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Administrative Adjudication of Constitutional Questions: Confusion in Florida Law and a Dying Misconception in Federal Law

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Administrative Adjudication of Constitutional Questions: Confusion in Florida Law and a Dying Misconception in Federal Law

ALAN C. SWAN*

It has long been held that Florida administrative agencies are powerless to pass upon constitutional challenges to statutes. In two recent decisions, however, the Supreme Court of Florida has sanctioned an extension of this traditional rule which would prohibit Florida administrative agencies from passing upon constitutional challenges to their own rules and regulations. The author demonstrates that this extension and the theory upon which it is based are not supported by precedent or sound policy. The author then traces the development of the traditional prohibition in both the Florida and federal courts and concludes that although the courts have sometimes purported to derive this limitation from the constitution, they have in fact based their judgments on more pragmatic considerations. These considerations, the author finds, can be fully protected by a discriminating use of the exhaustion of remedies doctrine without the perverse effects that the traditional rule can, on occasion, produce.

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* Professor of Law, University of Miami School of Law. The author wishes to express his appreciation for the editorial assistance given him in the preparation of this article by the editors and the staff of the *Law Review*.

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I. INTRODUCTION

Within the past year and a half, the Supreme Court of Florida in *Department of Revenue v. Amrep Corp.*¹ and *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*² has twice affirmed the rule that the administrative agencies of this state are powerless to judge the constitutionality of a statute. Standing alone, divorced from its context, this event is scarcely worth noting. The rule finds support in a long line of Florida cases.³ The Supreme Court of the United States has several times expressed a comparable disposition toward federal agencies,⁴ and the rule has been treated by several leading scholars as a fixture of American constitutional and administrative law.⁵

Yet, a brief probe of the subject makes plain that such complacency is misplaced. Florida law is in utter confusion, as a comparison of *Amrep* and *Gulf Pines* with a very perceptive line of intermediate appellate decisions which were ignored by the court illustrates.⁶ The federal decisions indicate that the rule may be no more than a hollow echo of an earlier day.⁷ The leading scholars have not only been met by dissenting authorities,⁸ but by theoretical contradictions within their own writings.⁹ At a more practical level, these

1. 358 So. 2d 1343 (Fla. 1978).

2. 361 So. 2d 695 (Fla. 1978).

3. See section III *infra*.

4. See section V *infra*. For like expressions in other jurisdictions, see, e.g., *Baldour v. Long Beach*, 279 N.Y. 167, 18 N.E. 2d 18 (1938); *Clayton v. Bennett*, 5 Utah 2d 152, 298 P.2d 531 (1956); *Dickenson v. Thorn*, 102 W. Va. 673, 135 S.E. 478 (1926).

5. 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 20.04 (1958).

6. See section III(c) *infra*.

7. See section V *infra*.

8. See *Berger, Exhaustion of Administrative Remedies*, 48 *YALE L. J.* 981, 988-99 (1939); Note, *The Authority of Administrative Agencies to Consider The Constitutionality of Statutes*, 90 *HARV. L. REV.* 1682 (1977).

9. Davis is the principal exponent of the subordinate role theory. See 3 K. DAVIS, *supra* note 5, § 20.04. Davis is also the authority cited by the District Court of Appeal, First District, in *Department of Administration v. Stevens*, 344 So. 2d 290 (Fla. 1st DCA 1977), in support of the Court's emphasis on the checks and balances function of the separation of powers doctrine. See text accompanying note 136 *infra*. It is precisely this view of the separation of powers doctrine, however, that establishes the basic conceptual fallacy that underlies the subordinate role theory. See section VI(b)(2) *infra*.

decisions are a step away from the goals manifested by the Florida Legislature when it enacted the Administrative Procedure Act in 1974 (APA).¹⁰ In sum, while the *Amrep* and *Gulf Pines* decisions start as seemingly simple affirmations of a traditional rule, they end up inviting an inquiry that ultimately suggests that the Florida courts would be well advised to abandon the rule completely.

A. *An Overview of the Inquiry*

Three basic features of the *Amrep* and *Gulf Pines* decisions serve as convenient starting points for a broad overview of our subject.

In both cases, the Supreme Court of Florida ignored its own long line of decisions, relying instead upon several recent intermediate appellate cases which held that administrative agencies were powerless to pass upon the constitutionality of their own rules or regulations—not just statutes.¹¹ This represented an extraordinary extension of the traditional rule. In sanctioning this extension, *Amrep* and *Gulf Pines* appear to endorse the truly remarkable theory that courts possess an exclusive jurisdiction to decide all constitutional questions that arise out of the workings of administrative government. It is an idea of very recent vintage in Florida law, finding little or no support in the court's own jurisprudence.¹² It has been expressly rejected by the Supreme Court of the United States and by those very scholars whose writings supply the principal theoretical justification for the traditional prohibition regarding statutes.¹³ The idea finds no sanction in the reasoning upon which Chief Justice Marshall footed the power of judicial review in *Marbury v. Madison*¹⁴ and cannot be reconciled with the separation of powers doctrine.

Apart from relying upon a dubious doctrine, the court in both decisions treated the rule prohibiting agencies from entertaining all constitutional questions as dispositive of the issue being decided. In both cases, however, that rule was, at least facially, irrelevant. The question before the court was whether a challenge to the statute underlying an action by an agency could be taken to a circuit court or whether, under the APA, the case had to be taken to the district court of appeal. All that was involved was a choice between two courts. Moreover, although the lack of power of the agency to decide

10. 1974 Fla. Laws ch. 74-310 (current version at FLA. STAT. §§ 120.50-.73 (1977 & Supp. 1978)).

11. See section II *infra*.

12. 231 So. 2d 34 (Fla. 1st DCA 1970), *rev'd on other grounds*, 278 So. 2d 261 (Fla. 1973).

13. See section V *infra*. See also 3 K. DAVIS, *supra* note 5, § 20.04.

14. 5 U.S. (1 Cranch) 137 (1803).

the constitutional question in the first instance meant that the party challenging the statute did not have to exhaust its administrative remedies and could go to *some* court immediately, why that lack of power should also cast the choice in favor of the circuit court rather than the district court was never explained.

We may assume that the supreme court saw something unique in circuit court jurisdiction that had to be preserved in cases where constitutional issues were being decided. Yet, the only factor that distinguishes the district from the circuit courts after passage of the 1974 APA is the latter's traditional function as a trial court—a court that starts by building its own factual record, rather than relying, as appellate courts do, upon the record “below.”¹⁵ Perhaps, therefore, it was the preservation of this right of a judicial trial *de novo* that the supreme court deemed essential in constitutional cases. Perhaps the court was fashioning a rule which, by prohibiting agencies from judging all constitutional questions, would preserve to the judiciary this record-building (*i.e.*, “trial”) function should the need for such a trial ever arise.

Admittedly, it is difficult to ascribe such reasoning to the court directly. But it is the only rational element in these decisions. Un-

15. Aside from review under separate statutes applicable to specific agencies, the Administrative Procedure Act of 1961, FLA. STAT. §§ 120.011-.331 (1961) provided for three alternative methods for securing judicial review of administrative action: (1) review of administrative “rules” by a declaratory judgment action in the circuit courts, *id.* § 120.30(1); (2) review of administrative orders by certiorari to the district courts of appeal, *id.* § 120.31(1); and (3) review of an “adverse order by mandamus, prohibition or injunction,” without the court being specified, *id.* § 120.31(4). Under these several grants it had been held that certiorari to the district courts would not lie to review any quasi-legislative or quasi-executive action of an agency. *Dickinson v. Judges of the Dist. Court of Appeals*, 282 So. 2d 168, 169 (Fla. 1973); *Bay Nat'l Bank & Trust Co. v. Dickinson*, 229 So. 2d 302, 306 (Fla. 1st DCA 1969). Doubts had also been expressed whether under § 120.31(4) an injunctive action would lie in the district courts. *Williams v. Ferrentino*, 199 So. 2d 504, 513 (Fla. 2d DCA 1967). Generally, therefore, under the 1961 Act review of all quasi-legislative or quasi-executive actions was by declaratory judgment or injunctive action in the circuit courts, while review of all quasi-judicial actions was by certiorari to the district courts. If, however, it were shown that an injunctive remedy were necessary to avoid irreparable harm, even agency orders (quasi-judicial actions) were probably reviewable through injunctive actions in the circuit courts.

