire on the legislature's part to use Louisiana Revised Statutes 49:969 as a limit upon the expansion of the newly created environmental agencies. This desire to limit the power of environmental agencies may also have been prevalent when the legislature attempted to suspend the law creating the Louisiana Department of Environmental Quality in 1983.

The Louisiana courts have yet to directly address the legislative veto. State v. Broom is the only case that has mentioned the legislative veto section of the LAPA. The case made a cursory appraisal of the section as a possible check upon arbitrary agency action but failed to mention any limits or to rule on the provision's validity. The court merely assumed the validity of the provision. However, since 1982, the United States Supreme Court and other states' courts have addressed issues raised by the legislative veto.

II. ISSUES RAISED BY THE SUSPENSION POWER

The legislature is empowered with some form of suspension power; however, the exercise of the power raises concerns regarding the limits

73. Force & Griffith, supra note 67, at 1289.
74. Id.
75. Bonfield, supra note 65, at 498-501.
80. Id.
81. See infra text accompanying notes 112-123 for discussion of these cases.
on and validity of the power when it is exercised to suspend environmental laws and agency regulations. The major issue raised by the suspension of environmental laws and agency regulations is whether such action amounts to a violation of the "separation of powers" doctrine.\(^{82}\)

Another related issue is raised by the interaction of the delegation of powers by the legislature to state agencies with the suspension and legislative veto procedures. Finally, when dealing with environmental laws and regulations, the exercise of the suspension power may clash with Louisiana Constitution article IX, section 1 and its mandate to protect the environment.\(^{83}\)

A. Separation of Powers Doctrine

1. Louisiana and the Separation of Powers Doctrine

Louisiana Constitution Article II embodies the doctrine of separation of powers and explicitly states the concept that the functions of government should be exercised by three co-equal but separate branches of government. Article II, section 1 states: "[T]he powers of government of the state are divided into three separate branches: legislative, executive, and judicial."\(^{84}\) This section is followed by the limitations upon the branches: "Except as otherwise provided by this Constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."\(^{85}\)

The drafters of the Kentucky Constitution developed its articles from the separation of powers language Thomas Jefferson originally wrote.\(^{86}\) The Louisiana delegates copied the Kentucky language into the 1812 Louisiana Constitution. Article III, section 1 of the 1974 Louisiana Constitution indicates that "[t]he legislative power of the state is vested in a legislature." Article IV, section 5 of the 1974 Louisiana Constitution indicates that "[t]he governor shall be the chief executive officer of the state . . . and see that the laws are faithfully executed." Recently,

82. The separation of powers doctrine is embodied in La. Const. art. II, §§ 1 and 2. La. Const. art II, § 1 reads: "The powers of government of the state are divided into three separate branches: legislative, executive, and judicial." La. Const. art II, § 2 reads: "Except as otherwise provided by this Constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."


84. La. Const. art. II, § 1.


Louisiana courts have tended to move away from a strict interpretation of the separation of powers doctrine.\(^7\)

In 1930, the Louisiana Supreme Court clearly established the basic premises of Louisiana's separation of powers doctrine in *Saint v. Allen*.\(^8\) In *Saint*, the court looked to the origin of Article II, Sections 1 and 2, of the Kentucky Constitution of 1797 and considered the fact that Thomas Jefferson was the author. The court held that members of the legislature could not be employed in the executive branch because that would violate the separation of powers doctrine in the Louisiana constitution. In making this decision, the court looked to Jefferson, Madison, and Hamilton as the strongest supporters of the separation of powers doctrine implicit in the United States Constitution and also to Montesquieu's works.\(^9\)

The court established a strict separation of the branches because the separation of powers doctrine is founded on the ideas that: 1) one branch of government, while exercising its legitimate powers, should not be able to exert overwhelming influence directly or indirectly upon another branch; 2) each branch should have a will of its own; and 3) placing all the power in one branch (executive or legislative) creates the potential for arbitrary exercise of power and unchecked authority.\(^9\) The court wished to create "no [chance] for usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."\(^9\) The court concluded that the ideals of the separation of powers doctrine are essential to a republican form of government, and "[t]o preserve liberty to the people, there must be restraints and balances and separations of power."\(^9\) The separation of powers doctrine that the court set out in *Saint* has been the basis for the Louisiana courts' decisions involving allegations that one branch has overstepped its constitutional boundaries of power.\(^9\)

The Louisiana separation of powers case most analogous to the present exercise of the suspension power by the legislature is *Henry v.*

