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Separation of Powers Under the Texas Constitution

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The constitutional law of Texas, mirroring the state's history, is rich, unique, and sometimes perplexing. A strong separation-of-powers tradition is a prominent feature of this law. In both the state and the federal contexts, everyone favors separation of powers as an abstract principle, but few understand its application to modern government. In particular, the "fourth branch" of government—administrative agencies—rests uncomfortably in the classical tripartite scheme.[1] Texas courts, like those elsewhere, have struggled with separation-of-powers issues and have produced a body of case law that resists confident application to new controversies.

This Paper has two principal purposes. Part I examines general separation-of-powers jurisprudence in Texas and suggests an approach our courts should follow in addressing these issues. My goal is to explore competing approaches to recurring problems rather than to canvass the cases comprehensively. Part II reviews one important deficiency in Texas law limiting the availability of judicial review of administrative action and suggests a cure based on separation-of-powers principles. Throughout the Paper, I draw on recent controversies about separation of powers at the federal level. They provide guidance for evaluating the somewhat different problems at the state government level.

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1. *See, e.g.*, Anderson, *Revisiting the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 277, 278 (1987) (observing that the transfer of legislative and judicial functions to administrative agencies has led to "what many feel is a de facto fourth branch").

I. Context: The Constitution and the Government of Texas

A. The Nature of the Texas Constitution

The constitution and government of Texas differ from those of the United States in ways that are common to many states, especially in the South.[2] In part, the differences are attributable to a change in the climate of opinion about government between 1789 and 1876. The federal constitution is a product of the Enlightenment.[3] It manifests a qualified optimism about the power of government to improve society—as long as separation-of-powers provisions provide elemental controls on the ambitions of individuals. The powers delegated to all three branches of the federal government can grow to meet future needs. Congressional enumerated powers can expand through the "necessary and proper" clause.[4] The President received the vague grants of power upon which the elaborate edifice of the modern Presidency eventually has come to rest.[5] The uncertain scope of article III combined with the security of life tenure has allowed the federal judiciary to assume a surprisingly central role in the life of our democracy.[6] Indeed, so flexible are the constitutional delineations of the relationships among the branches of government that they have been amended only slightly over two centuries of vast growth and change in the national government.[7]

By 1876, however, disillusionment reigned. In the aptly named Gilded Age, corruption soiled government at all levels.[8] The Grant Administration's scandals set the tone for much of American government. Giveaways to special interests (especially the railroads) were widespread.

2. *See generally* C. WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913, at 65-66 (1951) (discussing the history of the New South); J. Mauer, Southern State Constitutions in the 1870s: A Case Study of Texas *passim* (1983) (unpublished Ph.D. dissertation, Rice University) (available at Tarlton Library, University of Texas School of Law) (discussing the origins and contents of the Alabama, Texas, and Louisiana Constitutions).

3. *See, e.g.*, G. WILLS, EXPLAINING AMERICA: THE FEDERALIST 268 (1981) (describing Madison's world as "the world of the American Enlightenment—a world . . . of optimism about man's effort to order society rationally").

4. They have. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 353 (1819) (allowing Congress to establish a bank because the Constitution expressly gives Congress the power "to make laws which shall be necessary and proper").

5. *See* P. SHANE & H. BRUFF, THE LAW OF PRESIDENTIAL POWER 3-29 (1988).

6. This role stems, of course, from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), which asserted the judicial power to adjudicate the coustitutionality of statutes. *Id.* at 177. It was not long before the visiting de Tocqueville could make his celebrated observations about the tendency of Americans to convert public issues to legal controversies. *See* 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 330 (H. Reeve trans. 1961).

7. Although the Bill of Rights and a number of later amendments have affected national powers (for example, the sixteenth amendment authorized the income tax), few have altered the relationship among the branches. The principal exceptions are four amendments affecting presidential election, succession, and disability. *See* U.S. CONST. amends. XII, XX, XXII, XXV.

8. *See* S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 729-32 (1965).

One wag remarked that the Standard Oil Company could do whatever it wanted with the Pennsylvania Legislature "except refine it."

Meanwhile, the states of the former Confederacy boiled with resentment towards the Reconstruction governments. Texans suffered under a corrupt and autocratic regime that featured a carpetbag legislature, a despised governor, and his appointed judges.[9] When the opportunity arrived to form "restoration" governments in the South, broad charters with ringing empowerments were not in the offing. Instead, both structural and substantive limitations shackled the new state governments. In Texas, a convention dominated by agrarian reformers of the Grange sought all possible means to forestall oppressive, corrupt, and expensive government.[10] It confined the legislature to short biennial sessions and limited its power to tax and spend.[11] The convention fragmented the executive branch by providing for a weak governor and separate elections of several officers.[12] In addition, the convention sought to tie the courts to the popular will through short elective terms for judges.[13]

Compared to its federal counterpart, the Texas Constitution is long, specific, and confining.[14] Designed for a largely rural, agrarian state with less than a million inhabitants and no oil industry,[15] the Texas Constitution has endured to govern our largely urban and industrialized state only because it is relatively easy to amend.[16] Although encrusted with 326 amendments, the Texas Constitution retains its underlying nature.

9. *See* T. FEHRENBACH, LONE STAR 433-42 (1968); S. MCKAY, SEVEN DECADES OF THE TEXAS CONSTITUTION OF 1876, at 23-46 (1942).

10. For a good historical review, see Thomas & Thomas, *The Texas Constitution of 1876*, 35 TEXAS L. REV. 907, 907-18 (1957). This article asserts that the majority of the delegates were farmers who were "honest" and "industrious" believers in a "wise and frugal government." *Id.* at 907. The Grange was a national association whose purpose was to organize farmers into state and local chapters to combat the widespread political corruption and improve the social and cultural opportunities for farmers. *See id.* at 909. About half of the delegates to the Texas Constitutional Convention were Grangers. *See id.*

11. *See id.* at 914-16 (noting that, to reduce the cost of government, the delegates limited legislative salaries, discouraged long sessions, and limited the taxation power).

12. *See id.* at 914 (noting that "[t]he convention was determined to cut down on the governor's power to prevent a future renewal of executive despotic control").

13. *See id.* at 916 (noting that the 1876 Constitution provided that judges be elected by popular vote for 2-6 year terms in response to criticisms directed to the judiciary under the Reconstruction government).

14. The Texas Constitution contains over 60,000 words and is six times as long as the U.S. Constitution. *See* J. MAY, S. MACCORKLE & D. SMITH, TEXAS GOVERNMENT 43 (8th ed. 1980) [hereinafter J. MAY].

15. *See id.* at 38.

16. To amend the Texas Constitution, the amendment must be proposed by a joint resolution of the legislature, must receive a two-thirds vote in each house, and must carry a simple majority of the voters at an election. *See* TEX. CONST. art. XVII.

B. The Separation-of-Powers Requirement

Like most states—but unlike the federal government—Texas has an explicit constitutional provision mandating the separation of powers. Article II, section 1 is phrased strongly:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.[17]

This provision has an excellent pedigree. The 1836 Constitution of the Republic of Texas contained a shorter statement of the same principle: "[t]he powers of this government shall be divided into three departments, viz: legislative, executive, and judicial, which shall remain forever separate and distinct."[18] The first state constitution in 1845 adopted the present version of the text.[19] Its terminology closely tracked the Louisiana and Kentucky Constitutions that served as general models for Texas.[20]

Three potential sources for the original inclusion of a separation-of-powers provision existed in 1836. First, the basic structure of the federal constitution and the *Federalist Papers* embraced separation-of-powers principles.[21] Second, a number of existing state constitutions provided model provisions. In hurriedly drafting its constitution, Texas borrowed eclectically from both federal and state constitutions.[22] Several of the then-existing state separation-of-powers provisions antedated the federal constitution and were phrased similarly to the one Texas adopted in 1836.[23] Finally, the Constitutions of both Mexico and the State of Coahuila and Texas contained language similar to that adopted by Texas in

17. *Id.* art. II, § 1.

18. TEX. CONST. art. I, § 1 (1836).

19. *See* TEX. CONST. art. II, § 1, interp. commentary (Vernon 1984).

20. *See* Paxson, *The Constitution of Texas, 1845*, at 18 SW. HIST. Q. 386, 388 (1915). For the text of these cognate provisions, see 3 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 1492-1908, at 1277 (R. Thorpe ed. 1909) (Kentucky); *id.* at 1392 (Louisiana).

21. *See* THE FEDERALIST NOS. 59-66.

22. *See* Richardson, *Framing the Constitution of the Republic of Texas*, 31 SW. HIST. Q. 191, 209 (1928).

23. Indeed, in 1836 Texans needed to look no further than *The Federalist No. 47*, which Madison devoted to answering charges that the proposed constitution violated "the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct," THE FEDERALIST NO. 47, at 301 (J. Madison) (C. Rossiter ed. 1961), and in which he quoted various state constitutions resembling the original Texas formulation. *See id.* at 304-07.

1836.[24]

The general desirability of requiring separation of powers in state government was not controversial at the time Texas won its independence or at the important moments of constitution-making in 1836, 1845, and 1876.[25] Nor, I presume, would it be controversial today. But it is one thing to favor the separation of powers as a guiding precept and another to apply it to the complex operations of a modern state government. Here, difficulty and controversy intrude.