All of this was changed by the APA of 1974, FLA. STAT. §§ 120.011-.72 (Supp. 1976) (current version at *id.* §§ 120.50-.73 (1977 & Supp. 1978)), under which the district courts of appeal were empowered to review “any final agency action,” and certain intermediate or preliminary actions, unless review would lie in the supreme court. *Id.* § 120.68(1). In the exercise of this authority the district courts were empowered to issue decisions “mandatory, prohibitory or declaratory in form . . . and [to] provide whatever relief is appropriate irrespective of the original form of the petition.” *Id.* § 120.68(13)(a). Thus, it seems clear that after the 1974 Act, the district courts: (1) possess the power to review any agency action whether quasi-legislative, quasi-executive or quasi-judicial; (2) may fashion any remedy that the circuit courts might fashion; (3) may reach their own conclusions of law *de novo*, *id.* § 120.68(9), as a circuit court would do; and (4) may make *de novo* “findings of fact” from an agency record, if that were constitutionally required.

fortunately, even the rational core is suspect. It represents a particular application of the judicial exclusivity theory and, as such, appears to assume that to relinquish even the record-building (*i.e.* trial) function would impermissibly impair the integrity of the exclusive power conferred upon the courts by the judiciary article of the Constitution of the State of Florida. Forty-five years ago the Supreme Court of the United States was asked to draw the same conclusion out of article III of the Constitution of the United States.¹⁶ The Court refused to do so for all but a narrow class of cases, and even those exceptions can no longer be sustained on article III grounds for reasons that are clear. If preservation of the judicial power required a trial *de novo* of all facts pertaining to a constitutional question, the same would also be true of any other relevant factual question that might arise upon judicial review of an agency decision. The very considerations that argue for a trial *de novo* on constitutional facts argue, with no less force, for a trial *de novo* on all facts. The latter rule, in turn, would require invalidating the entire system of judicial review now firmly fixed in American administrative law, including the judicial review provisions of the APA, and would seriously impair the effective functioning of all administrative government. It would also be contrary to the basic assumptions which caused the Florida Legislature, in 1974, to demand greater fairness and regularity of all administrative proceedings. It would not serve more generally to advance the "rule of law" in administrative government indeed.

If, however, a judicial trial *de novo* is thought of only as a guarantee to the individual whose constitutional rights are at stake (*i.e.* as an aspect of "due process") and not as a measure to protect the judicial power as such, then a rule withholding all constitutional questions from administrative adjudication is far too broad. As the decisions of the Supreme Court of the United States demonstrate, due process as a predicate for a trial *de novo* has an extremely narrow compass.

In sum, even assuming some rational basis for the decision of the Supreme Court of Florida to embrace a broad principle of judicial exclusivity, that principle is at once doctrinally suspect and practically ill-suited to the purpose being pursued. It deserves a quiet burial.

This leads to the third and most intriguing feature of the *Amrep* and *Gulf Pines* decisions. In both, the Supreme Court of Florida wholly ignored another line of recent Florida appellate cases whose reasoning totally undermines the cases upon which the

16. See section IV(c) *infra*.

court did rely.¹⁷ The cases in fact cited by the supreme court vastly and impermissibly extended the traditional rule prohibiting an agency from judging the validity of a statute. The logic of this alternative line of cases would destroy the traditional rule itself.

Unfortunately, however, these alternate decisions do not expressly embrace the fuller implications of their own logic. Nor do they, or any other Florida decision, explore a number of alternative theories that have sometimes been used to limit the power of administrative agencies to entertain constitutional questions. Plainly, we cannot leave the subject without examining these alternate precepts.

The term "alternative theories" is used advisedly. All of the terms draw upon the unique position and other characteristics of the administrative function itself and not upon some hypothesized need to preserve the integrity of the judicial function. Each is reflective of a number of practical or institutional concerns. While these concerns could be treated as reasons for a judicial policy of withholding constitutional questions from administrative determination in particular cases, they have not been so limited. Each can be read as emanating from some more general constitutional precept and each has been, from time to time, treated as reflecting a more basic lack of constitutional power in the agency. We, in turn, have simply gathered these considerations under convenient headings according to their asserted constitutional underpinnings and have labelled each heading a "theory."

The most significant theory, if only because it has not yet been jettisoned by the Supreme Court of the United States, is what we shall call the "subordinate role theory." It builds from the fact that an agency's existence is usually derived from the legislature and its powers must be exercised according to the law established by the legislature. It would be, therefore, incongruous, according to this argument, to say that an agency may not ignore what the legislature has said on a point of statutory law, but may, with impunity, disregard an express or implied decision of the legislature on a point of constitutional law. The most dramatic expression of this idea is found in the prospect of an agency purporting to pass upon the validity *vel non* of a statute from which its very existence or major powers are derived.¹⁸

Implicit in the theory, however, is an important limitation. It would only bar an agency from passing upon the facial validity of a

17. See section III(c) *infra*.

18. 3 K. DAVIS, *supra* note 5, § 20.04; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 438-39 (1965); Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L.J. 817, 883-92 (1976).

statute. That is the only constitutional question upon which a decision can be reasonably imputed to the legislature. Indeed, as its chief exponent has argued, an agency must be empowered to pass upon the constitutionality of a statute as *applied*, otherwise it would be incapable of executing the intent of the legislature, whether express, implied or presumed.¹⁹ In addition, by definition the theory would not preclude an agency from passing upon the validity of its own acts.

On its face, the theory has problems. Since the legislature cannot excuse the executive from the latter's own independent obligation to uphold the constitution, it is not immediately apparent why a legislative decision regarding the constitutionality of a statute should have the kind of simplistic effect upon the executive that the theory seems to hypothesize. Be this as it may, the theory is taken as given and we assume that this embarrassment is answerable, if at all, by disassociating administrative agencies as a group from the executive as such, especially from the latter's status as an independent and coequal department of government.

Another set of considerations that militate against permitting administrative agencies to decide constitutional questions leads to what can be labelled the "lack of competence" theory. It emphasizes the fact that agencies do not always follow the procedures necessary to elucidate or inform the decisionmaker on subtle points of constitutional law. It also relies upon the fact that too often agency personnel are selected for their technical, not their legal or constitutional, expertise.

By its own terms, of course, this precept seems to invite a more discriminating agency-by-agency or even case-by-case judgment. But again, we leave the critique for later and note only that if one must find some broader constitutional grounding for these concerns—some reason to elevate a general sense of inappropriateness into an equally general constitutional disability—it may be described as an emanation of the "due process" clause.

Lastly, akin to the subordinate role theory is what we have chosen to call the "ultra vires" precept. It is sometimes used, quite inappropriately, to explain why agencies lack the power to entertain challenges to the facial validity of a statute. Our interest, however, is in its use to preclude agencies from entertaining constitutional challenges to their own jurisdiction.²⁰ The theory starts with the premise that the power of an agency to pass upon its own jurisdic-

19. 3 K. DAVIS, *supra* note 5, § 20.04.

20. See, e.g., *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919); *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908); *Writers Guild of America v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976).

tion presupposes the existence of the very jurisdiction being challenged. To entertain the challenge, therefore, would be *ultra vires*. At least this is so if a court remains available to answer the threshold jurisdictional question. Agencies, in other words, unlike courts, do not possess jurisdiction to determine their own jurisdiction because in the case of an agency, unlike a court, there is another department of government empowered to decide the threshold question.

Analytically, each of these precepts has a different scope. Potentially, the lack of competence principle could disable an agency from considering any constitutional question that might arise in the course of its operations, whether that question pertained to the facial validity of a statute, to a statute *as applied* or the agency's own actions. The *ultra vires* theory is more limited in scope but can reach beyond challenges to a statute to include challenges to the agency's own actions. As already noted, the subordinate role theory only disables an agency from considering the validity of a statute on its face.