\(^7\) Hargrave, supra note 7, at 43.
\(^8\) Saint v. Allen, 169 La. 1046, 126 So. 548 (1930).
\(^9\) Id. at 1053-54, 126 So. at 551.
\(^9\) Id. at 1053-62, 126 So. at 551-53.
\(^9\) Id. at 1064, 126 So. at 554 (quoting from George Washington's Farewell Address).
\(^9\) Id. at 1061, 126 So. at 553.
\(^9\) See generally State Bd. of Ethics for Elected Officials v. Green, 545 So. 2d 1031 (La. 1989), on rehearing 566 So. 2d 623 (La. 1990); Bruneau v. Edwards, 517 So. 2d 818 (La. App. 1st Cir. 1987); Board of Comm'ns of Orleans Levee District, 496 So. 2d 281 (La. 1986); Rapides Gen. Hosp. v. Robinson, 488 So. 2d 711 (La. App. 1st Cir. 1986); State ex rel. Guste v. Legislative Budget Comm., 347 So. 2d 160 (La. 1977); Henry v. Edwards, 346 So. 2d 153 (La. 1977); Carso v. Board of Liquidation of State Debt, 205 La. 368, 17 So. 2d 358 (1944).
Edwards. In *Henry*, the legislature had placed a general law in an appropriations item so that it looked like a limit upon the appropriation. This action forced the governor either to veto a needed appropriation or to accept what he believed to be an unwise and unacceptable piece of legislation. The court found a violation of the separation of powers doctrine under the premise that the legislature attempted to circumvent the governor’s constitutional veto power. The court described the legislature’s technique as “artfully drafting general law measures” to “impair the constitutional responsibilities and functions of a co-equal branch of government.” The reasoning of the Louisiana court finds federal support in *Consumer Energy v. F.E.R.C.*, where the Sixth Circuit Court of Appeals invalidated Congress’ legislative veto provision in the Natural Gas Policy Act of 1978. The court stated that the purpose of the federal presentment clause was to prevent Congress from “subverting the presentation requirement by restyling the nature of the action.”

The Louisiana Supreme Court recently reevaluated the separation of powers doctrine in *State Board of Ethics for Elected Officials v. Green*. Green raised the issue of whether the legislature’s appointment of members to the ethics commission was a usurpation of the governor’s appointment power and whether such a board could institute civil enforcement actions. On original hearing, the court found the legislature could appoint members to a committee without violating the governor’s appointment power and did not change this decision upon rehearing. The issue of whether a legislatively appointed board or commission could institute civil enforcement powers (traditionally an executive function), however, split the court in a 4-3 vote and caused a change in the outcome of the case on rehearing. On original hearing, the court issued an opinion which strictly separated legislative and executive functions and ruled that the committee could not institute a civil enforcement action because it had “the authority to exercise the exclusive executive function of enforcing the law by filing suit against alleged violators of the law.”

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95. La. Const. art. III, §§ 15, 17, 18. These sections of the Louisiana Constitution deal with the gubernatorial veto power and the legislative override authority.
96. *Henry*, 346 So. 2d at 158.
97. Id.
98. 673 F. 2d 425 (6th Cir. 1982).
100. *Consumer Energy*, 673 F. 2d at 452.
102. *Green*, 545 So. 2d at 1037 (original hearing).
In a 4-3 decision on rehearing, the court found the committee could institute the enforcement action. (The rehearing was held after Justice Hall joined the court.) Justice Lemmon, writing for the majority, held:

The mere fact that the Legislature has appointed [an agency's] members does not violate separation of power principles, as long as (1) the appointment of the members by the Legislature was constitutionally valid and (2) the appointees are not subject to such significant legislative control that the Legislature can be deemed to be performing executive functions through its control of the members [of an agency] in the executive branch.103

The court indicated that it would determine whether the legislature had usurped the executive function by focusing “on the degree of control [by the legislature] over the [agency] appointees contained in the particular statutory scheme under review.”104 The court further stated that it is not the exercise of an executive power that violates the separation of powers article, but whether the usurpation “significantly unbalance[s] the equilibrium sought to be established by the constitutional allocation of powers among the various branches of government.”105 The decision is a clear indication that the Louisiana Supreme Court is blurring the bright line separations between the executive and legislative branches set forth in Saint106 and is allowing functions of the legislative branch to overlap into the executive branch. The court will no longer look only at whether a member of an executive branch is also a member of the legislative branch, but will also look at the amount of “control” one branch has over the other. However, the split decision and the change upon rehearing indicates that the court could easily shift back to the stricter standard pronounced in the original hearing.

The only documented direct confrontation between the executive branch and the legislative branch over a suspension involved the suspension of the act creating the Louisiana Department of Environmental Quality (DEQ).107 During the 1983 special session, the legislature, as a measure to save money in the state’s budget, passed a concurrent resolution to suspend the act creating the DEQ.108 In response to the legislature’s action, Governor Treen promulgated an executive order declaring the resolution invalid and unconstitutional.109 The order then

103. Green, 566 So. 2d at 624 (on rehearing).
104. Id. at 625.
105. Id. at 626.
108. Id.
directed the execution of the act creating the DEQ. The governor based his order on the premise that the resolution violated the separation of powers doctrine, and he specifically quoted the "artfully drafted" test in *Henry v. Edwards.* However, a confrontation in the courtroom never materialized—the legislature backed down and repealed the suspension.

2. Separation of Powers in Federal Law and Other States

The separation of powers doctrine has played an important role in addressing the issue of the legislative veto at both the federal and state levels. The legislative veto/statutory suspension power was first challenged in state courts and then later in the federal courts. Most of the cases invalidating the legislative veto provisions were based on the separation of powers issue.