II. Modes of Interpreting Separation-of-Powers Provisions

A. Competing Interpretive Approaches

The separation of powers serves two principal purposes. First, it attempts to prevent excessive concentration of power in the hands of any particular officer who might then act arbitrarily.[26] Second, it promotes effective government by assigning functions to the branches of government that are institutionally best suited to discharge them.[27] The basic methods of implementing these goals are common to federal and state constitutions. Separately constituted governmental bodies are assigned certain defined powers; checks and balances provide the branches some

24. The 1827 Constitution of the State of Coahuila and Texas provided in article 29: "The supreme powers of the state shall be divided for its exercise into legislative, executive and judicial, and neither these three powers, or any two of the same, shall ever be united in one corporation or person, nor shall the legislative be deposited in one individual alone." 1 H. GAMMEL, LAWS OF TEXAS 426 (1898). There was a similar provision in title II, article 6 of the Mexican Constitution of 1824. *See id.* at 73. The Texans adopted some aspects of their Spanish and Mexican law heritage, especially those concerning land distribution and tenure. *See* Ashford, *Jacksonian Liberalism and Spanish Law in Early Texas*, 57 SW. HIST. Q. 1, 1 (1953). The extent to which they also drew their separation-of-powers provision from this source is unknown.

25. Constitutional histories of these periods discuss many controversial matters, but mention separation-of-powers provisions only in passing, if at all. *See, e.g.*, Richardson, *supra* note 22, at 199-204 (discussing the 1836 Constitution); Paxson, *supra* note 20, at 392-93 (discussing the 1845 Constitution); Thomas & Thomas, *supra* note 10, at 913 (discussing the 1876 Constitution).

26. The classic statement is Madison's quote from Montesquieu in *The Federalist No. 47*:

> "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them iu a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*."

THE FEDERALIST NO. 47, at 303 (J. Madison) (C. Rossiter ed. 1961) (quoting MONTESQUIEU, THE SPIRIT OF LAWS, Book XI, ch. 6).

27. *See* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 602 (1984). For example, the framers gave the President broad responsibility for conducting war and foreign policy because the executive is able to act with "energy and dispatch." Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491, 508 (1987). Similarly, they gave the House of Representatives the power to originate revenue measures because its short terms keep it close to the people. *See* Barber, *Judicial Review and the Federalists*, 55 U. CHI. L. REV. 836, 851 (1988); Tushnet, *Constitutional Interpretation and Judicial Selections: A View from* The Federalist Papers, 61 S. CAL. L. REV. 1669, 1680 (1988).

power to participate in one another's decisions as a means of self-defense and overall control. Examples of checks and balances include the executive's veto of legislation and the legislature's power to advise and consent to executive nominations.

The United States Supreme Court has decided many important separation-of-powers cases over the years. Its decisions have oscillated between two principal interpretive approaches.[28] One approach, called formalism, develops from the constitutional text and the framers' acknowledged purpose to create three independent branches with distinct functions. Formalist decisions tend to draw bright lines between the responsibilities of the branches.[29] The competing approach is a "functional" one. Functionalism assesses each branch's need to protect its core constitutional functions from attempts by other branches to aggrandize themselves.[30] Functional decisions stress the inclusion of checks and balances, making shared powers an integral part of the overall strategy of controlling government.[31] Functional analysis, therefore, favors complex arrangements that blend the powers of the branches, while formalism promotes distinct divisions.[32] The Supreme Court's rationale for choosing one approach over the other in a particular case, although sub-

28. *Compare* INS v. Chadha, 462 U.S. 919, 944-51 (1983) (using a formalist approach to separation of powers to preserve three distinct branches of government) *with* United States v. Nixon, 418 U.S. 683, 713 (1974) (using a functional approach that stresses flexibility). *See generally* Bruff, *supra* note 27, at 495-506 (discussing several Supreme Court separation-of-powers cases).

29. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 726 (1986) (invalidating the Comptroller General's power to shape budget deficit reduction plans); *Chadha*, 462 U.S. at 954-55 (invalidating Congress's retention of power to reverse decisions that Congress had authorized the Attorney General to make).

30. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 696-97 (1988) (holding that Congress's restriction of the Attorney General's power to remove independent counsel did not impermissibly infringe upon executive authority, because the President's control over counsel is not essential to the functioning of the executive branch); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856-57 (1986) (stating that the placement of adjudicative authority in an agency raised no question of aggrandizement of congressional power).

31. Another passage in *The Federalist No. 47* is illustrative. Madison emphasizes that Montesquieu's broad statements about the need for separated power

> did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.

THE FEDERALIST No. 47, at 302-03 (J. Madison) (C. Rossiter ed. 1961); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that the Constitution contemplates the integration of diffused powers into a workable government, giving the branches "separateness but interdependence, autonomy but reciprocity").

32. *See* Bruff, *supra* note 27, at 503 (noting that the functional approach allows a diverse government). *See generally* Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 493 (1987) (suggesting that a functional approach can be reconciled with the wording of the Constitution).

ject to scholarly speculation,[33] is ultimately obscure—perhaps even to the Justices. General separation-of-powers principles invite these two approaches; therefore, they also appear in state constitutional law. Because separation-of-powers scholarship has explored thoroughly the implications of these approaches in the federal context, and because state constitutional law often draws on federal analogues, I begin with the Supreme Court's experience.

Throughout the analysis, it will be necessary to note the disparities in structure and function of state and federal constitutions and governments; these disparities may suggest differences in legal approach and outcome.

B. The Place of Agencies in Government

It is often said (because it is easy to say) that the legislature enacts laws, the executive enforces them, and the judiciary construes them.[34] This truism does not, however, set precise limits to the organization of government. The reality is that both federal and state agencies routinely perform functions characteristic of each of the traditional branches of government. For example, an agency such as the Federal Trade Commission or the Texas Railroad Commission promulgates regulations having the force of law, decides whom to prosecute for violating them, and adjudicates the issue of guilt or innocence.[35] This combination of functions has long been considered indispensable to effective administration, but it bedevils separation-of-powers analysis and raises basic issues of fairness.

Although the United States Supreme Court has held that this combination of functions may produce unacceptable dangers of bias in particular circumstances,[36] the Court has upheld this combination against due

33. *See* Bruff, *supra* note 27, at 495-506; Strauss, *supra* note 32, at 488-90.

34. In Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825), Chief Justice Marshall remarked:

> The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.

Id. at 46. Unfortunately, the first part of Marshall's analysis is often quoted or paraphrased without the second. *See, e.g.*, 1 THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 90 (G. Braden ed. 1977) [hereinafter ANNOTATED CONSTITUTION] (paraphrasing the first part of the sentence without attribution).

35. *See* 15 U.S.C. § 45 (1988) (giving the FTC the power to police unfair competition); TEX. REV. CIV. STAT. ANN. arts. 6446, 6461 (Vernon 1926) (giving the Texas Railroad Commission the power to police railroad abuses).

36. *See* Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973) (holding that a state licensing board drawn from one group of practitioners could not decide whether a competing group had engaged in unprofessional conduct).

process challenges on the basis of fairness.[37] The Court has recognized three kinds of statutory protections that promote fairness and that characterize state and federal administrative procedure statutes such as the Administrative Procedure and Texas Register Act (APTRA).[38] First, statutes require procedural safeguards for agency rulemaking, investigation, and adjudication.[39] In Texas, for example, agencies must adjudicate on the basis of a record compiled according to rules of evidence and explain the results by making findings.[40] Second, statutes require "separation of functions"—structural separations between investigators and adjudicators within the agency that aid neutral decisions.[41] Finally, statutes define the scope of judicial review of agency action to provide a meaningful check on an agency's fidelity to law.[42]

These methods of assuring the fairness and legality of agency actions have important separation-of-powers implications. Agencies, often aptly called the fourth branch of government, draw their legitimacy from their relationships with the three constitutional branches and the people.[43] The legislature controls agencies through substantive and procedural statutes and appropriations, the executive appoints their members (or the people elect them), and the judiciary reviews their decisions to assure compliance with statutory and constitutional commands.

The delegation of legislative, executive, and judicial functions to

37. *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 55 (1975) (upholding the power of a state board of medical examiners to adjudicate charges against a doctor whom it had investigated).

38. TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1990).

39. *See id.* § 5 (rulemaking), §§ 14, 14a (investigation), §§ 13-18 (adjudication of contested cases). The Supreme Court has upheld federal statutes with similar restrictions. *See Withrow*, 421 U.S. at 38 (upholding a statute that contained certain due process guarantees, such as limiting the board's authority to impose a temporary suspension and find probable cause, and requiring resort to the courts to revoke a license or to make a criminal charge).

40. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, §§ 14(a), 16 (a,b) (Vernon Supp. 1990).

41. The Federal Administrative Procedure Act has a well-developed set of such restrictions. *See, e.g.*, 5 U.S.C. § 554(d) (1988) (providing that the employee who presides over the adjudicative function may not have been involved in the investigative or prosecutorial functions of the agency in that or a factually similar case). The Supreme Court has approved of the principle of "separation of functions" in agency actions, but not of a rigid application of this principle. *See Withrow*, 421 U.S. at 51 (explaining that, depending upon the particular situation, due process may require that distinctive administrative functions be performed by different persons). *But see id.* at 52 (finding "no support for the bald proposition . . . that agency members who participate in an investigation are disqualified from adjudicating"). *See generally* Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 760-61 (1981) (noting variables such as the formality of the adjudication and the personal involvement of the agency staff member that make it difficult to generalize about an agency's separation of functions). APTRA, however, has only limited restrictions on ex parte contacts between agency adjudicators and staff members who have participated in the case. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 17 (Vernon Supp. 1990).

42. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19 (Vernon Supp. 1990) (giving the state district court the power of de novo or appellate review, depending on the type of case and the statute under which review is sought).