When each of these precepts is traced through the decisions of the Supreme Court of the United States, several conclusions emerge. The *ultra vires* theory has been totally rejected.²¹ Agencies, like courts, do in fact possess the power to pass upon their own jurisdiction even if the challenge to that jurisdiction is constitutional in nature. At the same time, however, certain kinds of jurisdictional questions, whether statutory or constitutional, may escape the exhaustion of remedies requirement. But the reason for the escape is not because the agency lacks power to decide, but only because in practical terms submission to the agency is unlikely to serve the cause of justice and good government.

In a similar vein, the Supreme Court has rejected any broad rule of disability predicated upon an assumed lack of agency competence to entertain constitutional questions.²² Competence, both procedural and substantive, is only a matter for case-by-case determination in deciding whether to apply the exhaustion of remedies doctrine.

In sum, the Supreme Court of the United States has unequivocally rejected any principle that might have a general disabling effect upon the constitutional power of an administrative agency to judge the constitutionality of a statute *as applied* or to judge its own rules, regulations or orders.

The Court has not, however, jettisoned the traditional rule

21. See section V *infra*.

22. *Id.*

disabling an agency from passing upon the validity of a statute on its face. Indeed, it has several times paid lip service to the rule.²³ On the other hand, the Court has never offered any explanation for the rule and never expressly endorsed the subordinate role theory. Moreover, in holding that a party challenging the facial validity of a statute need not exhaust its administrative remedies, the Court has almost invariably shied away from citing a lack of agency power. It has relied instead upon those more pragmatic factors which normally determine whether an initial submission at the administrative level is required or not. The Court's ambivalence toward the rule is plain, and this ambivalence is our clue.

Upon close scrutiny, it would appear that the only effect of the traditional rule is to elevate the boundaries of the exhaustion doctrine to a constitutional status. Or, stated more precisely, where the pleadings frame a challenge to the facial validity of a statute, but the challenger would still be required to exhaust his administrative remedies under the normal criteria governing that doctrine, the traditional rule would not bar submission to the agency. If, however, the challenger would not be required to go to the agency first under normal exhaustion criteria, the traditional rule would elevate that decision to the status of a constitutional barrier, thereby foreclosing the challenger from submitting to the agency even if he chose to do so.

This result is totally indefensible. It may be conceded readily that in particular cases the party challenging the statute should be free to bypass the agency and take his case directly to court. But, there are persuasive reasons of justice, convenience and orderly government which would be served by giving the challenger the right to choose an initial submission to the agency. That right would not afford agencies a broad new opportunity for evading legislative policies with which they disagree. Nor would it limit the power of the courts in reviewing their work. The traditional rule is, in short, perverse.

Against this background, the recent line of appellate decisions in Florida—the decisions ignored in *Amrep* and *Gulf Pines*—take on renewed significance. If our analysis of the federal cases suggest that, in practical terms, the traditional rule is perverse, the logic of these decisions demonstrates that the subordinate role theory upon which the rule depends is theoretically unsound—a misapplication of the separation of powers doctrine. Perverse in its effect, based upon a theoretical misconception, the rule should be abandoned.

23. See section VI(a) *infra*.

B. *Summary of Conclusions*

To summarize, it is urged that the courts of Florida draw upon the logic of their own decisions and abandon the idea that the administrative agencies of this state lack the power to entertain constitutional questions. That such issues belong exclusively to the judiciary or that a judicial trial *de novo* may be constitutionally required in such cases is wholly indefensible. If a party challenges the constitutionality of a statute *as applied* in a particular case, or challenges an existing or proposed agency rule, or a recommended order, he should first be required to present his argument to the agency under appropriate APA procedures, unless the case falls within an established exception to the exhaustion doctrine. In a case framed by the pleadings as a challenge to the facial validity of a statute, the challenger should still be required to exhaust his administrative remedies—subject to the usual exceptions—if the constitutional question cannot be decided upon a motion for summary judgment. Where summary judgment is appropriate, submission to the agency may be dispensed with, but there should be no barrier whatsoever to a submission at the option of the party offering the challenge.

In proffering these conclusions, one cannot be unmindful of the quality and character of the state's bureaucracy. Even if the agencies of Florida are no different from bureaucracies elsewhere, many of those agencies are, nevertheless, high politicized and not noted for their allegiance to the rule of law or for their sensitivity to the rights of the citizens they purport to serve, unless the latter are possessed of money, status or political influence. One must, in other words, have misgivings about proposing that these agencies become more intimately involved in deciding constitutional questions.

To succumb to these misgivings, on the other hand, would not be a triumph of realism over abstract theory, but a triumph of cynicism and hopelessness over the more practical vision which insists upon correcting this state of affairs. Cynicism was not the posture adopted by the legislature when it enacted the 1974 APA. It is not a posture that the courts should adopt. Yet, to withhold all constitutional questions from administrative government, to excuse the bureaucracy from any responsibility for the constitutionality of its own actions and for developing an internalized loyalty to the law is an act of pure cynicism contrary to everything the legislature sought to achieve when it insisted upon greater "due process" in administrative affairs.²⁴

Experience makes the point. Many of the constitutional cases

24. See authorities cited note 185 *infra*.

with which we are concerned will be heard under the provisions of section 120.57(1) of the APA.²⁵ Among the most creative innovations of the 1974 Act—and one the bureaucracy most resents—was the decision to place the conduct of those hearings into the hands of a cadre of legally trained, independent hearing officers under the Department of Administration. There is already evidence of how those officers, if able and courageous and backed-up by the courts, can hold an obstreperous agency to its constitutional duty.²⁶ For the courts to refuse to support and strengthen the role of those officers violates both the spirit and intent of the 1974 Act and deprives the people of the State of Florida of a potentially important and inexpensive forum in which to air their grievances. To do this, while claiming that otherwise the judicial power would be undermined, completely misapprehends the role of the courts in this important endeavor. It is not for the courts to sap administrative government of its sense of responsibility by excusing the latter from its oath. It is the task of the courts to subject agency judgments to a skeptical, vigorous and hopefully increasingly expert scrutiny and to do so without regard to the wealth or political power of those who are at odds with the government. This, and this alone, is in keeping with the great traditions of the American judiciary, and this, and this alone, will assure to the people of this state a more responsive bureaucracy.

In defense of these conclusions, we begin in section II of this article by reviewing the *Amrep* and *Gulf Pines* decisions. In section III, we examine the Florida cases more systematically, noting the extraordinary extension of the traditional rule regarding statutes, which first occurred about 1970, and how a later series of intermediate appellate decisions has destroyed the logical underpinnings of both the extension and the traditional rule. In section IV, we examine the judicial exclusivity theory, including that special application of the theory that would require a *de novo* trial of all constitutional facts. Section V deals with the lack of competence and ultra vires theories, and in section VI we turn to the rule which holds that agencies are constitutionally disabled from judging the facial validity of a statute.

II. AMREP AND GULF PINES

In *Department of Revenue v. Amrep Corp.*,²⁷ Amrep, relying principally upon section 199.242(1)²⁸ and belatedly upon chapter 86

25. See note 32 *infra*.

26. FLORIDA LAW REVISION COMM'N, ANNUAL REPORT AND RECOMMENDATIONS (1974).

27. 358 So. 2d 1343 (Fla. 1978).

28. FLA. STAT. § 199.242(1) (1975) (repealed by 1978 Fla. Laws ch. 78-95, § 54). Section

of the Florida Statutes,²⁹ filed a suit in circuit court challenging an intangible property tax assessment which the Department proposed to levy. Amrep argued that some part of the assessment was improper but that, in all events, the statutory denial to it of an exemption from the tax violated the equal protection clause of the fourteenth amendment.³⁰ The Department responded by challenging the jurisdiction of the circuit court. It argued that the 1974 APA either expressly "replaced" or at least "impliedly repealed" section 199.242(1) and that the circuit courts lacked declaratory judgment jurisdiction where direct review was available in the district courts of appeal.³¹ The Department also contended that the company's action was barred by its failure to exhaust all of the administrative remedies available to it under the APA. Presumably, this meant a failure to demand a full section 120.57³² hearing on the Department's proposed assessment.

Since the parties had stipulated, and the court agreed, that the constitutional question was unavoidable,³³ the lack of power of the Department to pass upon that question was, of course, one possible answer to the Department's exhaustion argument. Even so, that only served to render more critical the separate contention by the Department that the district courts alone possessed the power to

199.242(1) provided for review of Department of Revenue decisions in the circuit courts.

