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Judicial Power and the Administrative State

Judge James L. Dennis*

Article V of the 1974 Louisiana Constitution ("Article V") furthers the same basic objects and values that are promoted by Article III of the United States Constitution ("Article III"): the establishment of an independent judiciary to serve as a barrier to the encroachments and oppressions of the legislative and executive branches; to provide impartial administration of the laws; to enforce the limited constitution's specified exceptions to the legislative authority; to interpret the constitution and laws as its proper and peculiar province; and to guard the constitution and the rights of individuals and minorities from dangerous innovations and serious oppressions by the representatives of the people.¹ This essay seeks to evaluate and gain insight into the meaning of Article V and its role in the modern administrative state by comparing and contrasting its characteristics with that of Article III in view of the jurisprudence and scholarly commentary resulting from the proliferation of administrative agencies authorized to exercise quasi-judicial powers.

The modern administrative state magnifies the danger of encroachment upon judicial power and jurisdiction by the legislative and executive branches through the creation of administrative agencies with adjudicatory powers. To the detriment of the general public interest, an agency can be co-opted by the special interests that the legislature authorized it to regulate.² A highly organized interest group may have sufficient political influence to induce the legislative branch to expand a captured agency's adjudicatory jurisdiction in order to remove matters from the initial jurisdiction of the courts.³ Unless the courts maintain their independence, disallow unconstitutional intrusions into judicial power, and exercise meaningful appellate review of agency adjudications, the judicial power necessary to protect individuals from the effects of biased,

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arbitrary, or oppressive governmental and bureaucratic action can be undermined.  

I.

Article V vests the state judicial power and general jurisdiction directly in courts established or authorized by the state constitution. Unlike Article III, the Louisiana judiciary article does not merely establish a supreme court and authorize the legislative branch to ordain and establish limited jurisdiction inferior courts. Consequently, Article V differs significantly from Article III in this respect, but otherwise serves the same essential constitutional purpose, viz., the establishment of an independent judiciary to enforce the separation of powers doctrine, checks and balances, and other constitutional limitations upon the powers of the executive and legislative branches.

The first section of the judiciary article of the state and federal constitutions establishes a supreme court and vests all of the judicial power in it and other courts. Article V, Section 1 of the 1974 Louisiana Constitution states that "[t]he judicial power is vested in a supreme court, courts of appeal, district courts, and other courts authorized by this Article." 5 Article III, Section 1 of the United States Constitution provides, in part, that "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." 6 The most significant difference between the provisions, of course, is that the Louisiana legislature is permitted to create courts only below the district court level as authorized by Article V, but Congress is empowered by Article III to establish all courts "inferior" to the supreme court. Congress could establish any number of inferior Article III courts, or it could elect to create none, allowing the state courts to have initial jurisdiction of all litigation over which the Supreme Court's judicial power extends. The Louisiana legislature may shape the court system only at the fourth level, below the district courts, within limits prescribed by Article V.

4. For recent Louisiana developments raising Article V-separation of powers questions beyond the scope of this essay, see Jay S. Bybee, Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act, 59 La. L. Rev. 431 (1999); see generally Corrections Administrative Procedure Act, La. R.S. 15:1171-1177 (1992) (creates multi-stage administrative system in the Department of Corrections, sheriffs' departments, and district courts, for processing and screening of prisoners' civil suits, prior to or in lieu of their being considered as civil matters within the original jurisdiction of the district courts).


The two judiciary articles promote judicial independence in different ways. Article V, Section 21 provides that "[t]he term of office, retirement benefits, and compensation of a judge shall not be decreased during the term for which he is elected." Section 22 of Article V provides that all judges shall be elected, except for appointees temporarily filling vacancies. Article III states that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Federal judges are appointed by the President with the advice and consent of the Senate. Although Louisiana judges are elected for six and ten year terms, rather than appointed for life during good behavior as are federal Article III judges, they are electorally accountable only within their districts, and therefore enjoy independence from control by the executive or legislative branch. A Louisiana judge is not protected against diminution in compensation during his or her entire continuance in office, but is protected from a reduction of compensation, retirement benefits, and terms of office during the term for which the judge is elected.

The jurisdictional provisions of Article III confine judicial power more narrowly and afford it less protection from executive and legislative incursions than those of Article V. Federal courts are courts of limited, not general, jurisdiction. They are empowered to hear only cases that are within the judicial power of the United States, as defined in Article III,10 and that are within a jurisdictional grant by Congress.11 Louisiana's district courts, appellate courts, and supreme court, like those of most states, are courts of general jurisdiction, and the presumption is that they have subject matter jurisdiction unless a

10. U.S. Const. art. III, § 2, cl. 1 provides that:
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . Cases affecting Ambassadors, other public Ministers and Consuls; . . . Cases of admiralty and maritime Jurisdiction; . . . Controversies to which the United States shall be a Party; . . . Controversies between two or more States; . . . between a State and Citizens of another State; . . . between Citizens of different States, . . . between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
showing is made to the contrary.12 Article V, Section 16 provides, with few exceptions, that the district courts "shall have original jurisdiction of all civil and criminal matters."13 Article V divides the general appellate jurisdiction over district court cases between the supreme court and the courts of appeal, according to case classification.14 Article V vests in the supreme court general supervisory jurisdiction over all other courts, and supervisory jurisdiction in each court of appeal over cases which arise within its district.15

In both the state and federal systems, litigation has arisen over whether an unconstitutional divestment of judicial power results when the legislative branch authorizes an executive or administrative officer to perform adjudicatory functions. Neither Article III nor Article V defines the terms "vested" and "judicial power." Additionally, Article V does not provide a definition of the "original jurisdiction of all civil and criminal matters" that is vested in a district court. The Louisiana cases have concerned whether the adjudication of a particular matter by an executive or administrative adjudicator would unconstitutionally divest a "civil matter" from the district courts' "original jurisdiction." A much larger number of federal cases have dealt with the related question of whether Congress violated Article III by assigning to executive or administrative officers, who do not have constitutionally guaranteed life tenure or undiminished compensation during their continuance in office, the power to adjudicate cases or controversies that would otherwise fall within the jurisdiction of Article III courts.

14. La. Const. art. V affirmatively vests (1) the supreme court with general supervisory jurisdiction over all other state courts, original jurisdiction of bar disciplinary proceedings, and appellate jurisdiction of cases in which a law or ordinance has been declared unconstitutional or a person has been sentenced to death; (2) the courts of appeal with supervisory jurisdiction over cases which arise within their circuits; and appellate jurisdiction (except for that vested in the supreme court) of all civil matters, including direct review of administrative agency determinations in workers' compensation matters, all matters appealed from family and juvenile courts, all criminal cases triable by a jury (except those appealable directly to the supreme court), and administrative agency determinations as provided by the Constitution; and (3) the district courts with original jurisdiction of all criminal matters, all civil matters, except as provided for by the Constitution, and appellate jurisdiction as provided by law. See La. Const. art. V, §§ 5, 10 & 16.
In the federal system the assignment of adjudicatory functions to executive and administrative tribunals has produced a long and sometimes tortuous history of Supreme Court decisions. From the early days of the nation, Congress has enacted laws placing the power of adjudication of certain matters in non-Article III officers, i.e., officers who do not enjoy the safeguards of life tenure and undiminishable salary.

In *Murray's Lessee v. Hoboken Land & Improvement Co.*, the Supreme Court recognized a category of "public rights" whose adjudication, though a judicial act, Congress may assign to tribunals lacking the essential characteristics of Article III courts. This doctrine has been "explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued." But the public-rights doctrine also has been said to "draw[] upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government." Thus, the public-rights doctrine was said to "extend[] only to matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," and only to matters that historically could have been determined exclusively by those departments.

In *American Insurance Co. v. Canter*, Chief Justice Marshall held that Congress may create non-Article III courts to adjudicate disputes in the federal territories, based on the much criticized theory that their jurisdiction is not part of the Article III judicial power, "but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." Under the influence of these decisions, the Court ratified the courts martial, and Congress, apparently based on the public rights concept, created the Court of Claims, a court of private land claims, and a court of customs and patent appeals.

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18. 458 U.S. at 67, 102 S. Ct. at 2869.
21. *Id.* at 546.
The Supreme Court’s jurisprudence has remained settled with respect to non-Article III legislative courts and tribunals for the adjudication of public rights. However, the Court has struggled unsuccessfully during the past two decades for a clear answer to the question of when Congress may establish non-Article III administrative tribunals for the adjudication of civil cases or controversies between private citizens of the states.

Near the beginning of the New Deal, the Supreme Court approved the use of legislative courts for private law matters when those tribunals serve as “adjuncts” to Article III courts. In 1932, the Supreme Court, in *Crowell v. Benson*, for the first time approved of a non-Article III tribunal for the adjudication of private rights, i.e., “the liability of one individual to another under the law as defined.”