43. *See* Strauss, *supra* note 27, at 578-82.

agencies, combined with checks on agency authority, offers a compromise between the goals of administrative efficiency and the separation of powers. To insist that only the legislature make law, only the executive implement statutes, and only the courts adjudicate controversies would destroy modern government. It also would pose insuperable practical and theoretical difficulties. On the practical side, the ability of a legislature to consider public issues is limited by the legislature's size and capacity—even without the meeting restrictions that Texas imposes.[44] Moreover, generalist legislators cannot develop as much expertise in particular matters as agencies can.[45] It would not be feasible for the legislature to enact and continually update the entire Administrative Code as statutes. While the legislature could expand the jurisdiction of Texas courts to handle all the formal adjudication now performed by agencies, doing so would strain an already large and busy state judiciary and forfeit the benefits of agency expertise.[46] Furthermore, state courts conld not perform all of the informal adjudications that agencies perform.[47]

Attempts to classify agency functions as legislative, executive, or judicial encounter theoretical problems because the three classic powers overlap. The application of law to fact, for example, is both a judicial and an executive function.[48] A judge's decision whether particular facts constitute a statutory violation requires construing the law and is clearly adjudicative. Yet this decision is ordinarily preceded by a similar executive judgment that the actions in question occurred, violated the statute, and warranted enforcement.[49] Similarly, policy making is both legislative and executive in nature. All agencies have general policies that functionally resemble legislation: "We don't prosecute first-time offenders for trace amounts of that substance." Such informal policy making inheres in government. Indeed, a clear statement of informal agency policy often advances good government even if the policy is not clearly authorized by statute.

44. *See* TEX. CONST. art. III, § 5 (providing for biennial legislative sessions and specifying the business to be conducted during each period of a session).

45. *See* G. ROBINSON, E. GELLHORN, & H. BRUFF, THE ADMINISTRATIVE PROCESS 11 (2d ed. 1980) [hereinafter G. ROBINSON].

46. *See* Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U.L. REV. 355, 382 (1987).

47. *See* G. ROBINSON, *supra* note 45, at 12.

48. The Supreme Court has compounded this confusion by remarking that "[i]nterpreting a law . . . to implement the legislative mandate is the very essence of 'execution' of the law." Bowsher v. Synar, 478 U.S. 714, 733 (1986). Yet this also describes much of what the courts do. *See id.* at 748-53 (Stevens, J., concurring).

49. *See generally* K. DAVIS, DISCRETIONARY JUSTICE 3-233 (1969) (reviewing kinds of dispositive discretionary decisions made by bureaucrats in the field, such as police officers).

C. *Separation-of-Powers Implications of the Structure of Texas Government*

If simple characterization of functions cannot settle separation-of-powers questions, then the strength and nature of the relationships between agencies and the constitutional branches take on paramount importance.[50] Because the structure of government establishes the parameters for these relationships, the differences between federal and state governments may prove important to the analysis.[51] The structure of Texas goverument permits the ties between a particular agency and each of the three branches of the state government to be weaker—sometimes far weaker—than they would be in the federal government.[52] Given this distance, fundamental questions arise about an agency's accountability to the people.

The Texas Legislature is in session far less often than Congress.[53] This hampers its consideration of changes in the statutes governing the agencies. Additionally, Texas legislative committees and their staffs exercise less vigilant informal oversight of the agencies than their federal counterparts do.[54] On the other hand, the Sunset Act forces the Texas Legislature to revisit our vast sprawl of agency authorities periodically for revision or possible termination.[55] Consequently, Texas has said goodbye to the Pink Bollworm Commission and the Stonewall Jackson Memorial Board but not to the Board of Podiatry Examiners.[56]

50. *See* Strauss, *supra* note 27, at 641.

51. Many of these differences are characteristic of most state governments and are not unique to Texas. *See generally* U.S. ADVISORY COMM'N ON INTERGOV'TAL RELATIONS, STATE COURTS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVES 4-5 (1989) (recommending the "[r]ebalancing of responsibilities in the federal system . . . to give state and local governments greater authority to serve the needs of their citizens"); U.S. ADVISORY COMM'N ON INTERGOV'TAL RELATIONS, THE QUESTION OF STATE GOVERNMENT CAPABILITY 20-24 (1985) (discussing states' contemporary roles in the federal system); *see also* COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES, 1988-89, at 6-7 (1988) (discussing new constitutional changes in various states that affect the relationship between the three branches of government).

52. *See* J. MAY, *supra* note 14, at 207 (noting that "[a] major characteristic of Texas administration is the general absence of overall or central managerial control and supervision"). Most federal agencies are subject to close oversight from all three branches of government. For an overview, see Bruff, *Legislative Formality, Administrative Rationality*, 63 TEXAS L. REV. 207, 227-44 (1984).

53. *Compare* TEX. CONST. art. III, § 5 (providing for biennial 120-day sessions of the Texas Legislature) *with* U.S. CONST. amend. XX, § 2 (requiring Congress to assemble at least once in every year). Other state legislatures share the characteristics described in this paragraph. *See* Rosenthal, *The State of State Legislatures: An Overview*, 11 HOFSTRA L. REV. 1185, 1187-1204 (1983).

54. *See* J. MAY, *supra* note 14, at 167. Both legislators and their staffs are part-time; frequent hiring for the "session only" guarantees high staff turnover and makes effective oversight during intersessions difficult.

55. *See* TEX. GOV'T CODE ANN. §§ 325.001-325.024 (Vernon 1988).

56. *See* TEX. SUNSET ADVISORY COMM'N, SUNSET REVIEW IN TEXAS: SUMMARY OF PROCESS AND PROCEDURE 7, 9 (1985). The Pink Bollworm Commission set up pink bollworm control areas to regulate cotton growing in certain parts of the state where it deemed control necessary. LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS, GUIDE TO TEXAS STATE AGENCIES 137 (5th

The long ballot assures the weakness of the Texas governor by providing for the separate election of such important state officials as the lieutenant governor, the attorney general, the comptroller, the treasurer, and the land commissioner.[57] For separation-of-powers purposes, however, the long ballot is an advantage. Direct election of administrators ensures their accountability to the people. In contrast, the appointment of administrators creates separation-of-powers problems. The governor appoints over two thousand officers to a vast array of state agencies.[58] The accountability of appointed administrators is always indirect; in Texas, fragmentation of the executive further attenuates any accountability. Texas has about two hundred administrative agencies,[59] which vary widely both in size and professionalism. The governor can remove officers that he appoints only with the advice and consent of the Senate.[60] The governor does have some budgeting powers, but they provide little opportunity for disciplining the agencies because the Legislative Budget Board's budget dominates the agenda in practice.[61] The governor also has the constitutional power to assure the faithful execution of the laws,[62] but Texas governors have never used it as a basis for vigorous oversight of the agencies.[63]

Texas courts' review of agency action varies from de novo review to no review at all.[64] The absence of review is especially troubling—judicial review assumes special importance when both legislative and executive oversight are attenuated. Absent effective judicial review, an agency may be accountable to no one but itself. This condition subverts a central

ed. 1978) [hereinafter LBJ SCHOOL OF PUBLIC AFFAIRS]. The Stonewall Jackson Memorial Board operated the Stonewall Jackson Memorial Fund and used the fund's interest to conduct essay contests and to grant scholarships. *See id.* at 173.

57. *See* J. MAY, *supra* note 14, at 212-13 (noting that a component of the strong executive model is a short ballot with the governor, or at most the governor, lieutenant governor, and the attorney general as the only elected officers).

58. *See* 1 TEX. RESEARCH LEAGUE, STATE GOVERNMENT ORGANIZATION IN TEXAS: DESIGNING THE BLUEPRINT 33 (1975).

59. The number depends on what is counted as an agency; institutions of higher education, for example, are sometimes omitted. *See id.* at 31-32 & app. A (listing 179 administrative departments, but omitting courts, the legislature, and institutions of higher education); LBJ SCHOOL OF PUBLIC AFFAIRS, *supra* note 56, at v (noting that the edition contains a listing of 242 agencies).

60. *See* TEX. CONST. art. XV, § 9.

61. *See* J. MAY, *supra* note 14, at 183-84. The governor and the Legislative Budget Board now share power to effect some emergency rescissions of funds appropriated to agencies. *See* TEX. GOV'T CODE ANN. §§ 317.001-317.012 (Vernon 1988).

62. *See* TEX. CONST. art. IV, § 10.

63. *See* 1 ANNOTATED CONSTITUTION, *supra* note 34, at 319.

64. *Compare* Bishop v. Martin, 740 S.W.2d 892, 893-94 (Tex. App.—Amarillo 1987, writ ref'd n.r.e.) (requiring de novo review for the revocation of a day care license) *with* Firemen's & Policemen's Civil Serv. Comm'n v. Blanchard, 582 S.W.2d 778, 779 (Tex. 1979) (holding that disciplinary suspensions of police officers are nonreviewable).

purpose of the separation of powers—preventing unchecked concentrations of governmental power.

D. Basic Separation-of-Powers Doctrine in Texas

The explicit separation-of-powers provision in Texas has affected the state's law to some extent, not always for the better. For the most part, Texas's separation-of-powers doctrine appears to flow not from the text of article II, section 1, but from principles and realities of government that are largely the same for the federal government, which lacks such a provision. Nevertheless, the prominence of Texas's constitutional command has given the separation-of-powers doctrine a special vigor in a number of respects. As I will demonstrate, while some Texas cases appear to have invoked the doctrine in support of purposes unrelated to the constitutional mandate, some of the doctrine's applications undoubtedly pay simple tribute to the power of parchment.