29. *Id.* § 86.011. Amrep amended its original complaint to assert circuit court jurisdiction under § 86.011. 358 So. 2d at 1346. Since the supreme court found jurisdiction under FLA. STAT. § 26.012 (1975), it was not necessary to decide whether jurisdiction also existed under the declaratory judgments statute. 358 So. 2d at 1348.

30. U.S. CONST. amend. XIV, § 1, cl. 4. Amrep contended that FLA. STAT. § 199.023(7) (1975) violated equal protection by allowing tax exemptions for inter-company accounts only to "affiliated groups" whose parent corporations were either incorporated in Florida or maintained their principal place of business in Florida. Amrep was fully qualified to do business in Florida, but was organized under the laws of Oklahoma and had its principal place of business in New York. The supreme court ultimately agreed with Amrep's contention and declared the limitation on the exemption unconstitutional. 358 So. 2d at 1352.

31. 358 So. 2d at 1347. The Department cited the general repealer of 1974 Fla. Laws ch. 74-310, § 3, stating that the purpose of the Administrative Procedure Act was to achieve uniformity in the "rule-making and adjudicative procedures used by administrative agencies in this state," and stipulating that the Act "shall replace" all other provisions relating to, *inter alia*, "judicial review of administrative actions." After the *Amrep* decision was rendered, the Florida Legislature specifically repealed § 199.242. 1978 Fla. Laws ch. 78-95, § 54.

The Department also contended that Amrep's belated resort to the Declaratory Judgments Act, FLA. STAT. § 86.011 (1975), was inappropriate because FLA. STAT. § 120.73 (1975) (current version at *id.* § 120.73 (Supp. 1978)) was not intended to broaden pre-1974 jurisdiction of the circuit courts.

32. FLA. STAT. § 120.57 (1975) (current version at *id.* § 120.57 (Supp. 1978)). Section 120.57 provided for proceedings where a "party timely asserts that his substantial interests will be affected in [rulemaking] proceedings" and that his interests will not otherwise be adequately protected.

33. 358 So. 2d at 1346.

pass upon the issues in the case. Indeed, at one point, the court appeared to recognize this when it framed the question as "[w]hether [the company] . . . ha[d] a right of action in the circuit courts . . . in view of the provisions of the [APA]."³⁴

In response to the question, the court, per Justice Sundberg, rejected the Department's argument for two reasons. Citing section 26.012 of the Florida Statutes,³⁵ the justice found that nothing in the 1974 Act was intended to "divest the circuit courts of their historical jurisdiction to determine the issues in contested tax assessment actions."³⁶ This, a dubious conclusion at best,³⁷ has prob-

34. *Id.*

35. FLA. STAT. § 26.012 (1975). The court quoted § 26.012(c), granting jurisdiction in cases in equity, and § 26.012(e), granting jurisdiction in "all cases involving legality of any tax assessment or toll." The court did not refer to § 199.242(1), which grants jurisdiction in the circuit courts to review assessments by the Department of Revenue. FLA. STAT. § 199.242(1) (1975) (repealed by 1978 Fla. Laws ch. 78-95, § 54). Since the court chose to rely on § 26.012(c), (e) it may be that the court was more concerned with preserving the equity power of the circuit courts than with its power to decide tax cases.

36. 358 So. 2d at 1348-49.

37. See FLA. STAT. § 120.72(1) (1975), which provides: "[I]t is the express intent of the legislature that the provisions of this act shall replace all other provisions in the Florida Statutes, 1973, relating to . . . administrative adjudication, or judicial review of administrative action"

The court failed to explain why the legislature exempted tax assessment actions from this general replacement of existing law. If, however, one assumes that the 1974 Act replaced only those provisions of the Florida Statutes which are strictly inconsistent with the Act, then perhaps Justice Sundberg's opinion can be understood. Since § 26.012 grants to the circuit courts "original jurisdiction" and the 1974 Act deals only with "appellate review" by the district courts, see *id.* §§ 120.68, .69, it may be argued that the Act was not intended to replace original jurisdiction in the circuit courts.

This argument, however, is unpersuasive in view of the history of Florida tax law. Prior to 1974, the Department of Revenue's administration of the tax laws was expressly exempt from the Administrative Procedure Act of 1961. FLA. STAT. §§ 120.21(1) (1971). Until 1972, the judicial review exemption was required by the constitution which vested "exclusive original jurisdiction" in the circuit courts over all tax assessment actions. FLA. CONST., art. V, § 6(3) (1956). The 1972 revision of the constitution, however, empowered the legislature to restructure the circuit court jurisdiction. FLA. CONST. art. V, § 20(b).

Against this background, it is indeed significant that the legislature failed to exempt the Department of Revenue from the provisions of the Act. This is especially apparent in view of the numerous exemptions the legislature did provide. FLA. STAT. § 120.63 (1975) (current version at *id.* § 120.63 (1977)). Section 120.63 provides that any administrative agency may apply for exemption from specific procedures of the Act if certain requirements are met. Certain agencies, e.g., the Industrial Relations Commission, are explicitly exempted from the hearing requirements of the Act. *Id.* § 120.57. The Division of Pari-mutual Wagering was exempted from the Act in 1977. 1977 Fla. Laws ch. 77-53 (codified at FLA. STAT. § 120.57(3) (1977)). The legislature was obviously aware of the need to exempt certain agencies. Thus, in view of the intent of the legislature to "make uniform . . . judicial review of administrative action," FLA. STAT. § 120.72(1975), it is unlikely that the legislature intended to leave tax assessment cases out of the Act, absent an express exemption.

More importantly an attempt to distinguish between appellate and original review for purposes of the 1974 Act would wreck havoc upon the principles underlying the Act. The Act was intended to eliminate the patchwork character of the jurisdictional grants then contained

ably been overturned by the 1978 revisions to the APA.³⁸ The second argument is, therefore, of principle interest to us. The constitutional question raised by *Amrep* was not only unavoidable, Justice Sunberg observed, but was not a question upon which the Department of Revenue could render a decision. For this proposition, the justice quoted with approval the following statement from the decision of the District Court of Appeal, First District, in *Department of Revenue v. Young American Builders*:³⁹ "The Administrative Procedure Act could not and does not relegate Fourteenth Amendment questions to administrative determination, nor restrict the occasions for judicial consideration of them by reference in § 120.73 [the 1975 Amendment] to ch. 86, nor otherwise impair the judicial function to determine constitutional disputes."⁴⁰ Apparently, because the agency was barred from considering the company's constitutional challenge to the statute, the jurisdiction of the circuit court had to be affirmed.

Why? Why is the lack of authority of the agency at all relevant to the issue of whether the constitutional challenge had to be presented to the district court under section 120.68 or whether resort could still be had to the circuit court? While the opinion continues to refer to the exhaustion question, that was not the issue being decided. The only issue was a choice between two courts, not between a court and an administrative agency. In this context, the quotation from *Young American Builders* was a total non sequitur. How could review by the district court of appeals impair the judicial function to determine constitutional disputes, unless, of course, the

in the Florida statutes. Distinguishing between appellate and original review would not only perpetuate but exacerbate the problem.

Consider, for example, the array of pre-1974 statutes dealing with occupational and professional licenses. For the majority, licensing revocations or suspensions were reviewable by certiorari or other limited review comparable to § 120.68. But, this was the extent of any rational pattern. Medical doctors and osteopaths were to go to the district court, FLA. STAT. §§ 458.123, 459.141 (1973); nurses and podiatrists to the circuit court, *id.* §§ 461.10, 464.21(6); pharmacists were to seek relief through injunction, *id.* § 465.19; and chiropractors were left without any specific relief. Adherence to the *Amrep* rationale would require that this incoherent pattern of review be retained.

38. See Administrative Procedure Act of 1978, 1978 Fla. Laws ch. 78-95, § 1, which makes clear the legislature's intent "to repeal or amend various provisions of the Florida statutes containing procedural language superseded or made redundant by chapter 120." *Id.* The fact that § 26.012, insofar as it pertains to tax assessments, was not expressly repealed by the 1978 Act (1978 Fla. Laws ch. 78-95), is immaterial in light of the fact that § 199.242(1) was expressly repealed by 1978 Fla. Laws ch. 78-95, § 54 and the fact that § 1(4) of the 1978 Act provides: "Failure of this act to amend or repeal any provision in the Florida Statutes does not imply that that provision is not in conflict with, superseded by or unnecessary in light of chapter 120."