The most significant case in which a court held the legislative veto to be repugnant to the separation of powers doctrine was the United States Supreme Court’s decision in *Immigration and Naturalization Service v. Chadha.* The Court found that the one-house legislative veto contained in the Immigration and Nationality Act violated the bicameralism requirement and the presentment clause. Quoting Madison, Hamilton, and its own separation of powers cases, the Court reasoned that the legislative veto upset the system of "checks and balances" in the constitution. Quoting Alexander Hamilton, the Court indicated that "[t]he primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the second one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design." The *Chadha* decision validated similar reasoning in *Consumer Energy v. Federal Energy Regulatory Commission* when the Sixth Circuit held that a one-house

110. Id. at § 7(f) (quoting from Henry v. Edwards, 346 So. 2d 153 (La. 1977)).


112. 462 U.S. 919, 103 S. Ct. 2764 (1983). The Louisiana Supreme Court originally heard State v. Broom, 439 So. 2d 357 (La. 1983) (discussed supra at text accompanying note 81) before *Chadha* was decided. The rehearing was granted and mentioned the legislative veto provision (La. R.S. 49:969 (1987)), but it appears the Louisiana court may have been confused about *Chadha*'s impact. The court made a cursory mention of the bicameralism issue and completely ignored the presentment clause issue upon which the U.S. Supreme Court based most of its opinion. The Louisiana court ultimately identified the legislative veto as a check on the delegation of legislative power but gave no hint as to its limits or validity. *Broom*, 439 So. 2d at 367-68.


115. *Chadha*, 462 U.S at 943, 103 S. Ct. at 2782 (quoting A. Hamilton, The Federalist No. 73, at 458 (H. Lodge ed. 1888)).

116. 673 F.2d 425 (D.C. Cir. 1982).
legislative veto was a violation of the separation of powers doctrine and the presentment clause.

A number of state courts have held the legislative veto invalid under their own state separation of powers provisions. Only Michigan, South Dakota, Iowa, and Connecticut courts have held legislative vetoes valid. These states are the only ones that have constitutional provisions that expressly authorize legislative overview of agency rules by either legislative committee or joint resolution. In the absence of a provision expressly authorizing statutory legislative vetoes, the veto is impermissible under most state constitutions.117

The state courts have given a variety of reasons for subscribing to the theory that the legislative veto violates separation of powers principles. The Kentucky Supreme Court held a provision authorizing a joint legislative committee to delay operation of any rule for up to 21 months was an encroachment upon executive authority, it authorized action that was inconsistent with the separation of powers principle, and was an undue delegation of legislative law-making authority to a committee.118 The Kansas court held that "broad and absolute legislative veto" of state agency rules violated separation of powers doctrine by excessive interference with the executive function and by allowing the legislature to amend and repeal existing laws without gubernatorial participation.119 In New Jersey, the legislative veto could not pass constitutional muster when "substantial potential to interfere with exclusive executive functions or alter the statute's purposes" exists.120 The West Virginia Supreme Court invalidated the legislative veto when the legislature purported to take action with the effect of law by nonstatutory means, acted as an administrative agency, and usurped exclusive power of the executive branch.121 In a pre-Chadha case, the New Hampshire court did not completely invalidate the legislative veto. It held that committees of the legislature, the senate president, or the speaker of the house could not permanently veto an agency rule, but that the legislature could provide a mechanism to suspend rules between sessions to assure a reasonable opportunity to veto by statutory means.122 Alaska was one of the first states to invalidate legislative suspension of agency rules when the Alaska Supreme Court held the action was a violation of separation of powers because reserving exclusive executive action in the legislature and thus,

118. Legislative Research Comm'n v. Brown, 664 S.W. 2d 907 (Ky. 1984). No mention was made in the opinion regarding the suspension provision of the Kentucky Constitution.
circumvented the gubernatorial veto power by non-statutory means. These cases indicate that the legislative veto has not been viewed favorably at the state level.

B. Delegation of Powers

The environmental agency rulemaking procedure is essentially a legislative function that the legislature has delegated to an executive agency. Consequently, the legislature may wish to justify its usurpation of the executive branch’s power, when the legislature reserves oversight power, as an exchange for its delegation of powers to the executive. The legislature will call the suspension power a control or limit upon the legislative power delegated to the executive branch. The question is whether this control is legitimate in light of the present safeguards the courts already erect for the legislature when evaluating the delegation of rulemaking authority or whether the legislature should have an additional check upon the delegation.

In State v. Union Tank Car Company, the Louisiana Supreme Court indicated that while the “legislature may not delegate the legislative power to determine what the law shall be, it may delegate to administrative boards and agencies of the state power to ascertain and determine the facts upon which the laws are to be applied and enforced.” This limit upon what the legislature can delegate to administrative agencies is based on the premise that for the delegation to be proper, it should embody some basic legislative policy decision within which the agency may make decisions, and it is this policy that is the law.

To assure that the legislature establishes “standards for guidance” for the executive, administrative body, or officer of such to prevent “unfettered discretion” and “arbitrary actions” in wielding the delegated power, the Louisiana Supreme Court has developed the three-prong Schwiegmann Brothers test to determine the constitutionality of a legislative delegation of power to an administrative branch. A Louisiana court should only uphold a legislative delegation when: (1) “the statute expresses a clear legislative policy;” (2) “[the statute] contains guidance for administrative officials in executing the law;” and (3) “the standards

124. 439 So. 2d 377 (La. 1983).
125. Id. at 380.
128. Barthelemy, 545 So. 2d at 534 (reiterating delegation test from Schwiegmann, 237 La. 768, 112 So. 2d 606).
do not permit arbitrary action by the administrative agency."  

This test gives both the legislature and the courts a method by which to control the delegation of power. If the legislature adheres to this standard, it has no need to provide for further safeguards to prevent itself from delegating the legislative function, and to do so would allow it to encroach into the realm of the executive. However, the court has applied the test less stringently when dealing with matters of environmental policy.