The challenged statute authorized an administrative agency, the United States Employees’ Compensation Commission, to make factual determinations with respect to employers’ liability to their employees for work-related injuries under the Longshoremen’s and Harborworkers’ Compensation Act. The Court noted that the statute provided for compensation of injured employees “irrespective of fault” and prescribed a fixed, mandatory schedule of compensation. The agency was assigned the role of deciding “questions of fact as to the circumstances, nature, extent, and consequences of the injuries sustained by the employee for which compensation is to be made . . . .” The agency did not possess the power to enforce any of its compensation orders: On the contrary, every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be ‘in accordance with law’ and supported by evidence in the record.”

Stating that “there is no requirement that, in order to maintain the


27. *Id.* at 36-37, 52 S. Ct. at 286-87.
28. *Id.* at 38, 52 S. Ct. at 287.
29. *Id.* at 54, 52 S. Ct. at 293.
essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges," 32 the Court held that the statutory design did not violate Article III. 33 The Court also held that in private law matters Article III courts have ultimate decision-making authority, there must be substantial oversight of legislative courts by an Article III court, and that Article III courts must be able to decide de novo all questions of law, constitutional facts, and jurisdictional facts. 34

In 1982, however, the Supreme Court, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 35 apparently moved by a concern that Congress might assign vast areas of private rights litigation to legislative courts, held, without a majority opinion, that the Bankruptcy Act of 1978 violated Article III by granting non-Article III bankruptcy judges broad jurisdiction to decide private disputes in "civil proceedings arising under... [the Act] or arising in or related to cases arising under [it]." 36 Northern Pipeline Construction had filed for bankruptcy and filed a claim against Marathon Pipe Line for breach of contract in the bankruptcy court. 37 Marathon Pipe Line, which had not filed a claim in the bankruptcy proceedings, argued that the breach of contract claim could not constitutionally be adjudicated in the bankruptcy court because its judges lacked life tenure and the salary protections of Article III judges. 38

Justice Brennan, writing for a plurality of four, set forth a four part rationale. First, the judicial power of the United States must be exercised by judges who have the attributes of life tenure and protection against salary diminution specified by Article III, which were incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches. 39 Second, non-Article III legislative courts are permitted in a few historically recognized instances—for territories, the military, and public rights disputes—but the bankruptcy courts do not fit into any of these exceptions. 40 Third, legislative courts also can be

32. Id. at 51, 52 S. Ct. at 292.
33. Id. at 54, 52 S. Ct. at 293-94.
34. Chemerinsky, supra note 25, § 4.5.2, at 237 ("In general, Crowell remains good law in that [constitutional facts] may be relitigated, de novo, in an Article III federal court... The jurisdictional fact doctrine, however, is no longer followed and has seldom been mentioned since Crowell.") (footnotes omitted).
36. Id. at 54, 102 S. Ct. at 2862 (citing 28 U.S.C. § 1471(b) (1976 ed. Supp. IV)).
37. Id. at 56, 102 S. Ct. at 2864.
38. Chemerinsky, supra note 25, § 4.5.3, at 244.
40. Id. at 62-71, 102 S. Ct. at 2867-71.
used as adjuncts to Article III courts under limited circumstances, e.g., as in Crowell, in which the agency was limited to jurisdiction in a particular area of law, it could not enforce its own orders, and its decision could be overturned by the district court “if not supported by the evidence.” However, under the 1978 Act the bankruptcy courts have jurisdiction over all civil matters, can enforce their own orders and exercise all of the powers of federal district courts, and their rulings can be set aside only upon “clear error.” Fourth, the argument in support of the bankruptcy courts based on token judicial review, i.e., that Article III is satisfied so long as there is available some degree of appellate review by a constitutional court, is without merit. “Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication . . . .” The plurality concluded that the declaration of unconstitutionality could not be limited to the plenary jurisdiction of the bankruptcy courts because it is uncertain whether Congress would have enacted the statute without the jurisdictional section. Justices Rehnquist and O’Connor concurred in the judgment and concluded that because Marathon Pipe Line was named simply as a defendant on a contract claim arising under state law, the constitutionality of the bankruptcy court’s exercise of jurisdiction over that kind of suit was all that needed to be decided. They stated that it was unconstitutional to vest in the bankruptcy courts broad authority to adjudicate state law matters that were only peripherally related to the adjudication of bankruptcy under federal law, and that the extent of review by Article III courts provided on appeal by the Act did not cure the constitutional defect under the rule espoused in Crowell. They argued that because all matters of fact and law in whatever domains of law the dispute may lead were to be decided by the bankruptcy court in the first instance, with only traditional appellate review by Article III courts contemplated, the bankruptcy court was “not an ‘adjunct’ of either the district court or the court of appeals.” Finally, they concluded that whether the prior cases support a general proposition and three tidy exceptions, as the plurality suggested, did not need to be decided, as none of the cases

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41. Id. at 77-78, 102 S. Ct. at 2875.
42. Id. at 84-86, 102 S. Ct. at 2878-79.
43. Id.. at 86 n.39, 102 S. Ct. at 2879.
44. Id.
45. Id. at 87 n.40, 102 S. Ct. at 2880.
46. Id. at 89-90, 102 S. Ct. at 2881 (Rehnquist, J., concurring).
47. Id. at 90-92, 102 S. Ct. at 2881-82.
48. Id. at 91, 102 S. Ct. at 2882 (Rehnquist, J., concurring).
49. Id.
had gone so far as to sanction the type of litigation to which Marathon would be subjected to against its will under the 1978 Act.\textsuperscript{50}

Justice White, joined by Chief Justice Burger and Justice Powell, dissented on the ground that a functional approach should be used to analyze the constitutionality of legislative courts concentrating on whether a particular court undermines checks and balances and separation of powers. Justice White stated:

The inquiry should, rather, focus equally on those Art[icle] III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Art[icle] III values should then be measured against the values Congress hopes to serve through the use of Art[icle] I courts.\textsuperscript{51}

Justice White concluded that Congress understandably was reluctant to create several hundred bankruptcy specialist judges with life tenure to address what may be a comparatively temporary plethora of such cases, and that the existence of traditional appellate review by Article III courts provided a sufficient rule of law check in this particular case, emphasizing that when a legislative court is "designed to deal with issues likely to be of little interest to the political branches," there is no fear that Congress is creating such tribunals to aggrandize its own power.\textsuperscript{52}

In two cases after \textit{Northern Pipeline} considering legislative courts' adjudications of private law disputes, the Court adopted an approach similar to that espoused by Justice White in his \textit{Northern Pipeline} dissent: balancing the adverse impact on Article III values with the justification for use of a legislative court. Balancing such indeterminate values has instilled more unpredictability in an already uncertain area of law.

In \textit{Thomas v. Union Carbide Agricultural Products Co.},\textsuperscript{53} the Court held that Article III does not prohibit Congress from selecting binding arbitration with only limited judicial review as the mechanism for resolving disputes between private participants in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")\textsuperscript{54} pesticide registration program. FIFRA authorizes the EPA to use a previous applicant's research data in considering another manufacturer's application for a "follow-on" registration of a similar product.

\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at 115, 102 S. Ct. at 2894 (White, J. dissenting).
\textsuperscript{52} \textit{Id.} at 115, 102 S. Ct. at 2894.
\textsuperscript{53} \textit{Id.} at 115, 102 S. Ct. at 2894.
\textsuperscript{54} FIFRA requires manufacturers of pesticides, as a precondition for registering a pesticide, to submit research data to the EPA concerning the product's health, safety, and environmental effects. \textit{Id.} at 571, 105 S. Ct. at 3328.
The EPA may consider such data only if the "follow on" registrant offers to compensate the original applicant for use of the data, and, if they disagree on compensation, the EPA may submit the dispute to binding arbitration. Judicial review was limited to instances of "fraud, misrepresentation, or other misconduct." A plurality, led by Justice O'Connor, distinguished Northern Pipeline as establishing only "that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." In approving the arbitration scheme, the plurality adopted a functional approach, considering the desirability of a non-Article III tribunal and the degree of encroachment on the federal judiciary. Significantly, the plurality rejected the Northern Pipeline plurality's rationale that there were only four situations in which legislative courts could be used: territorial disputes, military cases, public rights matters, and as adjuncts to Article III courts. The plurality emphasized, however, that "Congress, acting for a valid legislative purpose pursuant to [Article I], may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution."

Justice Brennan, with Justices Marshall and Blackmun, concurred in the result, stating that "the FIFRA compensation scheme challenged in this case should be viewed as involving a matter of public rights as that term is understood in the cases culminating in Northern Pipeline." Justice Brennan noted that the dispute arose "in the context of a federal regulatory scheme that virtually occupies the field" and that "at its heart the dispute involves the exercise of authority by a Federal Government arbitrator in the course of administration of FIFRA's comprehensive regulatory scheme."