39. 336 So. 2d 371 (Fla. 1st DCA 1975), *cert. denied*, 342 So. 2d 1101 (Fla. 1977).

40. 358 So. 2d at 1348-49.

district courts are not part of the judicial system of the state. Obviously, there is something at work here that still remains to be explained.

Unfortunately, we are brought no closer to an understanding of the supreme court's mind by its decision in *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*⁴¹ There, the court affirmed the authority of the circuit court to entertain a declaratory judgment action challenging the constitutionality of a statute relied upon by the comptroller in denying Oaklawn a license to operate a cemetery.⁴² As in *Amrep*, the party challenging the statute (Oaklawn) commenced its action in the circuit court before exhausting its right to a full section 120.57 hearing before the comptroller. And, once again, the argument was made that its suit was barred by that failure. Nevertheless, the comptroller had issued a "preliminary ruling" to the effect that the challenged statute was, in fact, applicable to the case. The supreme court held that this ruling could have been appealed immediately to the district court of appeal under section 120.68(1).⁴³

If the preliminary ruling could be brought immediately to the district court, the same would most certainly be true of the constitutional question. *Gulf Pines*, in other words, presented the same question as *Amrep*. If Oaklawn was not required to pursue its administrative remedies any further, was its remedy solely by way of appeal to the district court under section 120.68, or could it still invoke the declaratory powers of the circuit court?

41. 361 So. 2d 695 (Fla. 1978).

42. The Comptroller had tentatively agreed to grant Oaklawn a cemetery license, properly ignoring FLA. STAT. § 559.39(2) (1975) which required a showing of "need" for a new cemetery. That section had previously been declared unconstitutional in *Dickenson v. State*, 227 So. 2d 36 (Fla. 1969). *Gulf Pines*, as a person substantially affected by the proposed granting of a license, filed an objection and a request for a comptroller's conference. Between the time *Gulf Pines* filed and the conference, the legislature amended § 559.32(2) to provide more specific criteria for "need." At the comptroller's conference, the Comptroller ruled that the new statute was applicable to Oaklawn's application. Evidence was then presented regarding the need for a new cemetery and the Comptroller subsequently denied Oaklawn's license application based on this new "need" criteria. Oaklawn filed an action for declaratory judgment and a petition for mandamus in the Leon County Circuit Court claiming that the Comptroller erred in applying the new "need" criteria retroactively and that in any event the statute constituted an invalid delegation of legislative power. The circuit court granted Oaklawn's motion for summary judgment. 361 So. 2d at 696-98.

43. FLA. STAT. § 120.68(1) (1975) (current version at *id.* § 120.68(1) (Supp. 1978)), under which a "preliminary" or "intermediate" agency "action or ruling" is appealable if review after "final action" would "not provide an adequate remedy." Since the legality of agency "actions" as well as agency "rulings" are subject to review, it does not matter whether the agency actually decided the point of law being raised on appeal or not. Accordingly, if the "preliminary ruling" of the Comptroller was immediately reviewable because later review would not provide an "adequate remedy," that "ruling" constituted an "action" the constitutionality of which was also immediately reviewable. The constitutionality of that action, of course, turned upon the constitutionality of the statute.

The issue was a critical one. In 1974, the Florida Legislature had decided to vest primary responsibility for supervising the administrative agencies of this state in the district courts of appeal.⁴⁴ That decision was, and remains, essential to the development of a more adequate administrative law for this state and to bringing the highly politicized bureaucracy of this state under the rule of law. It is a decision opposed by all the forces of special interest who would prefer to see judicial energies diffused and the development of judicial expertise retarded by a scattering of the supervisory function in a system of parallel powers.⁴⁵ While the *Amrep* case was similar in

44. This provision received much criticism. In one article, Levinson stated that he would prefer to see the enforcement power vested in the district courts of appeal, rather than in the circuit courts. The judicial review provisions of the APA confer jurisdiction upon the district courts of appeal to decide cases brought *against* an agency by an affected party seeking review. It seems anomalous that the enforcement provisions of the same Act require the circuit courts to decide cases brought *by* an agency against an affected party seeking enforcement, in which the same types of issue are likely to arise. By having one level of courts decide petitions against the agency and another level of courts decide enforcement actions by an agency, the Act increases the possibility of inconsistent patterns of decisions from court to court and the related possibility that parties will attempt to maneuver their cases into one set of courts or the other, depending on their perception as to where their chances of success are greater.

Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617, 689 (1975) (footnote omitted).

In spite of the fact that the legislature provided in § 120.69 that all agency enforcement actions were to be brought in the circuit courts, the central supervisory responsibility will still remain with the district courts of appeal. This is because any party adversely affected by an agency action who wants to take the initiative to obtain judicial review must proceed to the district courts under § 120.68. This will certainly cover the bulk of adverse agency decisions. The parties affected by such a decision are not likely to sit around and simply defy the agency to enforce its decision. This is especially so if the agency action has a self-executing quality (e.g., license suspension) or if an unsuccessful effort to resist an enforcement action would open the affected party to fines relating back to the date that the agency issued its decision.

45. In order for the judiciary to be effective in controlling such a bureaucracy, the task must be concentrated in a limited number of increasingly expert appellate courts. Certainly this is the way the legislature saw the problem when it enacted § 120.68 and mandated replacement of all other statutes relating to judicial review of administrative action. FLA. STAT. § 120.72(1) (1975) (current version at *id.* § 120.72(1) (Supp. 1978)).

Modern government demands no less. Only if coherent, consistently enforced rules are developed by the judiciary is there any chance of imposing the rule of law on an otherwise highly political bureaucracy. This can best be achieved if the supervisory function is concentrated in a limited number of appellate courts that become increasingly expert in dealing with administrative action. Thus, by sanctioning the dispersion of the supervisory function, *Amrep* and *Gulf Pines* can only be seen as retarding the development of a more adequate body of administrative law for this state.

Moreover, justice for the people of Florida requires that administrative bodies have some freedom in order to deal effectively with the social problems they are created to solve. However, a bureaucracy unrestrained by law, even a benevolent bureaucracy, can by its excesses become a self-defeating enterprise. A government, unrestrained by the rule of law, is stripped

purport, read narrowly it pertained only to tax assessment cases. In *Gulf Pines*, the issue was more far-reaching. The court was being asked to uphold the declaratory powers of the circuit court on a question clearly referable to the district courts. As such, it was also being asked to overturn *School Board v. Mitchell*⁴⁶ where, in a very thoughtful decision, the District Court of Appeal, First District, had affirmed the long established rule that the circuit courts had no declaratory jurisdiction where certiorari would lie or, under the 1974 Act, direct review would lie.

In response to this, the supreme court, per Justice England, upheld the declaratory powers of the circuit court in an opinion that can only be characterized charitably as a curiosity. The presence of a constitutional question caused the court to become preoccupied with the powers of the agency and with the exhaustion of remedies doctrine, all of which it then confused with the jurisdictional issue. Thus, the justice began by insisting that he did not have to come to grips with the *Mitchell* decision.⁴⁷ Next, he proceeded to discuss avoiding "promiscuous intervention" in agency affairs, a phrase from the great pre-1974 exhaustion of remedies case, *Odham v. Foremost Dairies, Inc.*⁴⁸ This was then followed by what was apparently intended as a definitive discussion of the jurisdictional issue:

Gulf Pines is correct in interpreting [certain cited] . . . decisions to mean that, as a general proposition, the circuit court should refrain from entertaining declaratory suits except in the

of its legitimacy, without which it cannot be effective. Thus, in their failure to reinforce the system of judicial review best designed to develop a more adequate administrative law in this state, these two decisions also serve to undermine the true effectiveness of administrative government itself. This is even more apparent when one realizes that *Amrep* appears to require a *de novo* judicial proceeding. Apart from the added expense and inconvenience of such a proceeding, it inevitably denigrates the importance of the administrative record and encourages bureaucratic carelessness in formulating that record.