The initial premise of Texas's separation-of-powers doctrine is common to state governments—the legislature's power is plenary (not delegated as in the federal government), subject only to limits found in the state or federal constitution.[65] Of course, in a state like Texas, the legislature's "plenary" powers may be more apparent than real because of a proliferation of explicit constitutional restrictions.[66] Nonetheless, the premise aids much ordinary legislation because no enumerated powers need be invoked.

Although the other branches enjoy no plenary-powers doctrine, courts often read affirmative grants of power to the executive and judicial branches broadly enough to make the distinction largely meaningless. For example, Texas courts claim broad "inherent" and "implied" authority. In *Eichelberger v. Eichelberger*,[67] the Texas Supreme Court decided that it could reverse an appellate judgment over which it had no statutory jurisdiction to conform Texas law to a supervening decision of the United States Supreme Court.[68] The court said that inherent judicial power is "not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and

65. *See* Government Servs. Ins. Underwriters v. Jones, 368 S.W.2d 560, 563 (Tex. 1963); *see also* 1 ANNOTATED CONSTITUTION, *supra* note 34, at 99 (observing that "the Texas Constitution has always been interpreted to authorize the legislature to do anything neither it nor the United States Constitution forbids").

66. *See generally* 1 ANNOTATED CONSTITUTION, *supra* note 34, at 99-100 (noting that state constitutions are limiting instruments and that the Texas Constitution contains many express limitations).

67. 582 S.W.2d 395 (Tex. 1979).

68. *Id.* at 400.

charged by the constitution with certain duties and responsibilities."[69] The court found authorization for inherent powers in the separation-of-powers doctrine and defined them as "those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity."[70] Earlier cases had, for example, found inherent power to alter judgments, to call witnesses, and to regulate the practice of law.[71]

The *Eichelberger* court declined, however, to rely upon inherent power. It held that its constitutional power to review questions of law decided by the lower courts provided adequate implied power to reverse the judgment.[72] The court stated unhelpfully that implied powers are those that "can and ought to be implied from an express grant of power."[73] So defined, implied powers are little different from inherent or plenary ones. Courts can discover somewhere whatever powers they deem essential. Indeed, Texas courts have even claimed the power to force adequate funding from local legislatures.[74]

Separation-of-powers analysis, however, is always a two-edged sword. As *Eichelberger* demonstrates, any constitutional grant of authority to the courts or the executive may justify either direct action by the recipient branch or at least statutory authorization to act. But, at the same time, the grant can restrict both the recipient branch and the legislature if it is read to limit the power it confers.[75]

Alone among the branches, the executive lacks inherent powers.[76] Agencies must be able to point to identifiable constitutional or statutory authority for their actions.[77] Moreover, the legislature has an affirmative

69. *Id.* at 398.

70. *Id.*

71. *See id.* at 398 n.1 (citing, *inter alia*, A.F. Jones & Sons v. Republic Supply Co., 151 Tex. 90, 246 S.W.2d 853 (1952) (power to set aside or otherwise control judgments); Burttschell v. Sheppard, 123 Tex. 113, 69 S.W.2d 402 (1934) (power to summon and compel the attendance of witnesses); Scott v. State, 86 Tex. 321, 24 S.W. 789 (1894) (power to regulate the practice of law)).

72. *Id.* at 400.

73. *Id.* at 399.

74. *See, e.g.*, Vondy v. Commissioners Court, 620 S.W.2d 104, 109-10 (Tex. 1981) (holding that inherent power allowed courts to mandamus commissioners to provide salary for court constables); *see also* District Judges of the 188th Judicial Dist. v. County Judge, 657 S.W.2d 908, 909 (Tex. App.—Texarkana 1983, writ ref'd n.r.e.) (explaining that the judiciary, being entirely dependent upon the other two branches for its funding and enforcement of its decrees, is especially vulnerable to a breakdown of cooperation among the branches of government and therefore holds the inherent power to insure itself the means to discharge its responsibilities). Courts in other states also claim this power. *See* C. BAAR, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES 143-61 (1975).

75. *See, e.g., In re* House Bill No. 537 of the Thirty-Eighth Legislature, 113 Tex. 367, 369, 256 S.W. 573, 574 (1923) (holding that the Texas Legislature may not expand constitutional jurisdiction of the Texas Supreme Court).

76. *See* 1 ANNOTATED CONSTITUTION, *supra* note 34, at 302.

77. *See id.*

duty to place limits on the power it confers on the executive. In Texas, as elsewhere, the delegation doctrine theoretically requires that the legislature state policy standards when it empowers agencies.[78] I say "theoretically" because all administrative lawyers know that the delegation doctrine is honored mostly in the breach. Courts often uphold broad and even meaningless standards on the pretense that these standards confine administrative discretion.[79]

Still, in state administrative law, courts occasionally invoke the delegation doctrine to invalidate statutes.[80] The doctrine has greater vigor at the state level, perhaps reflecting differences between federal and state agencies:

> [f]ederal agency action usually involves full-time officials whose only occupation is to implement the governmental program. Also, with few exceptions, federal agencies are not designed to accommodate the direct representation of affected interest groups. By contrast, many state boards, such as occupational licensing boards, commonly are drawn entirely from the interested group. Even when no such interest representation is directly involved, widespread reliance on part-time, volunteer "citizen boards" inevitably raises problems of conflict of interest, disqualification, ex parte communications, and action based on personal knowledge outside a hearing record.[81]

Thus, the delegation doctrine attempts to force the legislature to impose substantive statutory controls on agencies, especially when an agency's structure allows capture by special interests or just amateurish fumbling. The prevailing judicial reluctance to invoke the doctrine to invalidate statutes reflects the fact that its vigorous enforcement would threaten separation-of-powers values by displacing the legislature's prerogative to decide how much discretion is appropriate for a particular function. Unfortunately, the overall result is often the very one that the doctrine attempts to avoid: the legislature delegates broad powers to agencies, and the courts faithfully interpret the statutes to confer wide discretion.[82] When this occurs, an agency may possess something approaching plenary or inherent powers (although ultimately at the grace of both the

78. *See id.* at 92.

79. *See, e.g.*, Martinez v. State Bd. of Medical Examiners, 476 S.W.2d 400, 403-04 (Tex. Civ. App.—San Antonio, writ ref'd n.r.e.) (applying a statute making a doctor's license revocable for "grossly unprofessional or dishonorable conduct"), *appeal dismissed*, 409 U.S. 1020 (1972); Jordan v. State Bd. of Ins., 160 Tex. 506, 509-12, 334 S.W.2d 278, 280-82 (1960) (applying a statute requiring that officers of a proposed company be "worthy of the public confidence").

80. *See* Texas Antiquities Comm. v. Dallas County Community College Dist., 554 S.W.2d 924, 931 (Tex. 1977) (invalidating the committee's authority to protect buildings of "historical interest").

81. Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537, 540 (footnote omitted).

82. *See* 1 ANNOTATED CONSTITUTION, *supra* note 34, at 100.

legislature and the courts). In such cases, whether the agency is subject to meaningful legal control depends mostly on judicial review of particular agency rules and decisions.

E. The Perils of Formalism

Because the Texas Constitution has been constantly amended, but not reformulated since 1876, it is a disorganized patchwork that challenges any interpreter. Traps for the unwary and opportunities for the enterprising abound. The explicit separation-of-powers command in article II, section 1 creates a constant possibility that Texas courts will invalidate some legislative attempt to define the powers of a governmental body. Given the text of section 1, a formalist approach allocating certain powers to one branch and discovering their exercise by another is sufficient to find a transgression. At the same time, section 1 contemplates the existence of express constitutional exceptions to its command. Therefore, under the same formalist approach, any reference to a governmental body or function elsewhere in the constitution, whatever the technical reasons for the reference, can be elevated to a separation-of-powers exception.[83] The danger of the formalist approach is that the interpreter may read the constitution woodenly, losing sight of the purposes of separated powers—to prevent arbitrary and inefficient government. The more flexible functional approach, which emphasizes the purposes of separated powers and asks whether core functions are threatened, better fits the complexity of state government.

Three recent decisions by the Texas Court of Criminal Appeals, all of which invalidated statutes for contravening article II, section 1, amply demonstrate the perils of formalism. In *Williams v. State*,[84] the court confronted an apparent legislative mistake. The legislature had enacted two provisions concerning remittitur of forfeited bail bonds in the same bill.[85] One of the provisions gave the district court discretion to remit all or any portion of a bond before entering final judgment against it if the defendant's appearance was voluntary or a result of the surety's action.[86] The other provision entitled the surety to a ninety-five percent remittitur if the defendant appeared within two years after a judgment and the

83. *See, e.g.*, Corzelius v. Harrell, 143 Tex. 509, 513, 186 S.W.2d 961, 964 (1945) (holding that article XVI, § 59 of the Texas Constitution, which authorizes the legislature to conserve natural resources through the creation and bonding of water conservation districts, also provides an exception to article II, § 1, sufficient to justify the Railroad Commission's performance of adjudicative functions).

84. 707 S.W.2d 40 (Tex. Crim. App. 1986).

85. *Id.* at 42-43; *see also* Tex. S.B. 727, 67th. Leg., ch. 312, §§ 1, 4 (1981).