In Commodity Futures Trading Commission v. Schor, Justice O'Connor, writing for a majority of the Court, held that the Commodity Exchange Act ("CEA") did not violate Article III in authorizing the Commodities Future Trading Commission ("CFTC")
to entertain a professional commodity broker's private state law counterclaim for a debit balance account against a customer who had filed a federal law reparation claim against the broker under the Act for fraudulent or manipulative conduct. First, the opinion reasoned that Article III serves both to protect the role of the independent judiciary as an inseparable element of the constitutional system of separation of powers and checks and balances, and to preserve litigants' interests in an impartial and independent federal adjudication of claims to which the federal judicial power extends. 65

Second, the Court found that the customer, Schor, waived any personal right he had under Article III to a trial of the counterclaim in an Article III court because he elected to forgo his right to commence his claim in a state or Article III court, filing it instead in the CFTC and demanding that the broker dismiss his previous federal court diversity suit, in which Schor had counterclaimed and which involved the same two claims. 66

Third, institutionally, rather than as a matter of personal right, separation of powers principles inherent in Article III are not subject to waiver or consent for the same reason that parties cannot confer subject-matter jurisdiction by consent. The CFTC's jurisdiction of the common-law counterclaim does not violate the nonwaivable protections which Article III affords separation of powers principles. 67 In determining whether a congressional assignment of an adjudication of Article III business to a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court must weigh a number of factors, none of which is determinative, with an eye to the practical effect on the constitutional role of the judiciary, including:

- the extent to which the 'essential attributes of judicial power' are reserved to Article III courts,
- the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts,
- the origins and importance of the right to be adjudicated, and
- the concerns that drove Congress to depart from the requirements of Article III. 68

Fourth, the Court found that Congress's allocation of power to the CFTC does not impermissibly intrude on the province of the judiciary for two reasons. First, the CFTC's adjudicatory powers depart from the traditional agency model in only one respect: jurisdiction over

65. Id. at 849-50, 106 S. Ct. 3255-56.
66. Id. at 848-51, 106 S. Ct. 3256.
67. Id. at 850-51, 106 S. Ct. at 3256-57.
68. Id. at 851, 106 S. Ct. at 3257.
common law counterclaims. The CEA leaves more of the "essential attributes of judicial power" to Article III courts than did that portion of the Bankruptcy Act held unconstitutional by a majority in Northern Pipeline. The CFTC, like the agency in Crowell, operates only in a particular area of law, not broadly with all civil proceedings related to bankruptcy cases as did the bankruptcy courts in Northern Pipeline. CFTC orders are enforceable only by order of the district court, and they are also reviewed under the same "weight of evidence" standard sustained in Crowell, rather than the clear error standard found unconstitutional in Northern Pipeline. CFTC legal determinations are subject to de novo review. The CFTC, unlike the bankruptcy courts, does not exercise "all ordinary powers of district courts" and may not preside over jury trials or issue writs of habeas corpus. Second, although the nature of the claim is significant apart from the method of its adjudication and the counterclaim asserted was a private state-law right at the core of matters normally reserved to Article III courts, the state law character of the claim is not talismanic. The character of a claim is significant for the simple reason that "private, common law rights were historically the types of matters subject to resolution by Article III courts." The risk of an Article III violation is magnified when Congress allocates the decision of a state private law claim to a non-Article III court. Accordingly, when such rights are at stake, an examination of the congressional action has been searching. In this case, however, the congressional grant of limited jurisdiction over a narrow class of common law claims incidental to the primary, unchallenged adjudicative function does not create a substantial threat to the separation of powers. Further, Congress did not withdraw the claim from jurisdiction of the state and Article III courts. Congress may make available a "quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences."

Justice Brennan, joined by Justice Marshall, dissented, stating that he would limit the judicial authority of non-Article III federal

69. Id. at 852, 106 S. Ct. at 3257.
70. Id.
71. Id. at 852-53, 106 S. Ct. at 3257-58.
72. Id. at 853, 106 S. Ct. 3258.
73. Id.
74. Id. at 852-53, 106 S. Ct. at 3257-58.
75. Id. at 853, 106 S. Ct. at 3258.
76. Id. at 854, 106 S. Ct. at 3258.
77. Id.
78. Id.
79. Id.
80. Id. at 855, 106. S. Ct. at 3259.
81. Id.
tribunals to the few, long-established exceptions described by the plurality in *Northern Pipeline* and would countenance no further erosion of Article III's mandate. After tracing the objects and values the Framers sought to achieve by the separation of powers and Article III, he maintained:

These important functions of Article III are too central to our constitutional scheme to risk their incremental erosion. The exceptions we have recognized for territorial courts, courts-martial, and administrative courts were each based on certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Here, however, there is no equally forceful reason to extend further these exceptions to situations that are distinguishable from existing precedents. The Court, however, engages in just such an extension. By sanctioning the adjudication of state-law counterclaims by a federal administrative agency, the Court far exceeds the analytic framework of our precedents. . . .

Article III's prophylactic protections were intended to prevent just this sort of abdication to claims of legislative convenience.

Although *Thomas* and *Schor* "rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights," 84 in *Granfinanciera, S.A. v. Nordberg*, Justice Brennan was able to make effective use of the distinction once again, albeit for a more limited purpose. 85 The question in *Granfinanciera* was whether a person who has not filed a claim against a bankruptcy estate, and therefore has not submitted to the bankruptcy court's equity jurisdiction, has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer. 86 Justice Brennan, writing for a six-member majority, held that the Seventh Amendment entitles such a person to a trial by jury, notwithstanding Congress's designation of fraudulent conveyance actions as "core proceedings." 87 First, the Court determined that the nature of the relief that the trustee in bankruptcy sought demonstrated that his cause of action should be characterized as legal rather than equitable, such that the defendants in the suit were

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82. *Id.* at 859, 106 S. Ct. at 3261 (Brennan, J., dissenting).
83. *Id.* at 861-62, 863, 106 S. Ct. at 3262, 3263 (citations and quotations omitted).
86. *Id.* at 36, 109 S. Ct. at 2787.
87. *Id.*
prima facie entitled to a jury trial under the Seventh Amendment. 88 Second, the Court addressed whether Congress may assign or has assigned resolution of the cause of action to a non-Article III adjudicative body that does not use a jury as a factfinder. 89 Relying on "our decisions exploring the restrictions Article III places on Congress'[s] choice of adjudicative bodies to resolve disputes over statutory rights to determine whether petitioners are entitled to a jury trial" in addition to Seventh Amendment precedents, the Court concluded that the Federal Government need not be a party for a case to revolve around public rights. 90 Relying on Thomas, the court stated:

The crucial question, in cases not involving the Federal Government, is whether Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I,[has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary. If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court. If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial. 91

Justice Scalia, in a concurring opinion, expressed the view that "public rights" involve only cases with the United States as a party, 92 and he argued that "[t]his central feature of the Constitution must be anchored in rules, not set adrift in some multifactored 'balancing test.'" 93 Whether Granfinanciera presages restoration of the distinction between private rights and public rights remains to be seen. 94

Furthermore, as Professor Chemerinsky notes, there are many other questions still unanswered:

Is appellate review a prerequisite to the use of legislative courts, or is its presence or absence simply one factor in the

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88. Id. at 47-48, 109 S. Ct. at 2793.
89. Id. at 53, 109 S. Ct. 2796.
90. Id. at 54, 109 S. Ct. 2796-97.
91. Id. at 53-55, 109 S. Ct. at 2797.
92. Id. at 68, 109 S. Ct. at 2804 (Scalia, J., concurring).
93. Id. at 70, 109 S. Ct. at 2805.
94. See Laurence H. Tribe, American Constitutional Law § 3-5, at 278 (3d ed. 2000); Chemerinsky, supra note 25, § 4.5.4, at 255 n.96.
balance? If appellate review must exist, what must be its scope? Under what circumstances should a legislative court be invalidated because of fairness considerations? . . . Also, the Court's balancing approach raises concerns that Congress can eviscerate the jurisdiction of Article III courts by the slow transfer of power on a case-by-case basis. 95

III.

Although the decisions of the Supreme Court have failed to produce a comprehensive set of principles for determining when a non-Article III tribunal will be held to be an unconstitutional divestment of judicial power, a number of scholars have provided some guidance. Two have developed particularly cogent guidelines for deciding such cases by debunking the literal meaning of Article III as a workable legal rule or concept; identifying the objects and values implicit within the literal meaning of Article III; and formulating precepts for using judicial review by Article III courts of non-Article III adjudications to preserve and further Article III objects and values. 96 For quick reading, here is a condensed, simplified version of their ideas, relying on quotations and close paraphrasing of their words.