46. 346 So. 2d 562 (Fla. 1st DCA 1977). In *Mitchell*, a school board employee lost her position when the school board instituted a reorganization plan. The employee sought a declaratory judgment that the plan was invalid because it violated FLA. STAT. § 231.36(3)(9) (1973) (amended 1974). The First District refused to allow the declaratory action since the employee could have sought a hearing pursuant to § 120.57(1).

The court noted the pre-1974 rule that where administrative action was deemed "quasi-judicial," declaratory relief was inappropriate if review by certiorari was available. After considering the effects of the newly-enacted APA, the court concluded that the old quasi-judicial/quasi-legislative distinction had been obliterated. Since all agency action—rules or orders—were subject to direct review, and most rules and orders would emerge from an adjudicatory proceeding, the court concluded that, following the traditional rule, declaratory relief would not be appropriate where direct appeal was available.

47. 361 So. 2d at 698. Justice England claimed there was no need to deal with the relationship between the APA and circuit court jurisdiction as presented in *Mitchell*.

48. 128 So. 2d 586, 593 (Fla. 1961), quoted in *Gulf Pines*, 361 So. 2d at 698.

most extraordinary cases, where the party seeking to bypass usual administrative channels can demonstrate that no adequate remedy remains available under Chapter 120. One class of exceptional cases was expressly recognized in *State ex rel. Department of General Services v. Willis*, however. The First District there acknowledged

"that the Administrative Procedure Act does not and cannot displace circuit court jurisdiction to enjoin enforcement of facially unconstitutional agency rules."⁴⁹

What does it mean to say that the 1974 Act "cannot displace" circuit court jurisdiction in these constitutional cases? As article V, section 20 makes amply plain, the constitution does not guarantee to the circuit courts the power to enjoin agency actions. It can be taken away at any time by the legislature.⁵⁰ The same is also true

49. 361 So. 2d at 699 (quoting *State ex rel. Dep't of Gen. Serv. v. Willis*, 344 So. 2d 580, 590 (Fla. 1st DCA 1977)).

50. FLA. CONST. art. V, § 5, which provides as follows:

The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. . . . They shall have power of direct review of administrative action prescribed by general law.

FLA. CONST. art. V, § 20(c)(3) stipulates: "After this article becomes effective, and until changed by general law consistent with sections 1 through 19 of this article: . . . Circuit courts shall have jurisdiction . . . in all cases in equity The circuit court may issue injunctions."

First, to argue that the grant of "original" jurisdiction in article V, § 5, guarantees to the circuit courts the power to enjoin enforcement of any facially unconstitutional agency rule, entirely misreads the section. The grant of original jurisdiction is not confined to constitutional cases. Thus, if that language is a guarantee of injunctive power where there is a challenge to the constitutionality of an agency rule, it must also constitute a guarantee of jurisdiction to hear any challenge to an agency rule. This obviously proves too much. It would mean that § 120.68 of the APA is unconstitutional to the extent it was also construed as the exclusive method for challenging an agency action on nonconstitutional grounds. See discussion in section IV(c). At bottom, such a reading is based upon a misconception of what constitutes "original" jurisdiction and what constitutes "appellate" jurisdiction. See discussion note 37 *supra*.

Second, the "all writs" provision of article V, § 5 cannot be read as a *guarantee* of the circuit courts' jurisdiction to enjoin facially unconstitutional agency rules. That language only assures the circuit courts the power to fashion an injunctive remedy if "necessary or proper to the complete exercise of their jurisdiction." It is necessary, in other words, to find an independent grant to the circuit courts of jurisdiction to review agency actions before the "all writs" language invests them with injunctive authority.

Third, one could certainly construe article V, § 20 as conferring upon the circuit courts a general jurisdiction in equity or a jurisdiction to enjoin facially unconstitutional agency rules. This might be viewed as the independent grant of jurisdiction necessary to support the "all writs" provision of article V, § 5, but that would be unnecessary. The grant in § 20, however, can be "changed by general law," and since § 5 contains no guarantee of equitable jurisdiction over agency actions, legislative withdrawal of the grants in § 20 would be entirely

of the declaratory judgment jurisdiction of the circuit court. In fact, the 1974 Act did appear to repeal that jurisdiction, and it took a 1975 amendment to restore it.⁵¹ Even if *arguendo* the powers of the circuit court could not be taken away by the legislature, that would apply to all cases challenging the legality of an agency's action, not just cases charging a facial violation of the constitution.⁵² On its face, and out of context, the statement from *Willis* cannot stand.

Why then did Justice England use it this way? The answer, it would seem, lies in the justice's reference to "bypass[ing] usual administrative channels."⁵³ Quite simply, he was still focusing almost exclusively upon the exhaustion of remedies point. This was further confirmed by his reference to "extraordinary cases," another phrase from *Odham*.⁵⁴ From all of this then, it is fair to conclude that the quoted portion of the opinion means nothing more than that the administrative exhaustion requirement, as an implicit term of the 1974 Act, cannot be used to "displace" circuit court jurisdiction in a case challenging the facial validity of an agency rule. The reason, as a later reference to *Young American Builders* makes clear,⁵⁵ is that agencies lack the constitutional authority to pass on such matters.

The confusion is transparent. The quotation from *Willis* is offered as the definitive answer to the jurisdictional question. It makes sense, however, only if treated as a discussion of the exhaustion requirement, precipitated no doubt by the comptroller's presumed lack of power to decide the constitutional issue. Yet, the exhaustion of remedies point is irrelevant to the jurisdictional question. All that the comptroller's lack of power proves is that immediate judicial intervention was warranted. It does not tell us why the circuit court could intervene nor why Oaklawn's right of appeal to the district court under section 120.68(1) did not bar the circuit court from entertaining the case. Apart from some vague reference to construing liberally the declaratory powers of the circuit court,⁵⁶

consistent with article V, §§ 1 to 19. Moreover, the grants in § 20 are not confined to constitutional cases. Thus, if § 120.68 withdrew from the circuit courts the equitable power conferred upon them by article V, § 20 in nonconstitutional cases, it must also have withdrawn that power in constitutional cases.

51. Section 120.73 was added to the APA in 1975, 1975 Fla. Laws ch. 75-191, § 11, because it was believed that the 1974 Act "repealed" or replaced the declaration and judgment jurisdiction of the circuit court under chapter 86. See 1974 Fla. Laws ch. 74-310, § 1 (codified at FLA. STAT. § 120.68 (Supp. 1974)).

52. See note 50 *supra*.

53. 361 So. 2d at 699.

54. 128 So. 2d at 593, quoted in *Gulf Pines*, 361 So. 2d at 699.

55. 361 So. 2d at 699.

56. *Id.*

that question, and the central challenge of the case, is left untouched by the opinion.

It is left for the reader to decide whether *Gulf Pines* effectively overrules *Mitchell*. More important to the present subject are two other points. It seems plain that in *Amrep* and *Gulf Pines* the supreme court embraced a thoroughgoing judicial exclusivity theory. This is apparent from the fact that while the traditional rule barring an agency from judging the constitutionality of a statute was wholly adequate to the court's purpose in each case, it relied instead upon the extension of that rule in *Young American Builders* and *Willis* (i.e., barring agencies from judging the constitutionality of their own rules and regulations). This extension in turn had to rest upon the exclusivity theory since it could not be reconciled with any of the alternative precepts; it was: (1) wholly incompatible with the subordinate role theory; (2) broader than warranted by the "ultra vires" theory; and (3) fashioned without reference to the question of agency competence and in open disregard of the procedural strictures contained in the 1974 Act.

On the other hand, it must also be recognized that the judicial exclusivity theory does not, on its face, explain the supreme court's special solicitude for circuit court jurisdiction. It does not explain why the judicial prerogative could not have been fully entrusted to the district courts of appeal. This poses the question that lies at the center of these decisions. Are there circumstances under which the district courts could not, due to the nature of their function, fully vindicate the judicial prerogative as defined by the exclusivity theory—circumstances under which resort to the circuit courts would be essential to the full discharge of that prerogative? If such circumstances do exist, we will perhaps have found a rational core in these decisions which can then be subjected to further analysis.