In *State v. Union Tank Car Company*, 4 the Louisiana Supreme Court allowed a less stringent standard "[b]ecause statutes directed at control of air pollution are intended to encompass infinitely variable environmental conditions" and "flexibility and adaptability are required in meeting factual situations which could not possibly be foreseen by the legislature."  

Based on this unique nature of environmental law, the court, while evaluating the state air control law in *Union Tank Car*, explained: "[S]tatutes in the area of environmental law need not address each and every factual situation in which air pollution might be involved; instead it is sufficient if [such] statutes be general in nature but at the same time retain standards of sufficient clarity to put [the] violator on notice."  

The court went on to stipulate that even broad environmental standards are adequate to support constitutional delegation of authority if the standards can be inferred from the legislative policy of the statutory scheme.  

The court emphasized the first *Schwegmann* factor, requiring a clear legislative policy set forth in the legislature, over that of setting express standards for agency guidance. The court in this instance was relying more on the idea that the legislative policy is the law, and the agency cannot go beyond that policy without stepping outside of the constitutional limits of the power transferred to it.

C. *Constitutional Environmental Mandate*

In dealing with matters of environmental concern, the Louisiana Constitution requires the legislature to be more careful in making its decisions. The Louisiana Constitution article IX, section 1 "public trust doctrine" is a "non-binding mandate [for] the legislature to protect the environment."  

The provision reads:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and aesthetic quality of the en-

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129. Id.
130. 439 So. 2d 377 (La. 1983).
131. Id. at 382.
132. Id.
133. Id. at 380-82.
134. Hargrave, supra note 7, at 156.
environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.\textsuperscript{135}

The drafters intended the provision to be a statement of policy and not "bind" the legislature such that they are forced to pass legislation to protect environmental concerns.\textsuperscript{136} The drafters indicated that the "shall enact laws" language means "that if the legislature in its wisdom should decide that they want to beef up this provision," they may do it.\textsuperscript{137} However, the courts have not ignored the provision and have made it stronger than the drafters intended. They are interpreting "shall" as a strong suggestion to the legislature to implement the policy. The courts' interpretation is more in line with the committee reports and discussions that view the provision as an environmental "bill of rights,"\textsuperscript{138} a view which the drafters appeared to have rejected in their floor debates.\textsuperscript{139} Even ignoring the stronger view, the courts should harmonize the environmental mandate and suspension powers provisions of the constitution to follow the jurisprudential interpretation of the "public trust doctrine."

In \textit{Save Ourselves, Inc. v. Louisiana Environmental Control Commission},\textsuperscript{140} the Louisiana Supreme Court recognized that Louisiana Constitution article IX, section 1 establishes environmental protection as a goal of the State of Louisiana. Justice Dennis seemed to suggest that article IX, section 1 should be considered by the legislature when it is enacting statutes that have an affect upon the environment.\textsuperscript{141} The same principle should apply to a repeal or suspension of an environmental law or regulation. The constitutional standard is that the legislature should promote environmental protection "insofar as possible and consistent with the health, safety, and welfare of the people."\textsuperscript{142} Justice Dennis stated this rule as a

\textsuperscript{135}  La. Const. art. IX, § 1.
\textsuperscript{136}  Hargrave, supra note 7, at 156. Professor Hargrave notes that "[a]ttempts to adopt a stronger provision first in the Committee on Natural Resources and the Environment and then on the convention floor were defeated." Id.
\textsuperscript{138}  See generally 13 Records of the Louisiana Constitutional Convention of 1973: Committee Documents 572-74, 602-03.
\textsuperscript{139}  See generally discussion in Hargrave, supra note 7, at 156 and the floor debates in Convention Transcripts-103rd Days, supra note 137, at 2911-13.
\textsuperscript{140}  452 So. 2d 1152 (La. 1984).
\textsuperscript{141}  Id.
\textsuperscript{142}  La. Const. art. IX, § 1.
rule of reasonableness which requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare. Thus, the constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given *full and careful consideration* along with economic, social and other factors.\(^{143}\)

The standard should apply equally to any act of the legislature and possibly more stringently to environmental acts since the constitution says “*[t]he legislature shall enact laws to implement this policy.*”\(^{144}\)

In *American Waste and Pollution Control Company v. State*,\(^{145}\) the Louisiana Supreme Court recently reaffirmed the “public trust” mandate of Louisiana Constitution article IX, section 1 as stated in *Save Ourselves*. The court stated that the policy was a reiteration of the “public trust doctrine” as stated in Louisiana Constitution of 1921 article VI, section 1 but was the first time the legislature was “mandated . . . to enact laws to implement [the] policy.”\(^{146}\) Although deciding whether appeals of environmental permit denials by the Department of Environmental Quality were subject to a *de novo* review in a state district court, the court, looking toward legislative history, indicated that the laws creating DEQ and setting up the regulation and control of waste disposal and water pollution were a direct result of the legislature’s implementation of the constitutional “public trust doctrine.”\(^{147}\) Although reversed on the substantive issue, the supreme court’s language relating to the “public trust” doctrine affirmed similar language stated in the first circuit court of appeal’s opinion in the same case.\(^{148}\)

Since the legislature is designated the guardian of this “public trust” policy by the constitutional provision, the legislature could be evaluated under a strict scrutiny test when it acts to repeal, nullify, or suspend environmental laws and regulations rather than by Justice Dennis’ reasonableness test used to evaluate the initial passage of environmental laws and regulations. If the constitutional policy has been implemented in accordance with the constitutional mandate, it should be harder for the legislature to reverse its course than it was to initiate it. A pre-

\(^{143}\) *Save Ourselves*, 452 So. 2d at 1157 (emphasis added).