(1) The literal meaning of Article III, as explained by Professor Bator, is that if Congress decides to remove some of the antecedent general jurisdiction of the state courts by assigning the adjudication of cases enumerated in Article III to a federal tribunal, that tribunal must be an "inferior Court" ordained pursuant to Article III and in accordance with the tenure, salary, and "case-or-controversy" restrictions. 97 The Constitution adopts "a simple, majestic, and powerful model": Congress may leave initial adjudication of some or all of the Article III cases to the state courts, but if federal adjudication is needed, the requirements of Article III automatically come into play and specify what sorts of courts Congress must employ. 98 The only federal tribunals that can be legislatively authorized to decide cases arising under the Constitution, the laws of the United States, and the other kinds of cases listed in Article III, are Article III courts, whose judges enjoy the safeguards of life tenure and undiminished salary. 99

(2) For over 200 years, however, Congress has consistently acted on the premise that it has the authority, if necessary and proper to the

95. Chemerinsky, supra note 25, § 4.5.4, at 255.
97. Bator, supra note 96, at 234.
98. Id.
exercise of its various substantive legislative powers, to constitute special courts, tribunals, and agencies to adjudicate cases and controversies arising under federal law. Yet these are not the inferior courts specified in Article III, because their adjudicators do not enjoy Article III’s tenure and salary protections, and because they have been entrusted with executive, legislative, or administrative tasks outside the scope of the judicial power extending to Article III cases and controversies. \(^{100}\) And, during all this time, with virtually equal consistency, courts have sustained that exercise of power. \(^{101}\)

(3) Nevertheless, implicitly reflected in the literal words of Article III and its guarantees of life tenure and nonreduction of salary is the design to promote at least three sets of values. \(^{102}\) First, and most important, are the values implicit in the separation of powers, \(^{103}\) including the ideal of an independent judiciary. \(^{104}\) The Constitutional Convention and the Federalist Papers demonstrate that the Framers intended to create a federal judiciary that, once appointed, was to be as free from political and financial pressures from the other branches as “the lot of humanity will admit.” \(^{105}\) The Framers aimed to create a government capable of effective action, but they feared the arbitrariness and tyranny that could result from excessive concentration of power in a single branch. Believing that the best safeguard lay in a structure in which the factional or self-aggrandizing tendencies of any one branch could be checked by another, the Framers viewed Article III’s provision for a life-tenured judiciary as crucial to the separation of powers. To subject federal judges to political influence would have threatened the rule of law. \(^{106}\) Although this constitutional framework has been largely transformed by the rise of administrative agencies, separation of powers concerns still pervade legal thought. The underlying constitutional conception is that those with governmental power must be subject to the limits of law, and that the limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary. \(^{107}\) “[T]he absence of electoral safeguards against arbitrary and self-interested bureaucratic decisionmaking and the documented risk of agency susceptibility to influence by private groups furnish compelling separation-of-

\(^{100}\) Bator, supra note 96, at 235.
\(^{101}\) Id.
\(^{102}\) Fallon, supra note 23, at 937.
\(^{103}\) Id.
\(^{104}\) Bator, supra note 96, at 235.
\(^{105}\) Id.
\(^{106}\) Fallon, supra note 23, at 937.
\(^{107}\) Id. at 938.
powers arguments for retaining the Article III courts as guarantors
of agency fidelity to law."

Second, Article III reflects the value of promoting fairness to litigants. This value is especially important when a citizen advances claims against the government or asserts an unpopular position in order to guarantee adjudicative fairness. "An official who is dependent on Congress or the executive for continuation in office may be, or may appear to be, less impartial than a judge whose continued tenure is assured." "

Third is the value of judicial integrity. Because of administrative agencies' hybrid and problematic status, Congress frequently provides for judicial review partly "to secure an imprimatur of legitimacy for administrative action." That imprimatur cannot properly be given if the reviewing court were not allowed to assess the underlying lawfulness of an agency's decision. At some point judicial integrity is compromised by limitations on the scope of judicial review. "Possessed of no power 'over either the sword or the purse,' article III courts ultimately function effectively only to the extent that they command respect." 

(4) There is an alternative "appellate review theory" of Article III that promotes its objects and values, and affords permissible accommodation to the reality of the administrative state and most of the Supreme Court's precedents. Article III vests judicial power in specified courts, extending it to nine enumerated classes of cases and controversies. But, it does not define the term exercise, or explain what participation in its exercise is required to constitute the exercise of the federal judicial power. Nor does it require those courts to have "a rigid monopoly over all aspects of the litigation from beginning to end." It leaves open the possibility that the concept of the exercise of the judicial power by Article III courts may include sufficient participation to protect Article III values whether as a matter of original or appellate jurisdiction. By requiring appellate jurisdiction in all cases decided initially by non-Article III adjudicators, an appellate review theory complies with both the letter and the spirit of the Constitution. The language is satisfied because in every case that is adjudicated the federal judicial power is vested in an Article III court, and the spirit is satisfied because the jurisdiction of the constitutional court, if it is appellate rather than

108. Id.
109. Id. at 941.
110. Id. at 942.
111. Id.
112. Id. at 933.
113. Bator, supra note 96, at 265.
114. Id.
original, includes sufficiently searching review to protect Article III values.\textsuperscript{115}

(5) To implement this interpretation of Article III, each scholar proposed his own appellate review theory rules.

Professor Bator proposed the rule that the federal judicial power has been adequately vested in Article III courts if:

(i) the jurisdictional scheme, including its assignment of initial jurisdiction to the agency, is a reasonably necessary and proper way to achieve the ends of a valid federal program; (ii) the procedures and constitution of the agency comport with procedural due process; (iii) the scheme satisfies the requirements of due process with respect to judicial review; and (iv) the scheme gives an Article III court ultimate power to control the legality and constitutionality of the powers asserted and exercised.\textsuperscript{116}

Professor Fallon proposes a more elaborate appellate review theory that he fills with greater detail after sketching its outline as follows: (i) Article III does not forbid Congress from employing non-Article III tribunals, at least in the first instance, in the adjudication of any category of cases that might have been assigned to an Article III court other than the Supreme Court;\textsuperscript{117} (ii) when Congress chooses to use a non-Article III federal tribunal, it must also provide for judicial review of at least some issues in an Article III court;\textsuperscript{118} (iii) the issues for which appellate review must be provided are violations of constitutional rights,\textsuperscript{119} all questions of law (including public rights),\textsuperscript{120} constitutional facts (findings of facts that effectively dispose of constitutional claims),\textsuperscript{121} jurisdictional facts\textsuperscript{122} and possibly liberty interests;\textsuperscript{123} (iv) the requisite scope of review varies with the issues: constitutional rights require de novo review;\textsuperscript{124} issues of law require de novo review, which is compatible with the idea of judicial deference insofar as the court decides whether the agency acted within its authority and acknowledges the agency’s expertise in interpretation;\textsuperscript{125} ordinary facts require relaxed, “substantial evidence”

\begin{itemize}
  \item \textsuperscript{115} Fallon, \textit{supra} note 23, at 944.
  \item \textsuperscript{116} Bator, \textit{supra} note 96, at 267-68.
  \item \textsuperscript{117} Fallon, \textit{supra} note 23, at 949.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id. at 975.
  \item \textsuperscript{120} Id. at 976-77.
  \item \textsuperscript{121} Id. at 986.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id. at 989.
  \item \textsuperscript{124} Id. at 976.
  \item \textsuperscript{125} Id. at 983-84.
\end{itemize}
review and constitutional and jurisdictional facts require de novo review.

IV.

Meditation on the limits imposed by Article V of the 1974 Louisiana Constitution upon the legislative and judicial powers, with respect to judicial and administrative jurisdiction, leads to at least four separate inquiries. First, as interpreted by the Louisiana Supreme Court, what is the general nature and scope of Article V judicial power? Second, what insights for interpreting Article V’s limits on judicial and legislative power are provided by the models or approaches to interpreting Article III? Third, in light of the Louisiana and federal jurisprudence and commentary, what limits does Article V place on the original jurisdiction of judicial and administrative tribunals? Fourth, with the same considerations in mind, what does Article V require with respect to judicial review of administrative agency adjudications? Finally, has Article V served well as a constitutional safeguard against legislative encroachment upon judicial independence through the creation of non-Article V adjudicatory tribunals and as a basis for judicial review and enforcement of the constitution and laws with respect to administrative, executive and legislative actions and determinations?

a.

The Louisiana Supreme Court decisions interpreting the judiciary articles of the 1974 and 1921 state constitutions generally reflect the similarities and differences between the structure and concepts of the state provisions and Article III of the United States Constitution. Prior decisions of the United States Supreme Court interpreting and applying Article III have been highly influential upon the state supreme court in instances in which the state and federal constitutional provisions at issue are structurally and conceptually similar.