To phrase the question this way immediately suggests an inquiry into the differences between "appellate review" and "original" jurisdiction. The circuit court, in exercising their equitable and declaratory powers, are typically thought to be exercising original jurisdiction. The district court review under section 120.68 is, of course, appellate in form.

On one level, the distinction yields no rational basis whatsoever for the decision in *Amrep* and *Gulf Pines*, as the text of section 120.69 makes plain. Under that section, a court always decides questions of law as an original matter (i.e., *de novo*), whether it be the supreme court, a district court of appeal or a circuit court. This means that in making the ultimate decision on a point of constitutional law, a district court of appeal acting under section 120.68 is no less a court of original jurisdiction than a circuit court acting under its equitable or declaratory powers. In like fashion, the latter

is no less an appellate court (*i.e.*, a court reviewing an agency action) than the district court. On the other hand, only a court of original jurisdiction can try a case *de novo*, in the sense of starting from its own raw, factual record. Only the circuit courts can perform that function. If, therefore, agencies lack the constitutional power to entertain constitutional questions, it follows that the circuit courts must remain open to hear all questions that cannot be disposed of upon summary judgment (*i.e.*, where there are disputed questions of fact to be resolved). In such cases, but only in such cases, is circuit court jurisdiction essential if the judicial prerogative is to be fully protected.⁵⁷

The argument, of course, cannot be used to justify the decision reached in either *Amrep* or *Gulf Pines*. Both cases could have readily been decided from the pleadings and affidavits. The argument, nevertheless, identifies a narrow range of cases in which the lack of power of an agency to entertain constitutional questions is germane to the choice between the circuit courts and the district courts of appeal. It yields a rational core in these two otherwise inexplicable decisions. At the same time, the entire argument would collapse if the agency were available to build the factual record and if the courts were confined to (1) deciding the ultimate question of constitutional law and (2) *de novo* judicial "factfinding" using the agency record or judicial review of agency "factfinding" under the substantial evidence test. If the judicial prerogative were limited in this fashion, the task could be fully discharged by the district courts. Yet, if the judicial prerogative were so limited, it would spell the end of the judicial exclusivity theory.

In sum, the basic question is clear. Is there anything in either the Florida jurisprudence, in the historical origins of judicial review, in the federal experience or in policy to suggest that constitutionally the judiciary must afford a trial *de novo* in that narrow class of cases where there are disputed questions of fact relevant to the underlying constitutional issue (*i.e.*, constitutional facts)? If the answer is negative, then plainly we are compelled to abandon the exclusivity theory altogether and look to the alternative theories that have from time to time been employed to bar administrative agencies from

57. Observe that if the words "original jurisdiction" in FLA. CONST. art. V, § 5 are construed as a guarantee of circuit court jurisdiction, they constitute a guarantee only in cases where there are disputed issues of fact to be tried. On this basis, *Amrep* and *Gulf Pines*, if interpreted as resting upon a constitutional requirement, were wrongly decided. More importantly, since the words "original jurisdiction" as distinct from "appellate jurisdiction" are not self-evident, then clearly the courts must interpret the grant in article V, § 5 in light of the larger consequences that would result were that section construed as a guarantee of a right of trial *de novo* whenever there was a disputed question of fact relating to an agency action. Those consequences are spelled out in section IV *infra*.

entertaining a variety of constitutional cases. We turn first, therefore, to the Florida cases.

III. THE FLORIDA CASES

A. *The Historical Background—The Law to 1970*

Until the 1970 decision by the District Court of Appeal, First District, in *Canney v. Board of Public Instruction*,⁵⁸ there is nothing in the appellate decisions of this state to support the *Amrep* and *Gulf Pines* broad theory of judicial exclusivity. To demonstrate, it is useful to begin with *State v. State Board of Equalizers*,⁵⁹ which is not only the leading case but the only decision to attempt any serious assay of our general discussion.

In *State Board of Equalizers*, the Board had refused to review an assessment by the comptroller on the ground that the statute empowering it to review the comptroller's decisions was unconstitutional.⁶⁰ In granting mandamus to compel the review, the supreme court declared the Board powerless to pass upon the constitutionality of the statute and without standing to raise the constitutional issue in its return on the petition for mandamus.

Two reasons were advanced by the court for denying to the Board a power to decide upon the constitutionality of a statute. The first was a point of policy that need not detain us.⁶¹ It has little validity today⁶² and was, even then, no more than makeweight;

58. 231 So. 2d 34 (Fla. 1st DCA 1970).

59. 84 Fla. 592, 94 So. 681 (1922).

60. *Id.* at 593-94, 94 So. at 682.

61. A well-organized movement, including at least 60 candidates for Congress in the previous election, had been inaugurated to deny to the courts the power to declare statutes unconstitutional. In light of this prevailing antijudicial mood, any extension of the power of judicial review to ministerial officers would, the supreme court thought, "give impetus to the movement to abrogate or limit the power of the courts." *Id.* at 595, 94 So. at 682.

62. When the Florida Legislature drafted the Administrative Procedure Act of 1974, it explicitly conferred upon administrative agencies the power to review the constitutionality of statutes. As initially enacted in 1974, § 120.56(2) provided that any person "substantially affected" by either an existing or proposed agency rule was entitled to seek "an administrative determination of the validity of the rule" on the grounds that the rule was an "exercise of invalidly delegated legislative authority." FLA. STAT. § 120.56(2) (Supp. 1974) (renumbered & current version at *id.* § 120.56(1) (1977)). In light of this statutory provision, the legislature's view on the wisdom of the policy of extending to administrative agencies the power to review the validity of a statute was clear. As such, it is equally clear that there is no rustification for the courts to adhere to the policy reasons given in *State Board of Equalizers* for denying to administrative agencies such review. In fact, it is questionable whether the courts can properly intrude their own judgment on that policy question. Presumably, however, in response to the decisions discussed *infra*, the 1976 Florida Legislature amended § 120.56. 1976 Fla. Laws ch. 76-131, § 6. The current provision provides that a substantially affected person may challenge the validity of an agency rule "on the ground that the rule is an invalid exercise of delegated legislative authority" not, as the 1974 version provided, on the grounds that it is "an exercise of invalidly delegated legislative authority." FLA. STAT. § 120.56(2)(b)

judicial policy cannot bar the exercise of a constitutional power. In the balance of its opinion regarding the Board's power, the court focused on the argument that an administrative officer, sworn to obey the constitution,⁶³ could not, consistent with that oath, enforce or otherwise implement a statute he believed to be repugnant to the constitution.⁶⁴ The argument, the court concluded, was fallacious since "every act of the Legislature is presumptively constitutional until judicially declared otherwise."⁶⁵ An oath to obey the constitution, meant, the court said, "to obey the Constitution, not as the officer decide[d], but as judicially determined."⁶⁶

Superficially, this may sound like the judicial exclusivity theory; the courts, not the officer, must determine what the officer's oath requires. At the same time, this seeming assertion of an exclusive judicial power is tied back to the presumptive validity of a statute and, as such, is suggestive of the subordinate role theory. The administrative officer, being dependent upon the legislature for his authority, is bound to presume the statute valid until instructed to the contrary by another co-equal department—the judiciary. Certainly, nothing in the opinion suggests that an officer was without obligation, and hence without power, to judge the validity of his own rules and regulations.

The point seems clear from the next step in the court's argument. If, after having vetoed a bill—which is not law—and after having that veto overridden by the legislature, so that the bill became law, the governor and other executive officers could disregard the law, the whole veto process would, the court thought, be rendered pointless. Rather than veto any law, the governor could simply sign every bill, even if he believed it unconstitutional, and then refuse to enforce it. Not only would the purpose of the veto be defeated, but the legislative power to override would be rendered nugatory.⁶⁷

Plainly, at this point, the court was relying on the special relationship between the legislature and the executive—the hallmark of the subordinate role theory which plays no part in the judicial exclusivity theory. Even when, later in the opinion, the court expressed

(Supp. 1974) (emphasis added). Obviously this statute is merely permissive and should not, in light of its history, be construed as a legislatively imposed barrier to an administrative decision on all constitutional questions, should the courts eventually reverse themselves and decide that an agency does possess the constitutional authority to entertain such questions.