\(^{144}\) La. Const. art. IX, § 1 (emphasis added).


\(^{146}\) *American Waste*, 588 So. 2d at 372 (emphasis added).

\(^{147}\) Id.

sumption should exist that the initial passage was in the interest of the "public trust" and that the repeal runs counter to that provision. This would prevent the legislature from whimsically changing its mind and remedy the potential conflict between two constitutional provisions. The court should use the strict scrutiny standard expressed in Hondroulis v. Schuhmacher when the legislature uses the suspension power to address environmental issues. Thus, the legislature's action could be "justified only by compelling state interests, and ... drawn to express only those interests." Additionally, the legislature would not enjoy the benefit of the usual presumption of the constitutionality of its acts, and the burden of proof would be upon the legislature to show that the suspension power is necessarily related to a compelling state interest more important than the constitutional mandate.

III. ANALYSIS

As the Louisiana Legislature continues to use its suspension power over environmental laws and regulations, the likelihood that the Louisiana courts will be faced with a confrontation between the executive and legislative branches increases. The courts must be prepared to define the limits of the suspension power in this context. Louisiana courts have not yet had to address this issue. How should they proceed to tackle the problem?

A. Separation of Powers

In evaluating the problems of both the constitutional and statutory suspension powers, the courts must first inquire into the general aspects of the "separation of powers" doctrine. It is obvious that the exercise of the suspension power impinges to some extent upon the executive branch. The improper use of the power to suspend the operation of laws can be very dangerous if used improperly.

The evaluation the courts should use is that enunciated in State Board of Ethics for Elected Officials v. Green. The court should look to "the degree of control" the legislature is exercising over the executive agency by suspending its rules or statutory authority. The legislature should be limited when the suspension power significantly upsets the equilibrium established between the branches by the separation of powers doctrine. However, the supreme court's vacillation in Green is
a good indication that the "separation of powers" doctrine is not well settled in Louisiana. Thus, the stricter standard enunciated in Saint v. Allen and on original hearing in Green may dictate a very limited usurpation of one branch of government's power by the other, and allow no degree of legislative control over executive agencies. The standard used will make a difference in a decision upon the validity of the suspension power. Either standard requires severe limits upon the suspension power. If no strong limitations exist, the legislature's unfettered discretion could lead to abuses of the suspension power, and the suspension power could severely disturb the balance that the constitution has established between the legislative and executive branches.

One way of determining whether the equilibrium has been upset and where to set limits is to examine the purposes for which the legislature has exercised the suspension power. The courts could easily be confronted with a situation similar to that in Henry v. Edwards. As in Henry, the legislature could use the suspension power to circumvent the gubernatorial veto power. Circumvention of the veto power is one of the most basic violations of the separation of powers doctrine. The legislature could attempt to "artfully" draft a concurrent resolution to do something they could not otherwise do. Although the action is a temporary measure when enacted under the guise of the suspension power, the legislature can use it from session-to-session to perpetuate the harm to the executive branch and the "public trust." The exercise of the suspension power in this manner essentially takes the executive branch out of the system of checks and balances inherent in the constitution and upsets the delicate balance established by the constitutional drafters. Not only is the executive branch unable to protect itself, but it is no longer able to protect the interests of the citizens.

Another reason the legislature could suspend or nullify environmental agency regulations or suspend environmental laws empowering agencies to act is to accommodate the needs of special interest groups. Special interest groups actually played a large role in the 1991 legislature's suspension of the teacher evaluation system.

154. 169 La. 1046, 126 So. 548 (1930).
155. 346 So. 2d 153 (La. 1977).
156. 1991 La. Senate Concurrent Resolution No. 66. Teacher's unions and interest groups played a large part in pressuring the legislature to suspend Louisiana's teacher evaluation and re-certification program. By suspending the program, the legislature eliminated any chance of Governor Roemer vetoing a repeal of a program that he had campaigned hard to establish as part of the Children's First Act. Consequently, the governor had little input into the matter. The legislature also avoided the public out-cry a repeal would have created, by saying they had not eliminated the program but were just re-evaluating it.
public trust by allowing the groups to circumvent the regular agency rulemaking process. Unchecked legislative suspension or nullification of agency regulations leaves the door open for special interest groups to pressure the legislature into suspending the rules when the groups are unsuccessful in challenging the agency action via the LAPA. Consequently, if a group has the ear of the correct number of legislators, it can ignore the legitimate statutory means the legislature has set up for reviewing agency actions, avoid the time and expense that is required under the presently established standards, and eliminate the power of the executive branch altogether. Taking the executive out of the legislative process prevents the executive from establishing what Hamilton called "a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of [the legislature]." Further, the executive check "increase[s] the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design." The influences that special interest groups exert are at least as important today as they were in Hamilton's time.