"It is a well established rule of constitutional construction that where a constitutional provision similar or identical to that used in a prior constitution is adopted, it is presumed such provision was adopted with the construction previously placed on it by the jurisprudence." Accordingly, in appropriate instances, we may rely on the Louisiana Supreme Court’s decisions under the 1921 state constitution in interpreting Article V of the 1974 Louisiana Constitution.

126. Id. at 989.
127. Id. 990.
128. Succession of Lauga, 624 So. 2d 1156, 1167 (La. 1993).
In principle, the Louisiana courts established by Article V are courts of general, unlimited jurisdiction. Article V vests power and jurisdiction directly in the courts it establishes and authorizes; the legislature cannot confer or enlarge the jurisdiction of any court as the jurisdiction of the courts is prescribed by the constitution. In contrast, federal courts are courts of limited jurisdiction. A federal court may adjudicate a case only if there is both a federal constitutional and a federal statutory grant of jurisdiction.

The requirement of a justiciable controversy is firmly established as a limitation upon the state courts' exercise of the judicial power by the Louisiana Supreme Court cases arising under both the 1921 and 1974 state constitutions. In Perschall v. State, the court observed that “[t]hese traditional notions of justiciability are rooted in our constitution's tripartite distribution of powers into the executive, legislative, and judicial branches of government.” Prior to Perschall, the court consistently applied the justiciability prerequisite as a constitutional or jurisdictional principle without fully explaining that it is inherently required by the state constitutional system of separation of powers and checks and balances, which replicates that doctrine of the national Constitution.

The 1974 Louisiana Constitution plainly vests in courts established and authorized by Article V the judicial power to declare laws unconstitutional and to review the actions of the executive.

129. See West v. Town of Winnsboro, 252 La. 605, 211 So. 2d 665 (1968).
131. See Chemerinsky, supra note 25, § 5.1, at 258 n.2: See, e.g., Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850) (Congress creates lower federal courts and thus has discretion to vest them with less than the full jurisdiction allowed in Article III.) . . . The requirement that there be a statutory provision for jurisdiction applies only to lower federal courts; that is, a constitutional provision is sufficient for Supreme Court jurisdiction, which is said to be ‘self-executing.’ But the Supreme Court nonetheless always has acted as if Congress confers jurisdiction on it. See Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810).
132. 697 So. 2d 240 (La. 1997).
133. Id. at 251.
134. See, e.g., St. Charles Parish v. GAF Corp., 512 So. 2d 1165 (La. 1987); State v. Bd. of Supervisors, 84 So. 2d 597, 599 (1955) (“Ever since 1810, it has been fundamental in the law of Louisiana that courts sit to administer justice in actual cases and that they do not and will not act on feigned ones, even with consent of the parties.”) (citing Livingston v. D'Orgeno, D.C., 108 F. 469 (1809)); see also Livingston v. D'Orgeno, 1 Mart. (o.s.) 87 (La. 1810); but see, In re Gulf Oxygen Welder's Supply Profit Sharing Plan and Trust Agreement, 297 So. 2d 663 (La. 1974).
branch of government. The Louisiana Supreme Court consistently has held under both the 1921 and 1974 state constitutions that it is the final arbiter of the meaning of the state constitution and laws. Undoubtedly, these interpretations of the state constitutions, as well as the adoption of Article V, § 5(D) itself, were influenced by Chief Justice Marshall’s opinion in *Marbury v. Madison* and its progeny. The Supreme Court’s opinion in *Marbury* established several important principles concerning the federal judiciary, including: (1) the federal courts have the power to declare federal statutes unconstitutional; (2) the Supreme Court is the authoritative interpreter of the federal Constitution and laws; and (3) the federal courts have the power to review the actions of the executive branch of government.

b.

The Louisiana constitutional system of checks and balances, separation of powers, and, to a large extent, its judiciary article, are modeled upon the national constitution. Therefore, because Article V and Article III appear designed to promote the same basic values and objects, Louisiana jurists and scholars should be aware of the dialogue and criticisms among the advocates of the various federal models or approaches to judiciary article interpretation. On the other hand, because of the significant differences between the structures of the two judiciary articles and between the fundamental concepts of


137. See, e.g., Succession of Lauga, 624 So. 2d 1156, 1167 (La. 1993); State v. Perry, 610 So. 2d 746, 751 (La. 1992); Jefferson Lake Sulphur Co. v. State, 213 La. 1, 34 So. 2d 331 (1948).

138. 5 U.S. (1 Cranch) 137 (1803).

139. See generally, Chemerinsky, supra note 25, § 1.3, at 14-18.

140. 5 U.S. (1 Cranch) at 176 (“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written”).

141. Id. at 177 (“It is emphatically the province and duty of the judicial department to say what the law is”).

142. Id. at 163, 166:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . But when the legislature proceeds to impose on that [executive] officer other duties; when he is directed peremptorily to perform certain acts; . . . he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.
the two constitutions, none of the federal models can be used as a custom-made guidebook for resolving Article V controversies.

The United States Supreme Court decisions and scholarly commentary suggest a number of models for interpreting Article III. For present purposes, four models or approaches to Article III interpretation also provide helpful insight to the analysis of controversies involving Article III of the Louisiana Constitution: (1) the literal model; (2) the categorical model; (3) the functional-balancing model; and (4) the appellate review model.143

In summary, the literal model is, of course, simply a literal reading of Article III. This model has not proven to be practicable, but Article III does evince the values and objects upon which the other models draw. The categorical approach, which Justice Brennan espoused in Northern Pipeline, asserts that the literal model states the general rule, which has simply been subjected to a few narrow, well-defined, specially justified, historical exceptions:144 (1) military courts; (2) territorial courts; (3) courts created to adjudicate cases involving “public rights;” and (4) adjunct tribunals, assigned limited functions in such a way that the essential attributes of judicial power are retained in the Article III court.145 The functional-balancing model asserts, first, that Article III must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate “with respect to specialized areas having particularized needs and warranting distinctive treatment”146 where “resort to the initial jurisdiction of an article III court may be ill adapted to the legitimate substantive end;”147 and, second, Article III “should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities.”148 In recent cases, this view has been expressed by Justice White in his Northern Pipeline dissent, and by Justice O’Connor in plurality and majority opinions in Thomas and Schor. Finally, the appellate review model is based on a simplified combination of the arguments of Professors Fallon and Bator: Congress may give adjudicatory power to non-Article III tribunals if the Article III courts have adequate power to control the legality of the tribunals’ exercise of adjudicatory power through judicial review of law and facts (including constitutional facts and law and the sufficiency of the evidence).

143. See Bator, supra note 96, at 240-63.
144. Id. at 243.
147. Bator, supra note 96, at 254.
The Louisiana constitutional courts are courts of general jurisdiction receiving their judicial power directly from the constitution. Unlike a limited jurisdiction federal court, the Article V courts are not dependent upon grants of jurisdiction from the legislature. Although in a particular instance a Louisiana constitutional provision may be congruent with aspects of a federal model, in others the federal model may be irrelevant. Even when the language of Article V and Article III are similar, the United States Supreme Court's interpretation may be influenced by historical events or governmental exigencies not relevant to the interpretation of the Louisiana constitutional provision.

c.

In deciding whether a particular legislative act violates Article V, Section 16(A) by transferring the original jurisdiction of a civil matter from the district courts to an administrative agency, for example, the federal models do not show the way but only warn of dangers to avoid. The court, in making such a decision, usually will be guided substantially by the plain words and structure of the constitutional provisions. Article V, Sections 1 and 16 vest original jurisdiction of virtually all civil and criminal matters in the district courts.\textsuperscript{149} Article V, Sections 1 and 15 exclude legislative power to establish courts except for trial courts of limited jurisdiction with parishwide territorial jurisdiction and subject matter jurisdiction uniform throughout the state.\textsuperscript{150} Article V, Sections 21, 22, and 23 bar the exercise of a district court's jurisdiction by a non-elected judge without the term, retirement, and compensation protections required by those provisions.\textsuperscript{151} If, at the time the legislature acts, the civil matter in question is within the original jurisdiction of the district courts, the power of the legislature does not extend to the divestment of the original jurisdiction of the district courts of that matter. Thus, only a comparatively simple and straightforward inquiry by the court into the familiar territory of its own jurisdiction is called for. It is not appropriate or necessary for the court to engage in its own policy balancing or to import arcane concepts from outside of the state constitution or legal system.

Furthermore, Article V, Section 16 is substantially similar to Article VII, Section 35, Clauses 3 and 4 of the 1921 Louisiana Constitution vesting original jurisdiction of all civil matters in the district courts, except such as may be vested in other courts

\textsuperscript{149} La. Const. art. V, §§ 1, 16.
\textsuperscript{150} La. Const. art. V, §§ 1, 15.
\textsuperscript{151} La. Const. art. V, §§ 21, 22, 23.
authorized by the constitution. In cases governed by the 1974 and 1921 constitutional provisions, the Louisiana Supreme Court held that the legislature cannot by statutory law enlarge the jurisdiction conferred on the district courts by the constitution. The words of Article V, Section 16(A) provide a clear statement that the district courts are constitutionally vested with original jurisdiction of all civil matters, except as otherwise provided by the Constitution, and it could be inferred from the state supreme court’s cases disallowing the legislature’s enlargement of that jurisdiction that the court would also hold an attempted statutory diminishment of that constitutionally conferred judicial power unconstitutional.