86. *See Williams*, 707 S.W.2d at 42-43.

surety claimed responsibility for the return.[87] The court noted the perverse incentive that the combination created: why would a surety risk the court's discretion by seeking a defendant before judgment when waiting until after entry of a judgment would entitle the surety to an automatic ninety-five percent recovery? The court, however, declined to invalidate the statute for lack of wisdom (lest the statute books be empty).[88] Instead, the court concluded that the automatic remittitur invaded judicial power by requiring the modification of a final judgment.[89]

The *Williams* court noted that the constitution vests the judicial power in the courts and gives them jurisdiction over suits to recover forfeitures.[90] The court then conceded that the legislature may affect the exercise of this jurisdiction in various ways, as by mandating procedures and penalties.[91] However, this statute "usurped" a judicial function by altering a final judgment.[92] The court did not explain why the legislature may not make a judgment conditional—at least prospectively.[93] Nor did it explain how the statute deprived the courts of the necessary discretion to perform their constitutional function.

In *Meshell v. State*,[94] the court invalidated the Texas Speedy Trial Act[95] for invading prosecutorial discretion during trial preparation.[96] The court began by noting that county and district attorneys are officers of the judicial branch because article V creates them, although they would be members of the executive branch under traditional separation-of-powers theory.[97] In any event, the court conceded that local attorneys derive their prosecutorial duties from the statutes, not from the constitution.[98] Despite the legislature's explicit constitutional authority to enact

87. *See id.*
88. *See id.* at 44-45.
89. *Id.* at 47.
90. *See id.* at 45 (construing TEX. CONST. art. V, §§ 1, 8).
91. *See id.*
92. *See id.* at 45-46.
93. The court relied on Langever v. Miller, 124 Tex. 80, 76 S.W.2d 1025 (1934), which forbids legislative modification of preexisting deficiency judgments. *See Williams*, 707 S.W.2d at 46. The *Williams* court thought that Robinson v. Hill, 507 S.W.2d 521 (Tex. 1974) had "no bearing," although it upheld a statute allowing 50% remittitur of amounts paid in prior bail bond forfeitures. *Williams*, 707 S.W.2d at 46.
94. 739 S.W.2d 246 (Tex. Crim. App. 1987).
95. Present version codified at TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon 1989).
96. *See Meshell*, 739 S.W.2d at 255-57.
97. *See id.* at 253 & n.9. For a discussion of the traditional placement of prosecutors in the executive, see Morrison v. Olson, 487 U.S. 654, 703-34 (1988) (Scalia, J., dissenting). Indeed, a line of separation-of-powers cases considers the legislature's power to allocate responsibility between the attoruey general, an executive officer who represents the state in the Supreme Court, and these local attorneys, who represent the state in the inferior courts. *See Meshell*, 739 S.W.2d at 253-54. Thus, some detailed constitutional provisions that seem designed for housekeeping assume the status of a mandatory organization chart for government.
98. *See Meshell*, 739 S.W.2d at 254.

rules of procedure, the court concluded that the legislature could not abridge their prosecutorial discretion once it vested the responsibility to prosecute in these officers.[99] The court's real objection appeared to be the statute's inflexibility. For example, the Act did not allow consideration of either the prosecutor's culpability or the defendant's injury.[100] Perhaps, then, the statute's restriction of prosecutorial discretion was arbitrary or excessive. Nevertheless, the court's broad categorical approach placed unnecessary obstacles in the way of statutory controls on prosecution.

Finally, in *Rose v. State*,[101] the court held that a statute requiring jury instructions regarding the effects of parole infringed the exclusive executive power of clemency possessed by the governor and the Board of Pardons and Paroles.[102] The court revealed its real objection to the statute, however, by referring to its own repeated efforts to stop juries from speculating about parole.[103] Perhaps the required instruction was misleading,[104] but in light of the persistence of jury consideration of the issue, the court had no justification for taking a broad separation-of-powers position that would disable the legislature from addressing the problem.

The court's rigid formalistic approach in these three cases focused on characterization of government functions rather than on actual injury to the operations of the supposedly aggrieved branch. *Williams* did not explain how automatic bail remittiturs would interfere with essential judicial discretion. *Meshell* did not rely on any finding that the deadlines in the Speedy Trial Act would interfere with effective prosecutorial preparation for trial. And *Rose* did not explain how jury knowledge of parole would hamper the executive's clemency powers. Perhaps these showings could have been made, but if they are not a requisite, many statutes that organize the state government are at risk.

F. The Advantages of a Functional Approach

Texas courts have also taken a more flexible, functional approach to separation of powers. In *State Board of Insurance v. Betts*,[105] the Texas

99. *See id.* at 254-58.
100. *See id.* at 256.
101. 752 S.W.2d 529 (Tex. Crim. App. 1987).
102. *Id.* at 535 (holding that the statute violated TEX. CONST. art. II, § 1). In *Ex parte* Giles, 502 S.W.2d 774 (Tex. Crim. App. 1973), the court had invalidated on similar grounds a statute allowing a defendant whose sentence was on appeal to elect resentencing under less severe penalty provisions of the new statute. *Id.* at 780-81.
103. *See Rose*, 752 S.W.2d at 536.
104. The majority believed it was. *See id.* at 534 n.6.
105. 158 Tex. 83, 308 S.W.2d 846 (1958).

Supreme Court considered the respective powers of the courts and the executive in insurance receiverships.[106] A statute authorized the State Board of Insurance to appoint a receiver and some assistants to liquidate the assets of a company under judicial supervision.[107] The Board had appointed and fired a receiver's attorney, whereupon the district court temporarily appointed a replacement attorney. When the replacement resigned and the Board took no action, the district court reappointed the original attorney.[108] The Board claimed it had sole authority to appoint the attorney,[109] but the district judge responded that placing appointive power in the Board violated article II, section 1 because the liquidation proceeding was judicial.[110]

The Texas Supreme Court said that "[i]t is only when the functioning of the judicial process in a field constitutionally committed to the control of the courts is interfered with by the executive or legislative branches that a constitutional problem arises."[111] The court credited the legislative purpose of centralizing some features of insurance administration in an agency and found that executive appointment posed no facial interference with judicial control of liquidation proceedings.[112] But the court also thought that the district court might need to intervene—as it had here.[113] Therefore, the court refused to find exclusive power over the appointments in either branch and upheld the action of the district judge.[114]

Betts implicitly recognizes that insurance receivers and their attorneys aid the functioning of both the executive and judicial branches and that it is unrealistic to think of them as wholly subject to the control of one branch. The same could be said of the local prosecutors in *Meshell*, who are judicial officers in Texas, executive officers in the federal government, and servants of both branches everywhere. Yet it is difficult to reconcile this reality with the text of article II, section 1, which forbids members of one branch from exercising any power belonging to another. In the complex structure of state government, this statement can only mean that certain core powers must be reserved to officers having the special characteristics of the branch designed to discharge them. That is, even if prosecutors are "judicial" officers, we would never allow them to

106. *See id.* at 89-95, 308 S.W.2d at 849-55.
107. *See id.* at 86-87, 308 S.W.2d at 849.
108. *Id.* at 92-93, 308 S.W.2d at 853.
109. *See id.* at 85, 308 S.W.2d at 849.
110. *See id.* at 86, 308 S.W.2d at 849.
111. *Id.* at 90, 308 S.W.2d at 851-52.
112. *See id.* at 88-90, 308 S.W.2d at 850-52.
113. *See id.* at 90, 308 S.W.2d at 852.
114. *Id.* at 95, 308 S.W.2d at 855.

supervise criminal trials. Only officers with the traditional characteristics of judges may do that.

Formalist approaches to separation of powers cannot work for agencies and local governments below the level of state constitutional officers. Formalism's limitations are evident in local Texas governments, which typically lack the separation of powers of the state and federal governments.[115] Texas county government is a vivid example. The commissioners court, presided over by the county judge, is not a court at all, but a combined legislative and administrative body.[116] Perhaps the fact that the Texas Constitution creates or mentions many kinds of local governments provides the explicit exceptions to general principles that are contemplated by the constitution. But most of these constitutional provisions, such as those allowing taxing and bonding, are unrelated to the separation of powers. The resulting mosaic, if approached formalistically, can yield unfortunate results. One example should suffice.

In *Ruiz v. State*,[117] a court considered whether a justice of the peace could also serve as a school teacher. As justice of the peace, Ruiz was clearly a judicial officer.[118] The issue was whether his position as a vocational teacher made him also an executive officer.[119] The court distinguished officers from employees by their policy-making responsibilities and classified Ruiz as an employee.[120] Following *Betts*, the court held that Ruiz's duties as a teacher did not interfere with his duties as justice of the peace.[121] That is surely the relevant inquiry as well as the right result.

A final example of the functional approach is the Texas Supreme Court's recent decision in *State v. Thomas*,[122] in which the court held that the Texas Attorney General may intervene on behalf of consumer state agencies in electric rate cases before the Public Utility Commission.[123] The attorney general's constitutional authority includes appear-

115. *See* Bruff, *Judicial Review in Local Government Law: A Reappraisal*, 60 MINN. L. REV. 669, 672-73 (1976).

116. *See* J. MAY, *supra* note 14, at 346 (enumerating the powers of the county commissioners court, including legislative and administrative responsibilities such as approving the budget and overseeing the condition of county roads).

117. 540 S.W.2d 809 (Tex. Civ. App.—Corpus Christi 1976, no writ).

118. *See id.* at 811.

119. *See id.*

120. *See id.*; *see also* Boyett v. Calvert, 467 S.W.2d 205, 209 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.) (holding that a faculty or staff member of a state university is an "agent or appointee" of the state), *cert. denied*, 405 U.S. 1035 (1972).

121. *Ruiz*, 540 S.W.2d at 811-12. The court also held that Ruiz was in compliance with TEX. CONST. art. XVI, § 40, which forbids dual officeholding but excepts justices of the peace. *Id.* at 810-11.