The legislature may justify its actions by asserting that the suspension power is a method for limiting the power of the governor to veto legislative action at his fancy, and that all parties concerned have a better chance to review the suspended law. The argument may have some weight when considered in light of the fact that the 1991 legislature's passage of Louisiana's new abortion law was the legislature's first override of a gubernatorial veto since the adoption of the 1921 Constitution. However, the court in Carso v. Board of Liquidation rejected this argument as a valid justification of legislative action when it stated: "[L]et there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed." The court further emphasized that "[t]he precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use may at any time yield" and further emphasized that a change which affects the constitutionally established balance of power should be accomplished by

159. Id.
161. 205 La. 368, 17 So. 2d 358 (1944).
162. Id. at 383, 17 So. at 364.
constitutional amendment. Therefore, the use of the suspension power in cases other than emergency situations should not survive under a justification that it offsets the traditionally strong power the gubernatorial veto has had in Louisiana. Only when an emergency situation exists or when the constitution clearly shows intent to the contrary does the need for suspension and immediate action “overbalance” the requirement that the governor review legislative actions as part of the system of checks and balances established by the constitution.

The legislature's perceived inability traditionally to override the gubernatorial veto does not justify usurping that power but for some very good reason, i.e. “a compelling state interest.” Otherwise, the false perception that too much power has been concentrated in the executive branch will lead to an actual shift in the concentration of power to the legislature. Power concentration in one branch creates what James Madison called the “very definition of tyranny.” Tyranny and abuse of power are what the drafters intended to avoid when they adopted the separation of powers doctrine, the gubernatorial veto, and the suspension power.

B. Delegation of Powers

The legislature could defend its suspension power under the delegation of powers theory. It can be stated that the legislature is delegating the rulemaking function to the executive branch, and should get something in return to protect itself. This argument is weakened by the strict scrutiny the Louisiana courts have given the legislature’s delegation of legislative functions to administrative agencies. The Schwegmann three-prong test is a prime example of the protection the legislature is already afforded against the executive branch. The judicial scrutiny of the delegation serves two purposes. First, the judiciary keeps the legislature from giving away too many of its legislative functions. Second, it prevents the legislature from inventing its own vague methods of administrative overview, such as exercising the suspension or legislative veto power, which may intrude upon the functions of the executive branch. Consequently, a neutral body evaluates the reasonableness of the legislature’s decision to delegate rather than the legislature itself.

Courts must consider the legislature’s delegation of power to environmental agencies in light of State v. Union Tank Car Company. Union Tank Car allows for a less strict standard of evaluation than Schwegmann since the complexity of some environmental issues may

163. Id.
165. 439 So. 2d 377 (La. 1983).
require the legislature to give environmental agencies more leeway than other administrative agencies. Consequently, Louisiana courts may allow more lax standards upon the limits of the exercise of the suspension powers over administrative agencies as a check upon the broader powers given to environmental agencies.

C. The Legislative Veto

The LAPA gives the legislature the power to suspend or nullify an agency regulation. This provision is a legislative veto. Similar provisions have been declared invalid by the United States Supreme Court and various states. In *Immigration and Naturalization Service v. Chadha,* the Court struck down the legislative veto provision as a violation of the "presentment" clause of the United States Constitution. A number of state courts have invalidated the legislative veto for similar reasons, or because it violated the separation of powers doctrine. The only states which have held the legislative veto valid are those with constitutional provisions specifically allowing the legislature to exercise a legislative veto.

In Louisiana, the nullification of agency regulations by the legislature would be a direct violation of the constitution's "presentment" provisions because it would be a permanent repeal of the agency regulation. This would be the equivalent of a partial repeal of the law giving the agency authority to make the regulations. Consequently, a repeal of a law requires the approval of the governor under the presentment provision of the Louisiana constitution.

The validity of the suspension of agency regulations under the LAPA legislative veto provision depends upon the validity of the constitutional suspension power. The provision is a legislative restatement of the constitutional provision as applied to agency regulations. Consequently, the

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167. See supra text accompanying notes 112-123.
170. See supra text accompanying notes 118-123.
171. See supra text accompanying note 117.
173. Since the writing of this paper, the 1992 Legislative Session used the nullification power under the LAPA to nullify rules adopted by the Louisiana Wildlife and Fisheries Commission prohibiting commercial fishermen from taking spotted sea trout (speckled trout) on weekends. See 1992 La. House Concurrent Resolution No. 211. The provision is specifically worded as a "nullification" of the rules and not a suspension. This type of nullification is a direct violation of the "presentment" provisions of the Louisiana Constitution under the "separation of powers" argument and its relationship to the legislative veto under the reasoning of *Chadha* and its prodgeny.
limits on the statutory suspension power are the same as the limits on
the constitutional provision.

It can be argued that the constitutional provision does not apply
to agency regulations since they are not "laws" as contemplated by the
Louisiana constitution. The legislature is empowered only to "suspend
a law." The reference to "law" may limit the power to acts of the
legislature and not those of other governmental bodies. In *Board of
Elementary and Secondary Education v. Nix*, the Louisiana Supreme
Court made clear that references to "law" in the state constitution were
to be interpreted as meaning "statute." To devine "by law," the court
looked to the 1973 Constitutional Convention debates and ascertained
that the drafters had explained in a style and drafting report that the
terms "by law" and "by statute" were equivalent. Justice Tate further
defined law as "the solemn expression of legislative will." Based on
this reasoning, agency regulations are not "law" and thus not subject
to the constitutional suspension power. Therefore, the suspension under
the LAPA becomes a partial repeal and invalid for the same reasons
as a nullification of an agency regulation.