Nevertheless, in 1988 the legislature enacted Act 938 of 1988 vesting in administrative hearing officers the “exclusive original jurisdiction” to adjudicate workers’ compensation claims. In Moore v. Roemer, workers’ compensation claimants and attorneys brought an action seeking a declaration of unconstitutionality of the Act. The Louisiana Supreme Court declared the Act unconstitutional as an attempted legislative divestment of district courts of the original jurisdiction of civil matters in violation of Article V, Section 16 of the 1974 Constitution. The rationale of the court’s holding was two-fold. First, Article V, Section 16’s “original jurisdiction” refers to jurisdiction in the first instance. The legislature may not alter the original jurisdiction of the district courts vested by the constitution. The constitutional convention history indicates a
clear intent by the delegates to prevent the legislature from changing the jurisdiction of the district courts by majority vote. Second, Article V, Section 16's language displays an evident intent to vest, with some exceptions, original jurisdiction of all civil and criminal matters in the district courts. The provision indicates an intent to include all matters not criminal as "civil matters." Nothing in the constitution suggests an intent to recognize a category of innominate matters, separate from civil and criminal matters, that the legislature could permissibly remove and assign to a non-Article V tribunal. Since the 1914 inception of workers' compensation in the state, claims for benefits have been adjudicated as civil matters by the district courts. Consequently, Article V, Section 16's "civil matters" includes workers' compensation cases.

The court rejected the defendants' argument that the Act effectively repealed the previously existing judicial remedy and created a new administrative remedy, stating that while the legislature could change or abolish the workers' compensation "remedy," it is not free of constitutional limits over a particular remedy. Thus, the court indicated that although the legislature has the power to modify or abolish unvested substantive rights and remedial rights or actions, it cannot divest the constitutional jurisdiction that has already been constitutionally extended to justiciable controversies involving those rights, and that Act 938 of 1988 does not purport to alter or abolish substantive rights or remedial rights but simply aims to transfer or assign to a non-Article V tribunal the power to exercise original jurisdiction over the adjudication involving those rights.

The court also rejected the defendants' argument that workers' compensation involves public law and that the legislature is free to create administrative jurisdiction in cases involving public rights. It did so, however, by simply concluding that workers' compensation is a matter of private right, the adjudication of which involves disputes between private parties. Thus, the court did not directly answer the questions raised by the defendants' contention, viz., whether there is a constitutional distinction between public and private rights, as has been recognized by the federal courts, and, if so, is the legislature empowered to assign adjudicatory jurisdiction to

157. Id. at 79.
158. Id. at 80. Recently, in Pope v. State, 792 So. 2d 713 (La. 2001), the court for similar reasons declared unconstitutional the Corrections Administrative Remedy Procedure, La. R.S. §§ 15:1171-1179 (1992), as an invalid attempt to divest district courts of original jurisdiction of inmates' tort claims against the state and vest original jurisdiction in an administrative system within the Department of Corrections and sheriffs' departments.
159. Id.
160. Id. at 80-81.
non-Article V tribunals over public civil matters even after they have been placed within the original jurisdiction of the district courts.

The Louisiana First Circuit Court of Appeal appears to be the only state appellate court to address the "res nova" question of "whether the [federal] public rights doctrine has any application under the Louisiana Constitution . . . ." The court decided "to refrain from adopting the federal public rights doctrine into the jurisprudence of this state, as it conflicts with the intent and purpose of the Louisiana Constitution." The first circuit based its decision on the grounds that, *inter alia*:

> While the Congress is authorized . . . to establish federal courts, the Louisiana Constitution prohibits the exercise of such power except as authorized therein[;] . . . the introduction of the public rights doctrine is unnecessary in . . . Louisiana, as an adequate provision is made in our constitution for the vesting of quasi-judicial powers in administrative agencies[;] [and there are] additional provisions in our constitution not present in the federal constitution, expressly restricting legislative power to alter the court system....

Although three dissenting judges disagreed with the majority's criticism of the public rights doctrine and identification of its source, they did not dispute that its adoption would be res nova in Louisiana, or expressly contend that it should be adopted. Perhaps even more significant, the Louisiana Supreme Court, in reversing on other grounds, avoided any mention of the public rights doctrine.

The Louisiana first circuit's decision rejecting the federal public rights doctrine appears to have been well-founded. Louisiana has not recognized the public rights doctrine in its substantive or procedural law or jurisprudence. Louisiana and civil law scholars have recognized the categories of public and private law for analytical and academic purposes.

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162. *Id.* at 407.
163. *Id.*
164. *Id.* at 408-411 (Watkins, Shortess, and Foil, J., dissenting).
166. See A. N. Yiannopoulos, *Civil Law System Louisiana and Comparative Law* § 121, at 241 (2d ed. 1999):
   For the purpose of systematic analysis of legal institutions, laws are frequently classified into various branches that contain the basic rules
held or suggested, however, that the mere analytical classification of a law as public or private can affect or determine whether a justiciable controversy involving substantive rights and remedial rights created by the law falls within the original jurisdiction of the district courts. Because "all civil matters" within the district courts' original jurisdiction include all matters that are not "criminal" in nature,\footnote{Moore v. Roemer, 567 So. 2d at 79-80 (La. 1990); see also John Devlin, Louisiana Constitutional Law, 51 La. L. Rev. 295, 314-18 (1990).} justiciable controversies based on rights created by laws classifiable as public, private, or both, necessarily come within that jurisdiction. This appears to be the case in most jurisdictions. Professor Dan B. Dobbs, in discussing public law and private law remedies, observes:

Courts impose no across-the-board distinctions between public and private law remedies. Remedial principles remain the same, and public law remedies are, in the broad sense, the same as those used in private law. For instance, public agencies recover statutory damages, injunctions, and even restitution of improper gains made by the defendant at public expense. Private individuals, pursuing litigation of public importance, recover the same general remedies. Private plaintiffs recover both damages and injunctions in civil rights cases, and private individuals may similarly serve the public interest when they force a law violator to disgorge or make restitution of his wrongful gains.\footnote{Dan B. Dobbs, I Dobbs Law of Remedies § 1.5, at 21 (2d ed. 1993) (footnotes omitted); see ("[W]hat is a public law issue is a matter of degree, but it certainly includes private litigation brought to enforce civil rights or to litigate...\@)\footnote{See generally Allan Kanner, Public and Private Law, 10 Tul. Envt'l L.J. 235, 236-40 (1997); see id. at 254 ("[E]xpress legislation may expand individual rights, such as where a citizen suit provision is added to public law."); 1 Planiol & Ripert, Treatise on the Civil Law pt. 1, ch. 1, nos. 18-27, at 15-19 (La. St. L. Inst. trans., 12th ed. 1959); see id. at no. 18: It is difficult to establish a sharp division between the different branches of the law. The points of contact are numerous. Many of the matters and questions are common to two and sometimes three different branches, where they are considered from different points of view. Nevertheless, if precise limits are often lacking, the existence of the large divisions are nonetheless beyond a doubt.}
Similarly, the Louisiana Code of Civil Procedure and the courts do not impose any distinction with respect to jurisdiction or procedure between private and public law based civil actions. Moreover, to read such a distinction into Article V, Section 16(A), would be inconsistent with the well-settled view that the district courts are courts of general jurisdiction having original jurisdiction over all criminal and non-criminal litigation, except as otherwise provided by the constitution.\textsuperscript{169}

In addition to the lack of any basis in Louisiana law for the public rights doctrine, the federal courts’ own experience counsels against its adoption. The public-private right dichotomy appears to have originated with a statement by Justice Curtis in \textit{Murray’s Lessee v. Hoboken Land & Improvement Company}.\textsuperscript{170} The case concerned whether summary executive enforcement, without resort to courts, violates Article III or the due process clause. In no way did it address the issue of whether Congress may determine to constitute a court as a legislative or administrative court without regard to Article III.\textsuperscript{171} Justice Curtis justified executive execution on the basis of a distinction between public and private rights:\textsuperscript{172}

\begin{quote}
[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress [sic] may or may not bring within the cognizance of the courts of the United States, as it may deem proper.\textsuperscript{173}
\end{quote}