122. 766 S.W.2d 217 (Tex. 1989).

123. *Id.* at 219-20.

ing in "the courts" to prevent corporations from exacting excessive charges.[124] The court noted that the legislature had shifted rate proceedings from the district courts to the agency, where the rate proceedings were formal adjudications.[125] Since the statutory proliferation of agencies occurred after the 1876 adoption of the Texas Constitution, the court read the term "courts" in a "generic sense to refer to an adjudicative forum."[126] The contrary literal reading would "mean that the legislature had obliterated a constitutional grant of power merely by statutorily creating an agency to serve the same function as courts once did in adjudicating such disputes."[127] Thus, the court treated the evident purpose of the attorney general's power as a guide to modern limits of that power. As the next section demonstrates, the practice of allocating adjudicative power to agencies has broad constitutional implications.

III. Judicial Review of Administrative Action

The legitimacy of agency action in state government depends on the nature of judicial review, because legislative and executive oversight are often attenuated.[128] Moreover, only the courts routinely address the critical issue of the fidelity of administrative action to existing statutory and constitutional requirements. Oversight by the two "political" branches is, as it should be, mostly devoted to the desirability of altering current statutes, funding, personnel, or policies.

Both statute[129] and the separation-of-powers doctrine define judicial review. The latter has produced a rich jurisprudence in Texas. This Part first analyzes the legislature's power to allocate adjudicative authority to agencies and to define the stringency of subsequent judicial review. It then examines a doctrine that limits review in the absence of statutory authority and suggests the need and justification for abandoning it.[130]

A. Agency Adjudication and the Limits of Judicial Review

At the federal level, two insights reconcile agency adjudication with separation-of-powers principles. First, courts can retain ultimate control through limited judicial review.[131] Second, agency adjudication often

124. *Id.* at 219 (construing TEX. CONST. art. IV, § 22).
125. *See id.*
126. *Id.*
127. *Id.*
128. *See supra* note 64 and accompanying text.
129. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19 (Vernon Supp. 1990) (prescribing the procedure for and scope of judicial review).
130. *See infra* subpart III(B).
131. *See generally* Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 949 (1988) (arguing that "when Congress chooses to employ a non-article III

functions as policy making[132] and therefore partakes of executive action. Texas courts have come to the same general conclusions by a circuitous route that owes much to legislative action.[133]

In an era before the proliferation of agencies, Texas courts adopted a simple and understandable initial approach: agencies could not exercise judicial power. Thus, in *Board of Water Engineers v. McKnight*,[134] the Texas Supreme Court did not allow the Board to determine water rights in the Pecos River.[135] The court, however, found ways to allow some agency adjudication. It characterized some government-conferred benefits (such as liquor licenses) as privileges and not as rights. Agency adjudication was then proper because only "administrative" and not "judicial" power was involved in allocating the benefits.[136]

The court also supported agency adjudication by canvassing the Texas Constitution for references to governmental bodies or functions that could be characterized as express exceptions authorized by article II, section 1. Thus, in *Corzelius v. Harrell*,[137] the court justified the Railroad Commission's control of natural gas production by an authorization in article XVI, section 59[138] to enact laws to conserve natural resources.[139] However plausible on its face, this holding tore section 59 from its context—it was adopted to allow the formation of flood control districts.[140] Plainly, it was undesirable to strain so hard just to allow

federal adjudicator, it must provide for judicial review of at least some issues in a constitutional court"). The principal case is Crowell v. Benson, 285 U.S. 22 (1932), holding that Congress may establish agencies to " 'determine various matters . . . which from their nature do not require judicial determination and yet are susceptible of it.' " *Id.* at 50 (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

132. *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 92 (1943) (holding that prohibitions of directors and officers from buying or selling stock of a company undergoing reorganization "presents problems of policy for the judgment of Congress or of the body to which it has delegated power to deal with the matter").

133. For an able discussion of the issues explored in this section, see Hamilton & Jewett, *The Administrative Procedure and Texas Register Act: Contested Cases and Judicial Review*, 54 TEXAS L. REV. 285 *passim* (1976).

134. 111 Tex. 82, 229 S.W. 301 (1921).

135. *Id.* at 97, 229 S.W. at 307.

136. *See, e.g.*, State v. DeSilva, 105 Tex. 95, 100, 145 S.W. 330, 333 (1912) (declaring that a proceeding to revoke a liquor license was not an assertion of "judicial" power).

137. 143 Tex. 509, 186 S.W.2d 961 (1945).

138. "The conservation and development of all of the natural resources of this State, . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." TEX. CONST. art. XVI, § 59(a).

139. *Corzelius*, 143 Tex. at 513, 186 S.W.2d at 964.

140. The resources specifically delineated in article XVI, § 59(a) all pertain to water, with the single exception of "trees." Sections 59(b)-(f) detail the creation and funding of "conservation and reclamation districts." TEX. CONST. art. XVI, § 59(b)-(f). The interpretive commentary notes that this amendment was originally inspired by citizen demand for flood control after the Texas floods of 1913 and 1914. *See* TEX. CONST. art. XVI, § 59 interp. commentary (Vernon 1955).

agencies to adjudicate. A more satisfactory general approach eventually developed.

Here the legislature played a role. It often delegated adjudicative power to agencies with accompanying rights to de novo reconsideration in court.[141] In an era when agency procedures were often slipshod, legislative distrust of their decisions was natural. And because agency decisions were not binding, the courts were unlikely to find a misallocation of judicial power. At the same time, however, duplicating the agency's efforts resulted in obvious waste. Moreover, an emerging principle in federal and state administrative law was that a court should not substitute its judgment for that of an executive agency. Accordingly, the prevailing national standard for review of agency adjudication called for courts to uphold orders supported by "substantial evidence" in the agency record.[142] This standard had the advantages of deferring to agency discretion, while requiring enough evidentiary support to find a basis in law. As a fundamental accommodation of competing separation-of-powers values, it remains a dominant principle in modern administrative law.

Texas courts initially adapted the substantial-evidence standard in a unique way. They interpreted de novo review provisions to mean that courts should assess the reasonableness of an agency's order on the basis of a record compiled not by the agency, but in court.[143] This "Texas substantial-evidence" standard avoided the perils of unguided judicial formulation of a discretionary order, on the one hand, and reliance on a poorly developed agency record, on the other.[144]

A constitutional collision soon occurred, however, as the Texas Legislature confirmed its intention to require true de novo review by passing new statutes regulating review of agency determinations.[145] The courts responded by invalidating such provisions as unconstitutional attempts to give them nonjudicial duties,[146] unless the matter involved "judicial" action by the agency.[147] The courts had come full circle—from doubting that agencies could adjudicate at all to requiring that judicial review be limited.

Texas courts have defined the "judicial" actions for which de novo review may be required as those focusing on past facts about particular

141. *See* Hamilton & Jewett, *supra* note 133, at 295-302.
142. *See* G. ROBINSON, *supra* note 45, at 152-54.
143. *See* Hamilton & Jewett, *supra* note 133, at 296-300.
144. *See id.* at 300.
145. *See id.* (citing TEX. REV. CIV. STAT. ANN. art. 4548h, § 5 (Vernon 1976); TEX. REV. CIV. STAT. ANN. art. 6687b, § 31 (Vernon 1977)).
146. *See* Davis v. City of Lubbock, 160 Tex. 38, 57-60, 326 S.W.2d 699, 713-14 (1959).
147. *See* Key Western Life Ins. Co. v. State Bd. of Ins., 163 Tex. 11, 25-27, 350 S.W.2d 839, 848-49 (1961).

parties; "administrative" actions consider broader "legislative" issues of fact and policy.[148] Thus, de novo review is allowed only for matters that could have been assigned to courts originally. This test blurs at the margin. For example, revocation of an occupational license may concern both individual conduct and social policy about professional standards. Nevertheless, no better test seems readily available. De novo review may be wasteful, but it is hard to find reasons why the Texas Legislature may not require it in these limited instances.[149]

The next development in Texas concerned review on the agency's record. In *Gerst v. Nixon*,[150] the Texas Supreme Court upheld a statute providing for review of decisions by the Savings and Loan Commissioner on the administrative record.[151] A decade later, APTRA upgraded agency adjudicative procedures and provided for either substantial evidence review on the agency's record or true de novo review, as particular statutes might require.[152] With better agency procedures, de novo review became even more duplicative, and the problem of displacing administrative discretion remained.

In *Southwestern Bell Telephone Co. v. Public Utility Commission*,[153] the Texas Supreme Court in a telephone rate proceeding confronted an odd hybrid provision that called for de novo review of one issue (confiscation) and otherwise required a substantial-evidence review of the agency's record.[154] Holding that the mixture was "so inharmonious and conflicting as to be impossible of execution," the court converted the statute to pure substantial-evidence review.[155] It emphasized the inefficiency of de novo review after APTRA and suggested that judicial hostility to these statutes will, if anything, intensify.[156]

Today, most agency adjudication is reviewed on the administrative

148. *See* Scott v. State Bd. of Medical Examiners, 384 S.W.2d 686, 690-91 (Tex. 1964); *Key Western*, 163 Tex. at 23-24, 350 S.W.2d at 847-48.

149. Federal courts dealing with similar issues concerning the allocation of adjudicative power to agencies employ the notoriously conclusory "public rights" doctrine. *See* Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEXAS L. REV. 441, 468-77 (1989). Indeed, the Texas test parallels the one used to determine whether the due process clauses of the federal constitution require agencies to provide adjudicative procedure. *See* G. ROBINSON, *supra* note 45, at 36, 593. When due process demands adjudicative procedure, relatively intense judicial review is appropriate. *See id.* at 150-52.