A further reason for not applying the suspension power to agency
rules, and thus invalidating the statutory and constitutional provisions
as applied to agency rules and regulations, is that the constitution requires
the same vote "required for enactment of [the] law." Agency rules
are not "enacted" but are "promulgated" by the governing agency.
Since agency rules and regulations are not "enacted" by the legislature,
the vote requirement cannot be met, and therefore, the suspension is
not valid.

One commentator has suggested a number of options besides the
legislative veto which lessen the need for its use. The most frequent
suggestion is for the legislature to withhold appropriations when it is
dissatisfied with the actions of an agency. Another suggestion is to
require agencies to report annually to the legislature during some type
of "oversight" committee review in which agency heads would be re-
quired to give an accounting of their actions. Finally, there is a suggestion
for a legislatively appointed "super agency" in the executive branch that
could review all rules. In light of *Green*, the legislature could probably
appoint such a committee in Louisiana as long as the legislature did
not have substantial control over it.

175. 347 So. 2d 147 (La. 1977).
176. Id. at 151-52.
178. Slater, supra note 70, at 153-57.
179. State Bd. of Ethics for Elected Officials v. Green, 545 So. 2d 1031 (La. 1989),
on rehearing 566 So. 2d 623 (La. 1990).
D. Constitutional Environmental Mandate

The courts must also evaluate the exercise of the suspension power over environmental laws and agency regulations in light of *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*.\(^{180}\) The court suggested that all environmental laws and regulations should be considered in relationship to the "public trust" doctrine contained in the Louisiana Constitution, article IX, section 1. The court relied upon the "shall"\(^{181}\) language in the constitutional provision to emphasize the importance of the legislature's carrying out of the mandate. Justice Dennis indicated that the legislature's environmental enactments should be based on "reasonable" decisions and made after "full and careful considerations."\(^{182}\) Consequently, the reasons the legislature suspends environmental laws and regulations should be weighed against the "public trust" doctrine.

Furthermore, suspensions are similar to repeals, and the legislature should be subject to a stricter standard than *Save Ourselves*. Since *Save Ourselves* dealt with the initial enactment of environmental regulations, the courts may adopt a stricter standard for judging the legislative repeal of environmental laws. The legislature enacts environmental laws for the public good, and once these are passed, the repeal or suspension is likely to be contradictory to the public good and the "public trust" doctrine. For this reason, the legislature should be subject to a higher level of scrutiny when it repeals and suspends environmental laws and regulations than when it creates them, and greater weight should be given to the "public trust" doctrine. The stricter standard prevents hasty repeals of laws which were intended to be for the "public trust" originally and prevents the legislature from easily changing its mind without careful consideration. Justice Barham, in his dissent in the original hearing of *State v. Placid Oil Co.*,\(^{183}\) which the court reversed on rehearing, stated the importance of the "public trust" doctrine when he said:

> In this day and time, when environment, ecology, and conservation of natural resources are of such vital concern to the public, at this time when public lands and lands for the use in common are rapidly disappearing, at this time when society appears on the verge of desecrating the last vestige of the natural environment of this country, it is most important as a matter of public policy

\(^{180}\) *452 So. 2d 1152* (1984).

\(^{181}\) La. Const. art III, § 1.

\(^{182}\) *Save Ourselves*, 452 So. 2d at 1157.

\(^{183}\) *State v. Placid Oil Co.*, 300 So. 2d 154 (La. 1974).
that we make every attempt to conserve for the public as much of the vital natural resources as the law will permit.\footnote{184}

\textbf{E. Recommended Test}

The courts must adopt a "strict scrutiny"\footnote{185} test when evaluating suspensions of environmental regulations and laws. A strict scrutiny test would keep the suspension power confined within very narrow constraints, where the drafters of the concept intended it to remain. A high level of scrutiny would force the legislature to express a "compelling state interest"\footnote{186} before it could validly suspend any environmental regulations and would limit use of the suspension power to legitimate exercises of the state's "police power" and emergency situations. Limiting the suspension power to a small number of situations ensures that the separation of powers balance between the executive and legislative branches is preserved and that the environmental mandate emanating from the "public trust" doctrine is preserved. A narrow construction allows it to be used in situations which are truly justified.\footnote{187}

By adopting the stricter standard, the suspension power will more closely resemble that originally envisioned by the drafters of the English Bill of Rights and copied into the Louisiana Constitution. The power was intended to address extreme situations when the normal lawmaking process could not adequately address the need to suspend laws. Traditionally, people understood the suspension power to be exercised to confront "emergency" situations such as wars and natural disasters. Due to the potential for abuse when put in the hands of the executive branch, the drafters of the Louisiana Constitution saw fit to put this extraordinary power in the hands of the people through their legislative representatives. However, the potential for abuse still exists and was even addressed by delegates to the Louisiana Constitutional Convention of 1973. Therefore, the exercise should be severely limited to those situations where some harm would result from not having to subject a change in the law to the usual checks and balances inherent in the protections set forth by the Louisiana Constitution.