Justice Curtis made no reference to the language, history, or values of Article III to support the dichotomy. Nevertheless, it was subsequently used in the 1920s and 1930s by some cases which suggested that Congress may disregard Article III in setting up legislative courts if “public” rather than private rights are involved.\textsuperscript{174} Thereafter, the dichotomy fell into disuse until Justice Brennan revived it as an “exceptional category” in his plurality opinion in \textit{Northern Pipeline}.\textsuperscript{175} But after the doctrine received

\begin{footnotes}
\footnote{environmental issues, or issues about the disposal or management of public resources.}{Id. (footnotes omitted).}
\footnote{See, e.g., Moore v. Roemer, 567 So. 2d 75, 79 (La. 1990); West v. Town of Winnboro, 211 So. 2d 665 (La. 1967); Tomas v. Conco Food Distributors, 666 So. 2d 327 (La. App. 3d Cir. 1995).}
\footnote{59 U.S. 272, (18 How.) 272 (1855).}
\footnote{Bator, supra note 96, at 247.}
\footnote{Id.}
\footnote{Murray’s Lessee, 59 U.S. at 284.}
\footnote{Bator, supra note 96, at 247.}
\footnote{Id.}
\end{footnotes}
severe criticism from other justices and scholarly commentators, a majority of the Court "rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights..."\textsuperscript{176}

There may have been a practical justification for the public rights doctrine when it was conceived and expanded by the Supreme Court. The Supreme Court evidently embraced the public rights doctrine to avoid requiring that Congress ordain and establish Article III courts to handle all litigation within the territories, as well as customs disputes and military courts martial. Congress used the public rights doctrine during the New Deal and afterwards as authority for providing Article I adjudicatory tribunals for the large number of federal legislative courts and administrative agencies, rather than creating an extraordinary number of Article III judges with life tenure and undiminishable salaries. Louisiana, however, has never had the need for such expediencies. The classification of an individual's legal right as a "public" right not worthy of initial adjudication by an independent judiciary does not further the Article V goals of upholding the constitution and the rule of law. There is equal need for an independent and impartial judiciary to provide a check on the political branches with regard to both public and private rights. With the proliferation of statutory and administrative law, the advent of entitlements, and the erosion of the right-privilege distinction, the dichotomy between public and private rights has become virtually meaningless.\textsuperscript{177}


\textsuperscript{177} See Bator, supra note 96, at 250:

Justice Brennan's own confusing and contradictory formulations demonstrate that the "public rights" category has no holding power whatever. In the modern administrative state, suffused by statutory and administrative schemes that characteristically create complex interdependencies between public and private enforcement, it is unintelligible and futile to try to maintain rigid distinctions between questions of private and public rights. It may be that there was a time when pure common-law actions could be characterized as involving "only" private rights. But when an injured worker seeks statutory workmen's compensation, is the claim one of purely "private" right? (Does this depend on the formality of whether the insurance fund is administered by the state or the employer?) Is a reinstatement and back pay proceeding before the NLRB on account of an employer unfair labor practice a matter of public or private right? What about a bankruptcy trustee's action to set aside a preference? A citizen's suit to enjoin water pollution? A Title VII discrimination case?

The fact is that there is no intelligent way to answer these questions. And, in any event, the answer really has no bearing at all on the question whether it is or is not appropriate to dispense with the trappings of article III adjudication. For even if the "public rights" category were an...
Nor should the Supreme Court’s functional-balancing methodology be followed by Louisiana courts in interpreting Article V. Although the Supreme Court in Schor took significant steps toward giving substantive content to the functional-balancing methodology, it is still an unstable and highly unpredictable interpretive approach. It leaves the Court with vast ad hoc discretion to uphold or strike down non-Article III tribunals, depending on its own sense of institutional considerations. This is because:

In doing so, the Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case. Thus, while this balancing creates the illusion of objectivity and ineluctability, in fact the result was foreordained, because the balance is weighted against judicial independence. . . . [A]s individual cases accumulate in which the Court finds that the short-term benefits of efficiency outweigh the long-term benefits of judicial independence, the protections of Article III will be eviscerated.

The Louisiana delegates and the electors struck a balance between the power of the legislature to alter the framework of government and the values of separation of powers, checks and balances, individual constitutional rights, and the rule of law, to be enforced by an independent elected judiciary. They drew bright lines clearly establishing boundaries that the legislature may not cross to divest the courts of matters within the original, appellate, and supervisory jurisdiction of the courts. There is no authority in the constitution for the legislature or the courts to employ a functional-balancing methodology to strike a different balance or to revise the mutual limits between the legislative and judicial powers. In Article IV, the legislature is expressly granted a broad scope of power to enact laws reallocating the functions, powers, and duties of all departments, offices, agencies, and other instrumentalities of the executive branch. In Article V, however, because of the role of the judiciary in providing an independent and impartial rule of law check upon the political branches, the legislature is expressly denied the power to alter the constitutionally established courts or their jurisdiction.

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178. Id. at 257.
179. Schor, 478 U.S. at 863-64, 106 S. Ct. at 3263.
180. See generally La. Const. art. IV.
181. See generally La. Const. art. V.
Louisiana, therefore, a change in the structure or jurisdiction of a court established by Article V requires a constitutional amendment. Consequently, Louisiana’s constitutional court system is quite different in this respect from the federal system in which Congress may ordain, establish, change or abolish inferior Article III courts and grant, deny, or limit their jurisdiction within the ambit circumscribed by Article III. The decision to make a change in the basic Louisiana court system, and the balancing of values pro and con, must be made preliminarily by the legislature, by a vote of two-thirds of the elected members of each house, and finally by the electorate of the state. The requirement of a constitutional amendment to alter the basic court system provides assurance that the change is genuinely needed and in the public’s interest, and because a state constitutional amendment is easier to obtain than a federal one, the requirement does not deprive the system of sufficient flexibility when there is a legitimate need for change. Article V was amended in 1990, creating an exception to the district courts’ original jurisdiction over worker’s compensation claims in response to a need perceived by the legislature and the electors to deal with those matters initially in an administrative law system. Thus, there is no justification for Louisiana courts to engage in a judicial weighing process to evaluate the legislature’s balancing of factors and proposed alteration to the general jurisdiction of the courts; the electors voting on a proposed constitutional amendment are the final arbiters of whether such a change should be adopted.

Moreover, although legislative acts generally are presumed to be constitutional unless proven otherwise, it is also generally accepted that the jurisdiction of a general jurisdiction court is presumed, unless the contrary is made to appear. The Louisiana Supreme Court has


183. See Board of Louisiana Recovery District v. All Taxpayers, 529 So. 2d 384 (La. 1988).

recognized that the district courts are courts of general jurisdiction. Consequently, when a controversy arises as to whether the legislature has properly asserted its power over a matter arguably within the original jurisdiction of the district courts, the issue cannot be decided on the strength of a presumption that the legislature is not encroaching upon the independent powers of the judicial branch. This naturally follows because the state constitution is not a grant of power but instead is a division of the plenary power of the people of the state into three branches of government. Article V, pertaining to the judicial branch, vests the judicial power of the state in courts that it establishes, including the district courts. Article V, Section further provides that a district court shall have original jurisdiction of all civil and criminal matters except as otherwise provided by the constitution or except as provided by law for administrative agency determinations in workers' compensation matters. Consequently, any act of the legislature which allegedly without constitutional authorization usurps the district court's jurisdiction should not be presumed valid, but should be scrutinized closely and carefully solely on its merits.

d.

There are cases, however, in which Article V, Section 16 places no constraints upon the initial adjudication of a civil matter by a non-Article V administrative tribunal. These are the exceptions that prove the rule, viz., (1) civil matters adjudicated by other constitutionally established and authorized tribunals, and (2) disputes concerning rights, entitlements and obligations, created specifically as part of an administrative or regulatory system, which traditionally have not been considered as justiciable controversies cognizable under the original jurisdiction of the district courts.

The Louisiana Supreme Court, in Moore v. Roemer, recognized the first class of exceptions by noting that Article V, Section 16 provides that "original jurisdiction over all civil and criminal matters is to be in the district courts 'unless otherwise authorized by the constitution,' [and that there is] express authorization elsewhere in the constitution for original jurisdiction in administrative bodies such as the Civil Service Commission and Public Service Commission . . . ."
Subsequent to Moore's holding that claims for worker's compensation are civil matters of which the district courts have original jurisdiction, Article V, Section 16 was amended to except "administrative agency determinations in workers' compensation matters," as provided by law, from the district court's original jurisdiction.

In American Waste & Pollution Control Co. v. State Department of Environmental Quality, the Louisiana Supreme Court recognized the second class of exceptions, holding that the DEQ determinations regarding waste disposal or water discharge permits are not civil matters within the meaning ... [and] scope of the district courts' constitutional grant of original jurisdiction, because waste disposal and water discharge permitting did not exist as a traditional civil matter in 1974 and has never been delegated in the first instance to the judicial branch, and because such matters were thereafter constitutionally delegated by the Legislature to the DEQ within the executive branch.