150. 411 S.W.2d 350 (Tex. 1967).

151. *Id.* at 355-56.

152. *See* TEX. REV. CIV. STAT. ANN. art 6252-13a, § 19 (Vernon Supp. 1990).

153. 571 S.W.2d 503 (Tex. 1978).

154. *See id.* at 506.

155. *Id.* at 512.

156. *See id.* at 508-10.

record, although islands of de novo review[157] and even "Texas substantial-evidence review" continue to exist.[158] The lingering constitutional issue is whether a particular statute makes judicial review too intrusive.

B. Unreviewable Administrative Action in Texas

Federal administrative law presumes that agency action is subject to judicial review absent a showing of clear congressional intent to restrict or deny it.[159] The effect is to make review widely available on a nonstatutory basis—that is, for suits that are not based on statutes specifically authorizing review of administrative action, but on statutes authorizing courts to issue declaratory judgments or the prerogative writs such as mandamus.[160] Indeed, a congressional decision to preclude all judicial review of an agency action for which it is functionally appropriate might violate due process.[161]

Texas employs the opposite presumption—that administrative action is unreviewable unless there exists specific statutory authority. An exception, responding to the due process concerns raised by the federal cases, allows review if the action would infringe upon constitutional rights or vested property rights.[162] Yet many actions remain unreviewable.

In *Motorola, Inc. v. Bullock*,[163] the company paid a tax bill of 97,000 dollars under protest and filed a refund claim with the Comptroller. He denied it after a hearing, and the company appealed to the district court. Motorola had not availed itself of a statutory right to sue for a refund within ninety days of payment, presumably because it was exhausting its administrative remedies. Yet no statute specifically authorized an appeal from the Comptroller's hearing. The court of appeals, citing the general

157. *See, e.g.*, Bishop v. Martin, 740 S.W.2d 892, 893-94 (Tex. App.—Amarillo 1987, writ ref'd n.r.e.) (requiring de novo review for the revocation of a day care license).

158. *See, e.g.*, Mercer v. Ross, 701 S.W.2d 830, 831 (Tex. 1986) (applying the substantial evidence test to a case that arose under a special statute for the Texas Employment Commission, which is explicitly excluded from APTRA).

159. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

160. *See* G. ROBINSON, *supra* note 45, at 136-38.

161. *See generally* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401-02 (1953) (discussing situations in which Congress may regulate the jurisdiction of the federal courts); Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 (1981) (same). Courts avoid the issue by reading preclusion statues to allow consideration of some issues, such as constitutional ones. *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 367 (1974) (holding that the question of the constitutionality of veterans' benefits legislation was not within a statute otherwise barring review).

162. *See* Stone v. Texas Liquor Control Bd., 417 S.W.2d 385, 385-86 (Tex. 1967).

163. 586 S.W.2d 706 (Tex. Civ. App.—Austin 1979, no writ).

Texas rule, ordered dismissal of the suit.[164] The court did not consider whether a constitutional or vested property right might be present, although Motorola characterized the Comptroller's action as confiscatory.[165] Nor would the court read APTRA's provision defining judicial review of contested cases as a grant of jurisdiction.[166] The court regarded APTRA as a purely procedural statute, although section 19(a) states: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this Act. This section is cumulative of other means of redress provided by statute."[167]

In *City of Amarillo v. Hancock*,[168] Amarillo's Civil Service Commission, after a hearing, demoted a firefighter from captain to driver. He appealed to the district court, which found no cause for demotion and reinstated him. Because a statute provided for demotion procedures before the Commission but did not provide for an appeal, the Texas Supreme Court ordered the case dismissed for want of jurisdiction.[169] The court cited the Texas rule, emphasizing that jurisdiction must rest on constitutional or statutory grants except in cases raising the inherent right to review an action threatening constitutional rights (including vested property rights).[170] The court could find no property right in Hancock's captaincy because the city was free to abolish the position at any time.[171]

Motorola and *Hancock* typify the Texas approach.[172] Consequently, definitions of the constitutional rights that justify unauthorized judicial review are important. Common-law property rights such as mineral estates provide some easy cases.[173] Yet property rights take many forms (arguably, Motorola's tax payment should qualify). Interests in the "new

164. *Id.* at 708.

165. *See id.* at 707-08.

166. *See id.* at 708-09.

167. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(a) (Vernon Supp. 1990). This provision is drawn from § 15 of the Model State Administrative Procedure Act of 1961. *See* MODEL STATE ADMIN. PROCEDURE ACT § 15, 14 U.L.A. 429-30 (1980). The first sentence is a direct quotation of the Model Act; the second is a paraphrase. The commentary to the Model Act does not address whether the provision grants jurisdiction.

168. 150 Tex. 231, 239 S.W.2d 788 (1951).

169. *Id.* at 238, 239 S.W.2d at 792.

170. *See id.* at 234-35, 239 S.W.2d at 790-91.

171. *See id.* at 235, 239 S.W.2d at 791.

172. For another example, see Firemen's & Policemen's Civil Serv. Comm'n v. Blanchard, 582 S.W.2d 778, 779 (Tex. 1979) (holding that disciplinary suspensions of police officers are nonreviewable).

173. *See, e.g.*, Railroad Comm'n v. Graford Oil Corp., 557 S.W.2d 946, 950 (Tex. 1977) (enjoining the Railroad Commission from consolidating nine oil wells, holding that due process had been denied and mandatory fact finding had not been accomplished).

property"[174]—government-conferred statuses or benefits, such as Hancock's captaincy—are even trickier. Since the 1970s, the United States Supreme Court has repeatedly held that the "property" protected by federal due process includes any form of the new property to which the recipient has a legitimate claim of entitlement under state law.[175]

If Motorola was entitled to a refund on certain grounds,[176] or if Hancock could not be demoted without cause,[177] they possessed property interests protected by federal due process. The federal cases ask the question that modern Texas courts should address in their efforts to define vested property rights—whether state law provides mandatory criteria for granting or withholding benefits conferred by government. Thus, in *Martine v. Board of Regents*,[178] a Texas court of appeals relied on the federal criteria for defining property in deciding that faculty tenure is a vested property right that allows unauthorized judicial review of a dismissal.[179]

Yet, the underlying issues at the state and federal levels are different. The federal due process cases do not directly govern Texas controversies about judicial review. The federal cases focus on hearings that agencies must provide rather than on subsequent judicial review. Both Motorola and Hancock had hearings before agencies and complained not about the process provided there but only about the outcome.

The federal criteria for defining property are pertinent to defining rights to judicial review in Texas because, like agency hearings, judicial review prevents arbitrary government decisions and should therefore be available when state law creates entitlements to certain benefits. The fact

174. The term originated in Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964).

175. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985) (holding that state law defines property rights that public employees may have in employment, while federal constitutional law governs the adequacy of procedure); Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (holding that absent a state statute or university policy securing an employee's interest in employment, and absent debilitating stigmatization, the employee does not have a constitutionally protected property interest); *see also* Tarrant County v. Ashmore, 635 S.W.2d 417, 422 (Tex.), *cert. denied*, 459 U.S. 1038 (1982) (holding that the removal of justices and constables following a redistricting order did not deprive them of property).

176. The issue was unclear: the statute said that the Comptroller "may refund" overpayments due to mistake of fact or law. *See* Motorola, Inc. v. Bullock, 586 S.W.2d 706, 707-08 (Tex. Civ. App.—Austin 1979, no writ).

177. This appears to have been so. *See* City of Amarillo v. Hancock, 150 Tex. 231, 237, 239 S.W.2d 788, 792 (1951). However, it would be pertinent only under the modern definitions of property, which were not formulated when *Hancock* was decided.

178. 578 S.W.2d 465 (Tex. Civ. App.—Tyler 1979, no writ), *appeal after remand*, 607 S.W.2d 638 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

179. *Id.* at 470. On remand, the trial court set aside the Regents' order on the merits and ordered reinstatement of the plaintiff to his position as a tenured faculty member. The reinstatement order was affirmed in Board of Regents v. Martine, 607 S.W.2d 638, 643 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

that federal constitutional law does not clearly require judicial review should not weigh against providing it as a matter of state constitutional law because many state agencies receive little scrutiny from other branches of government. Indeed, Texas cases have recognized various forms of the new property for purposes of judicial review. Bank charters[180] and occupational advertising permits[181] are examples.

Nevertheless, gaps remain where judicial review may be denied, despite the existence of an important interest that should not be treated arbitrarily. Motorola's money and Hancock's captaincy are examples. In any event, statutory review has long been extended to many interests that were not thought to be of constitutional stature. When review is not provided and no clear constitutional right is at stake, what should courts do?

The Texas Supreme Court provided an answer in dictum in *Fire Department v. City of Fort Worth*:[182] "[i]t is generally recognized that even without express statutory authorization the orders entered by an administrative body pursuant to legislative sanction are subject to judicial review."[183] This statement was unnecessary in a case challenging de novo review. It was later implicitly disapproved because it rejects the prevailing Texas rule.[184] Yet the court's reason for the dictum should be persuasive today: "[t]he exercise of this jurisdiction by the courts is not in derogation of the separation of powers . . . but, on the contrary, is calculated directly to uphold and preserve that principle."[185]

Thus, Texas courts can justify a presumption in favor of judicial review on separation-of-powers grounds. No wide-ranging judicial claims of inherent or implied powers are necessary. Nor is it necessary to state a principle that disables legislative control of the nature and availability of review. Instead, Texas courts should determine the availability of judicial review by applying well-established federal and state administrative law concepts about the role of courts.