\textbf{V. Conclusions}

The ability of the Louisiana legislature to suspend environmental laws and agency regulations raises serious questions about the limits of the

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\item \footnote{184} Id. at 171 (Barham, J., dissenting).
\item \footnote{185} Hondroulis v. Schuhmacher, 553 So. 2d 398 (La. 1988).
\item \footnote{186} Id. at 415.
\item \footnote{187} A similar approach has been taken by the federal courts in limiting the exceptions to the "notice and comment" provisions of the Federal Administrative Act. 5 U.S.C. § 553(b)(B) and § 553(d)(3). The provisions require "good cause" before an agency can by-pass the normal procedures and are usually limited to-emergency situations. See Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 751-52 (10th Cir. 1987).
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suspension power embodied in Article III, Section 20 of the Louisiana Constitution. If not limited, the suspension power has the potential to circumvent the gubernatorial veto power and violate the principles of the separation of powers doctrine embodied in the Louisiana Constitution since 1812.

Originally designated as a right to protect the citizens against the executive branch, the suspension power now has the possibility of being abused by the legislature. This is the same body which the constitutional drafters acknowledged as guardian of this right of the people. The Louisiana courts have not directly addressed the problem of the legislature abusing this power and using it against the other co-equal branches of government. The courts can check that abuse and prevent the creation of situations that are contrary to the public good.

The courts already have the tools to limit the discretion exercised by the legislature in wielding the suspension power. First, they can engage in a traditional “separation of powers” analysis to limit the power and prevent usurpation of the executive powers. Second, the courts should consider the “give-and-take” that may have to occur when the legislature delegates authority to an administrative agency in the executive branch. Third, the courts may separately address the statutory suspension/nullification provision of the LAPA as a legislative veto. Finally, when dealing with environmental laws and regulations, the courts must evaluate the limits in light of the environmental public trust doctrine and the legislature’s duty as guardian. With those factors in mind, the courts will be able to strike a balance that benefits both the executive and legislative branches, prevents undue influence of special interest groups, and does not threaten the environment of the state.

To establish limits to the suspension power, the courts must adopt a “strict scrutiny” evaluation of all exercises of the power. The high level of judicial scrutiny will ensure that the power is not used except during “emergencies” and legitimate exercises of the state’s “police power,” and thus ensure that the constitutional drafters’ original intent is preserved. With this standard, the courts will be able to prevent legislative abuses of the suspension power and limit the legislature’s expanding reliance upon it as a mechanism to control administrative agencies.

David Alexander Peterson
APPENDIX A

List of Proposed Legislative Resolutions Suspending or Nullifying Environmental Agency Rules and Regulations During the 1991 Regular Session

House Concurrent Resolutions

HCR-22:

(Author: Guzzardo) Directs the Department of Environmental Quality to grant dairy farmers a two-year extension of time to establish "no runoff" oxidation ponds.

HCR-101:

(Author: Hopkins) Suspends the toxic air pollutant emissions control program.

HCR-104:

(Author: Dale Smith) Suspends certain laws and nullifies certain regulations concerning the take and possession limits for black bass.

Suspends the authority of the Louisiana Wildlife and Fisheries Commission to reduce the daily take and possession limits on black bass below 15 and suspends its authority to issue special permits to tournament participants to take black bass in excess of the legal limits.

Nullifies the rules and regulations of the Louisiana Wildlife and Fisheries Commission that reduce the daily take and possession limits on black bass below 15 and nullifies provisions to issue special permits to tournament participants to take black bass in excess of the legal limits.

Senate Concurrent Resolutions

SCR-20:

(Author: Rayburn) Directs the Department of Environmental Quality to grant dairy farmers a two-year extension of the time to establish "no runoff" oxidation ponds.

SCR-31:

(Author: Brinkhaus) Suspends LAC 33:IX.70-8 et seq., promulgated under R.S. 30:2074(C), as it relates to open bays and deltaic passes for the discharge of produced waters.

SCR-50:

(Author: Brinkhaus) Suspends that portion of the Water Resources law which prohibit the discharge of produced water.

Suspends R.S. 30:2074(B)(1),(3),(4), and (5) and LAC 33:IX.708 et seq., relative to the prohibition of the discharge of produced water and spent drilling fluid.
Suspends these rules and regulations until the Department of Energy scientific study is completed.

Requires the Secretary of the Department of Environmental Quality to repromulgate rules and regulations if necessary after the DOE findings are published.

**SCR-67:**

(Author: Crain) Suspends the toxic air pollutant emission control program.

**SCR-69:**

(Author: Chabert) Suspends the law providing authority to the Department of Environmental Quality to regulate, control, or prohibit certain discharges by shrimp processors until the legislature has an opportunity to review, and make statutory amendments concerning, new regulations.

**SCR-145:**

(Author: Crain) Suspends the authority of the Department of Environmental Quality to set dioxin criteria below their current levels.

Suspends that portion of R.S. 30:2074(B) which authorizes the Department of Environmental Quality to set dioxin levels lower than those already imposed until 60 days after final adjournment of the 1992 regular legislative session to enable the department to review the favorable science currently being developed on dioxin.

**SCR-171:**

Suspends laws which authorize the Secretary of the Department of Environmental Quality to grant permit for public solid or hazardous waste disposal facility or landfill in certain locations.

Suspends until January 1, 1992, that portion of the law which authorizes the Secretary of the Department of Environmental Quality to grant permit for public solid or hazardous waste disposal facility or public solid waste or sanitary landfill within two miles of the corporate limits of any municipality or the nearest boundary line of any property on which is located a public elementary or secondary school or health care facility licensed by the state.