The court further explained that the state's regulation of waste disposal and water pollution historically had been statutorily vested in the executive branch without creating justiciable rights or actions cognizable by the district courts under their original civil matter jurisdiction. In other words, the legislature may create an administrative agency with regulatory and original adjudicatory jurisdiction over a type of matter that traditionally has not been considered justiciable initially within the original jurisdiction of the district court. Prior to the establishment of the DEQ, such questions had been resolved by other executive branch departments without formal adjudicatory proceedings. The legislature's reallocation of the permitting matters to the DEQ within the executive branch did not constitute a subtraction of anything from the judicial powers. Moreover, it would appear that many, if not most, issues appropriately assignable to administrative agencies for initial determinations would not present cases of a "judiciary" or...
“justiciable” nature so as to invoke the original jurisdiction of the
district courts. 194

What is the meaning of Article V and what does it require of the
courts and the administrative tribunals in the adjudication and review
of matters constitutionally excepted from or never included within the
district courts’ original jurisdiction? It is with regard to these classes
of cases that we may derive significant insight from the appellate
review model for interpreting federal Article III. Applying that
approach, it may be strongly argued that Article V, Section I requires
that the determinations by all administrative adjudicatory tribunals
must be reviewed by an Article V court at least for constitutional and
legal error and for a substantial evidentiary basis to support factual
findings. 195 If an administrative tribunal’s faithful adherence to the
requirement of law is not subject to judicial review, separation of
powers values will be endangered. 196 “The fairness interests of
litigants may also be compromised insofar as [non-article V]
adjudicators are tempted by opportunities for self-aggrandizement or
are subject to political or other pressures.” 197

The absence of judicial review of alleged constitutional rights
violations that are justiciable controversies would severely damage
constitutional values in two ways. First, a central value of separation
of powers, “a judicial check against arbitrariness and self-
aggrandizement by [the legislature], the executive, and their
administrative agents,” would be subverted. 198 Second, Article V’s

194. See Wright, supra note 11, at § 3529 (“[I]t is recorded that Madison’s
question whether jurisdiction of cases arising under the Constitution should
be limited to cases ‘of a Judiciary Nature’ was answered by a general supposition that
the jurisdiction given ‘was constructively limited to cases of a Judiciary nature’”);
Embodied in the words ‘cases’ and ‘controversies’ are two
complementary but somewhat different limitations. In part those words
limit the business of federal courts to questions presented in an adversary
context and in a form historically viewed as capable of resolution through
the judicial process. And in part those words define the role assigned to
the judiciary in a tripartite allocation of power to assure that the federal
courts will not intrude into areas committed to the other branches of
government. Justiciability is the term of art employed to give expression
to this dual limitation placed upon federal courts by the
case-and-controversy doctrine.
justiciability must decide “whether the duty asserted can be judicially identified and
its breach judicially determined, and whether protection for the right asserted can
be judicially molded”).
195. See Fallon, supra note 23, at 975-90.
196. Id. at 950.
197. Id. at 950-51.
198. Id. at 975-76.
interest in fairness to individual litigants, most heavily impacted when constitutional rights are at stake, would be undermined. 199 Article V courts must also review all questions of law decided by non-Article V tribunals. 200 "Administrative agencies, which are neither electorally accountable nor insulated from political pressures by the constitutional separation of powers, raise serious concerns of legitimacy and accountability." 201 Added empirical worries arise about the influence of powerful private groups and agencies' tendencies to expand their bureaucratic power. 202

Measured by the foregoing appellate review theory standards, the Louisiana courts have performed well in maintaining judicial independence and providing a constitutional and rule of law check and balance upon legislatively created adjudicatory tribunals. Even in the absence of statutory authority, the right of judicial review of administrative agency proceedings by an Article V court is presumed to exist. 203 The Louisiana Supreme Court, in Buras v. Board of Trustees of the New Orleans Police Pension Fund of the City of New Orleans, 204 a case governed by the 1974 Louisiana Constitution, recognized that it was "well settled . . . that the right of judicial review is presumed to exist and the availability of such review is necessary to the validity of administrative proceedings under our legal system and traditions." 205 The court in Buras based its constitutional holdings on "our legal system and [our] traditions," as well as the due process and access to courts guarantees of the state constitutions. 206 Evidently, in addition to the constitution's declaration of rights provisions, the court rested its decision on the state constitutional system of separation of powers and checks and balances, as well as the judiciary articles vesting the judicial power and jurisdiction in the constitutionally established and authorized courts, for the purpose of enforcement of all the constitutional safeguards of individual freedoms. 207 Consequently, the Louisiana

199. Id.
200. Id. at 976-77.
201. Id. at 977-78.
202. Id. at 978.
203. Bowen v. Doyal, 259 La. 839, 845-46, 253 So. 2d 200, 203 (1971) ("Generally the availability of judicial review is necessary to the validity of such proceedings under our legal system and our traditions") (emphasis added).
204. 367 So. 2d 849 (La. 1979).
206. See Bowen, 253 So. 2d at 203; Buras, 367 So. 2d at 851 n.4.
Supreme Court views the right of judicial review of administrative agency determinations to be constitutionally required and essential to the constitutional function of the courts in providing a constitutional and rule of law check upon the political branches and the administrative agencies.

Furthermore, the Louisiana Supreme Court has required that judicial review of agency adjudications must be searching and must include application of standards substantially the same as those set forth in the appellate review theory model and in the state Administrative Procedures Act. In *Save Ourselves, Inc. v. The Louisiana Environmental Control Commission*, the court held that there is no substantial difference between the standards of review provided by § 964 of the Louisiana Administrative Procedures Act (the “LAPA”) and its own jurisprudential rules pertaining to judicial review, which were developed by the court pursuant to its constitutionally vested judicial power. Accordingly, the court stated that it would continue to apply the standards of judicial review provided by § 964 by analogy even when not required by statute.

The court set forth the judicial review standards as follows:

Pursuant to § 964, a reviewing court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (6) manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

The Louisiana Supreme Court in *Save Ourselves* went on to elaborate on the standards of judicial review and their application. It is evident from the court’s paraphrasing of the provisions of § 964 of the LAPA and its further elaboration on the application of each standard that they must meet all of the requirements suggested by

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208. 452 So. 2d 1152 (La. 1984).
209. *Id.* at 1158.
210. *Id.*
211. *Id.* (citing La. R.S. 49:964(G)).
212. 452 So. 2d at 1158-60.
the judicial review theory model for upholding Article III values and the constitutional system of checks and balances and separation of powers.\textsuperscript{213}

Consequently, Article V has served as a worthy vehicle for the preservation of judicial independence in the modern administrative state. In retrospect, it is fortunate that the drafters of the judiciary article of the 1974 Louisiana Constitution continued the safeguards of judicial power and jurisdiction that were provided by the 1921 constitution. The delegates of the 1973 constitutional convention wisely decided that those protective provisions were necessary precautions against the political branches' inherent tendency toward incursions on judicial independence. Article V, Section 16 affords the district courts a broad original jurisdiction that in turn bolsters the judicial branch courts as constitutional courts of general jurisdiction.

Fortunately, also, the drafters did not place anything in the constitution that would detract from the resilience and genius of the system of separation of powers and checks and balances that we have inherited from the framers of the national constitution. Article V, Section 1 vests the judicial power of the state directly in the courts established and authorized by the judiciary article, assuring them a sturdy constitutional foundation upon which to conduct a searching appellate review of executive, legislative and administrative agency determinations. Altogether, Article V provides an ample basis of power by which the Louisiana judiciary may maintain its independence, provide rule of law checks on administrative, executive and legislative officers, and uphold the constitution for the protection of individuals, minorities and the people as a whole.

\textbf{CONCLUSION}

This essay focuses on problems associated with the preservation and exercise of independent judicial power under the state constitution in conflict or competition with the quasi-judicial functions of legislatively created administrative agencies. Insights are suggested from the study of similar conflicts involving federal agencies and federal Article III courts. It is recommended that Louisiana jurists and scholars avoid applying the federal public rights doctrine and functional-balancing methodology to state constitutional problems. These interpretive approaches were developed by the United States Supreme Court in response to federal governmental

exigencies that have not arisen in Louisiana due to differences in history, scale and court structure. Also, these federal approaches are subject to the criticisms that they are inconsistent with the doctrines of separation of powers, checks and balances, and an independent judiciary, and that they are highly manipulable and unpredictable. On the other hand, the work of scholars to preserve the objects and values of these doctrines through an appellate review theory appears to have beneficial application to Louisiana problems and to validate the current rules and standards of Louisiana courts in appellate review of administrative agency determinations. Finally, this essay concludes that Article V, the Louisiana judiciary article, continues to serve as a worthy vehicle by which Louisiana judges can maintain their independence; enforce the doctrines of separation of powers, checks and balances, and the rule of law with respect to administrative agencies and the other branches of government; and uphold the constitution for the protection of individuals, minorities and the people as a whole.