The Supreme Court's first encounter with judicial review of administrative action occurred in *Marbury v. Madison*.[186] The importance of Chief Justice Marshall's assertion of the power to invalidate unconstitu-

180. *See* Chemical Bank & Trust Co. v. Falkner, 369 S.W.2d 427, 433 (Tex. 1963); Brazosport Sav. & Loan Ass'n v. American Sav. & Loan Ass'n, 161 Tex. 543, 551, 342 S.W.2d 747, 752 (1961).

181. *See* Texas Optometry Bd. v. Lee Vision Center, Inc., 515 S.W.2d 380, 382 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.).

182. 147 Tex. 505, 217 S.W.2d 664 (1949).

183. *Id.* at 509, 217 S.W.2d at 666.

184. *See* Firemen's & Policemen's Civil Serv. Comm'n v. Kennedy, 514 S.W.2d 237, 239 (Tex. 1974).

185. *Fire Department*, 147 Tex. at 509, 217 S.W.2d at 666.

186. 5 U.S. (1 Cranch) 137 (1803).

tional statutes often obscures his opinion's fundamental contribution to administrative law.[187] Marbury sought mandamus compelling a high executive officer, the Secretary of State, to deliver his commission. Marshall's opinion set the foundation for judicial review of administrative action in the United States by stating that a court could grant mandamus against a high executive officer without invading the prerogatives of a coordinate branch.

American courts still employ the sources and limits of judicial power that Marshall identified in *Marbury*. The statute in question simply authorized the Supreme Court to issue mandamus "in cases warranted by the principles and usages of law."[188] Marshall therefore drew his definition of the role of mandamus directly from common-law sources such as Blackstone. These sources convinced him that courts could force even high executive officers to comply with legal duties. But mandamus could not intrude on discretionary, "political" duties.[189] Marshall concluded that delivery of the commission to Marbury was a ministerial action that any court with jurisdiction could compel.[190]

Marbury adapted a common-law power of the English courts to our scheme of separated powers. The framers of the various Texas constitutions surely understood and accepted *Marbury*'s essential premises.[191] Thus, the "judicial power" that the Texas Constitution vests in the courts[192] should include a power that has existed throughout our nation's history, namely, the power to conform executive action to law. Similarly, Texas's separation-of-powers provision commands the courts to play their traditional, proper role in checking executive activity. Such interpretations have a far better claim to historical legitimacy than does the current Texas presumption against judicial review.

Finding an inherent judicial power to control executive action also fits modern separation-of-powers theory. Federal courts have reconciled shifting vast amounts of power to agencies, power that could have been placed in the courts' hands, by emphasizing the need to retain the check

187. *See generally* Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 *passim* (1983) (arguing that *Marbury*'s "prominence as a constitutional decision has long deflected interest in examining its other implications," particularly with respect to the scope of judicial review of administrative action).

188. *Marbury*, 5 U.S. (1 Cranch) at 173.

189. *See id.* at 170-71.

190. *See id.* at 173. Of course, the Court's holding was that Congress could not constitutionally expand the Court's original jurisdiction, so the authority to grant mandamus was invalid. *Id.* at 176-80.

191. In Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 538 (1838), the Supreme Court confirmed *Marbury*'s dicta that mandamus could issue against executive officers—almost four decades prior to the current Texas Constitution.

192. *See* TEX. CONST. art. V, § 1.

of judicial review.[193] Similarly, the Texas Supreme Court's insight in *Thomas*, that legislative creation of large numbers of agencies should not displace fundamental constitutional grants of power,[194] supports a presumption in favor of judicial review.

Methods for obtaining nonstatutory review in Texas should be relatively simple; they are the methods used in other jurisdictions. The district courts have statutory power to issue mandamus and injunctions.[195] The district courts also have explicit authority under the Declaratory Judgments Act to construe statutes and declare the rights created by statute.[196] Texas courts have used these remedies to provide relief when constitutional rights have been implicated.[197] To permit nonstatutory review in Texas, the courts need only extend the remedies they already possess to claims that agencies are acting contrary to law.

If separation-of-powers principles fail to create a presumption favoring judicial review, either of two provisions in our bill of rights should suffice.[198] First, article I, section 13 provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[199] Second, a separate due process guarantee in article I, section 19 provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."[200]

In an effort to avoid treating any constitutional text as surplusage (and perhaps to pay homage to emphasis), Texas courts do not treat

193. *See supra* notes 36-49 and accompanying text.

194. *See supra* notes 122-27 and accompanying text.

195. *See* TEX. GOV'T CODE ANN. § 24.011 (Vernon 1988); TEX. CIV. PRAC. & REM. CODE ANN. §§ 65.011, 65.021 (Vernon 1986). The district courts had explicit constitutional power to issue mandamus and injunctions until recently. *See* TEX. CONST. art. V, § 8 (1891, amended 1985). A simplifying amendment in 1985 gave the district courts all original jurisdiction not allocated elsewhere by law and affirmed the power of district courts to issue writs that are necessary to enforce their jurisdiction. *See id.* The Texas Supreme Court has constitutional power to issue mandamus, *see* TEX. CONST. art. V, § 3, which is exclnsive in some cases involving "officers of the executive departments." TEX. GOV'T CODE ANN. § 22.002(c) (Vernon 1988).

196. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (Vernon 1986).

197. *See, e.g.*, Duckett v. City of Houston, 495 S.W.2d 883, 887 (Tex. 1973) (affirming district court's issuance of mandamus compelling city officials to fill a vacant civil service position in compliance with Fireman's and Policeman's Civil Service Law); *cf.* Spring Branch Indep. School Dist. v. Stamos, 695 S.W.2d 556, 562 (Tex. 1985) (reversing the trial court's finding of unconstitutionality as to TEX. EDUC. CODE ANN. § 21.920(b) (Vernon 1972), but noting that arbitrary exercise of a school principal's discretion under the section could give rise to an equal-protection claim), *appeal dismissed*, 475 U.S. 1001 (1986).

198. For the background of the Texas Bill of Rights, see Ponton, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 112-14 (1988); *see also* Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457 *passim* (1959).

199. TEX. CONST. art. I, § 13.

200. *Id.* § 19.

these provisions as coterminous.[201] Instead, they pursue several distinct inquiries. First, federal or state procedural due process may require agencies to provide hearings.[202] The two similarly phrased Texas due process guarantees have lived in the shadow of the fourteenth amendment—Texas courts have generally conformed them to federal precedents.[203]

The interests protected by the Texas due-course-of-law provisions, however, are more broadly phrased than those protected by the federal counterpart; the federal provision refers only to life, liberty, and property. Surely this comparative breadth justifies an approach like that of the federal cases, recognizing all government-conferred statuses and benefits governed by mandatory criteria as interests entitled to due course of law. When the availability of judicial review is at issue, Texas courts could also follow the federal presumption, based on due process, that review is available unless a statute clearly precludes it.

Second, Texas courts follow an active substantive due process doctrine that has invalidated a number of statutes for unreasonably interfering with common-law causes of action. Restrictions on medical malpractice actions are examples.[204] Courts that are willing to protect common-law causes of action against statutory modification should also be willing to protect common-law remedies in administrative law in the absence of statutory limits.

Finally, the open-courts clause of article I, section 13[205] has received independent emphasis as a right of access to the courts.[206] The major modern case relying on this provision is *LeCroy v. Hanlon*,[207] which invalidated an increase in court-filing fees aimed at increasing general revenue rather than supporting the courts.[208] The court stressed the presence of an open-courts provision in every Texas constitution and cited with

201. *See* Nelson v. Krusen, 678 S.W.2d 918, 921 (Tex. 1984).

202. *See supra* notes 176-81 and accompanying text.

203. *See* Harrington, *The Texas Bill of Rights and Civil Liberties*, 17 TEX. TECH L. REV. 1487, 1523-28 (1986).

204. *See, e.g.*, Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988) (invalidating a statute that limited medical malpractice damages to $500,000); Nelson v. Krusen, 678 S.W.2d 918, 922 (Tex. 1984) (invalidating a statute of limitations for medical malpractice claims because it cut off a cause of action before the party knew he was injured); Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983) (invalidating a statute of limitations for medical malpractice claims dealing with minors).

205. Article I, § 13 provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13.

206. For example, an appeal bond requirement fell because it was not conditioned on ability to pay. *See* Dillingham v. Putnam, 109 Tex. 1, 4, 14 S.W. 303, 305 (1890).

207. 713 S.W.2d 335 (Tex. 1986).

208. *Id.* at 342.

approval a series of early cases that invoked the provision to cure gaps in statutory grants of jurisdiction—such as assignments of jurisdiction to counties that had not been organized.[209] Although the *LeCroy* court announced a balancing test by which only unreasonable interference with access to the courts would be unconstitutional,[210] its invalidation of a forty dollar increase in fees effectively adopted a general rule against taxes on the right to litigate.

LeCroy's obvious solicitude for litigants' "right to their day in court"[211] should be extended to the administrative context, where a presumption favoring judicial review does not require the invalidation of any statutes. Moreover, as *LeCroy* recognized, Texas courts have long used the open-courts provision to justify filling gaps in their jurisdiction not reflective of considered legislative policy to deny common-law remedies.

Ever since Marbury sued for his commission, judicial review of administrative action has provided American litigants an important day in court. Judicial review of administrative action also enforces separation-of-powers controls on executive action for everyone's benefit. It is time for Texas to recognize that right.

209. *See id.* at 340.
210. *See id.* at 341.
211. *Id.*