63. 84 Fla. at 595, 94 So. at 682-83.

64. The court treated this argument as the principal foundation for asserting a power in administrative officers to judge the constitutionality of a statute. *Id.*

65. *Id.* at 595-96, 94 So. at 683.

66. *Id.*

67. *Id.*

dismay that an administrative officer would even presume to possess the same power as a court to "declare an act unconstitutional," and affirmed that the function "is purely judicial," it confined its remarks to the invalidating of statutes.⁶⁸ Nowhere did the court imply that the whole field of constitutional judgment, including judgments regarding agency rules and orders, belongs exclusively to the judiciary. In sum, *State Board of Equalizers* provides no warrant for the judicial exclusivity theory.

The second important point concerning *State Board of Equalizers* is the inherent weakness of the court's constitutional argument. Theoretically, the veto power interjects the governor into the legislative process and is by no means exhaustive of his executive power. More pragmatically, the court's concern to protect the veto procedure is unpersuasive. The governor's hand in any constitutional dispute with the legislature is vastly strengthened if he employs the veto. First, he wins the dispute outright unless two-thirds of the legislature can be mustered against him. Second, in any later court contest his case is far more credible and likely to succeed if he has fought the veto battle and lost than if he had signed the bill with or without protest. Also, the argument may prove too much. Not only administrative officers, but judges, take an oath to "obey the constitution." That oath was among the principal factors which Chief Justice Marshall, in *Marbury v. Madison*,⁶⁹ relied upon when he posited a power in the judiciary to pass upon the constitutionality of a statute. To deny that an administrative officer, acting under his oath, has authority to override the presumptive regularity of a statute comes dangerously close to denying a like power in the courts.⁷⁰

In sum, although *State Board of Equalizers* stands as the only serious effort by the Supreme Court of Florida to assay our problem, it constitutes a rather fragile foundation upon which to build. Nevertheless, it is the principal foundation of Florida law on the subject. Relying upon *State Board of Equalizers*, a long line of cases affirms that executive officers may not declare statutes unconstitutional.⁷¹

68. *Id.*

69. 5 U.S. (1 Cranch) 137, 179 (1803).

70. It is notable that in *State Board of Equalizers*, the court treated the power of judicial review of the Florida courts as a principle that was "settled, secure and no longer questionable," under the authority of *Marbury*. 84 Fla. at 595, 94 So. at 682.

71. From 1922 until 1970, *State Board of Equalizers* was cited in a number of Florida decisions, all of which involved a constitutional challenge to a state statute. See, e.g., *Pickerrill v. Schott*, 55 So. 2d 716 (Fla. 1951) (en banc) (Beverage Director must observe state law until its constitutionality is judicially decided); *State ex rel. Howarth v. Jordan*, 105 Fla. 322, 140 So. 908 (1932) (clerk of circuit court without authority to hold state act invalid). A number

In spite of this, however, collateral developments were beginning to suggest that perhaps a reappraisal of that decision was a matter of some urgency. The most important of these was the development of the exhaustion of remedies doctrine, of which *Odham v. Foremost Dairies, Inc.*,⁷² was and remains the seminal opinion.

In *Odham*, a milk distributor sued to restrain the Milk Commission from holding a hearing to determine whether the distributor's license to operate a dairy should be revoked.⁷³ As characterized by the supreme court, the prolix complaint alleged that the statute relied upon by the Commission was void for vagueness under both the Constitution of the State of Florida and the fourteenth amendment to the Constitution of the United States.⁷⁴ Holding that the circuit court erred in entertaining the complaint, the supreme court

of other Florida opinions rendered during the period between 1922 and 1970 hold that a public official cannot raise the constitutional validity of a statute in a mandamus proceeding, brought to compel performance of ministerial duties under the statute in question. See, e.g., *Barr v. Watts*, 70 So. 2d 347 (Fla. 1953) (en banc) (State Board of Law Examiners may not attack constitutionality of a statute providing that persons with specified qualifications shall be entitled to take state bar examination); *Steele v. Freel*, 157 Fla. 223, 25 So. 2d 501 (Fla. 1946) (en banc) (clerk of circuit court may not challenge constitutionality of a legislative act which provides for redemption of tax sale certificates); *State ex rel. Ship Canal Auth. v. Lancaster*, 125 Fla. 464, 170 So. 126 (1936) (clerk of circuit court may not allege unconstitutionality of a statute as grounds for refusing to carry out ministerial duties imposed upon him thereby).

A notable exception to the preceding decisions is a line of cases holding that where expenditure of public funds is involved in the administration of a state act, an executive officer may indeed raise the question of the validity of an act but only in a judicial proceeding. See *City of Pensacola v. King*, 47 So. 2d 317 (Fla. 1950) (en banc) (Railroad and Public Utilities Commission may question validity of legislative enactment because in reaching certain determinations under the act, it may be necessary for the Commission to have a hearing requiring the expenditure of public funds); *State ex rel. Harrell v. Cone*, 130 Fla. 158, 177 So. 854 (1938) (State Comptroller has right to challenge constitutional validity of state act requiring distribution of monies to county governments for state road construction); *State ex rel. Florida Portland Cement Co. v. Hale*, 129 Fla. 588, 176 So. 577 (1937) (State Road Department may question validity of an act which requires it to expend public funds); *Green v. City of Pensacola*, 108 So. 2d 897 (Fla. 1st DCA 1959) (State Comptroller entitled to question constitutionality of act exempting city from payment of gross receipts tax required by general law). Of note, however, is Justice Terrell's dissent in *Barr* wherein the argument is made that other matters may have importance equal to that of the public purse. 70 So. 2d at 353-54 (Terrell, J., dissenting).

In none of the cases rendered during the period between 1922 and 1970 does the theoretical basis of *State Board of Equalizers* receive further analytical treatment. A brief reference to the adverse practical effects of allowing agency determination of the constitutionality of state statutes may be found in the majority opinion in *Barr*. 70 So. 2d at 351.

72. 128 So. 2d 586 (Fla. 1961).

73. The appellant Milk Commission had issued to the appellee distributor a show cause order and appellee sued in the Duval County Circuit Court. The court's decree granted appellee's request for an injunction and denied appellant's motion for summary judgment. The Commission then took an interlocutory appeal to the Supreme Court of Florida. *Id.*

74. *Id.* at 588.

laid down the following much quoted explanation for the exhaustion of remedies doctrine:

The courts have been extremely reluctant to interfere with the actions of such [administrative] bodies in the proper performance of their duties and responsibilities in the absence of a clear and unmistakably flagrant violation of a constitutional or statutory right of the affected party. Promiscuous intervention by the courts in the affairs of these administrative agencies except for most urgent reasons would inevitably result in the dethronement of the commissions and the substitution of the courts in their place and stead. The subject case is aptly illustrative of this point We must assume that these agencies *will follow the mandates of the Constitution* and the laws in the discharge of their duties. If they fail to do so, those aggrieved may resort to the courts for review of such actions.⁷⁵

Plainly, submission of the case to the Commission would have required the latter to pass upon the company's constitutional allegations. More importantly, the court recognized this point, as demonstrated by that portion of the opinion dealing with its own jurisdiction to review the case. In concluding that it had jurisdiction by reason of article V, section 4 of the Constitution of the State of Florida,⁷⁶ the court observed that entry of a final decree upon the complaint as framed would "inevitably require the trial court to pass directly upon a state statute and construe a controlling provision of both the federal and State Constitutions."⁷⁷ Surely, the supreme court must have recognized that if a trial court could not dispose of the complaint without deciding the constitutional question, the same was true of the Commission to whom it was requiring that the case be submitted. Yet, there is no mention of the rule in *State Board of Equalizers*.

Finally, in the period up to 1970, there does not appear to have

75. *Id.* at 592-93. (emphasis added). The court further observed that its decision was governed by *Florida Hotel & Restaurant Comm'n v. Marseilles Hotel*, 84 So. 2d 567 (Fla. 1956), wherein it had held that a statute providing for judicial review "afforded adequate protection against any denial of due process or other constitutional guaranty by appropriate judicial review." *Id.* at 593 (citing 84 So. 2d at 569) (statute in *Marseilles* provided for review of agency proceedings by certiorari to circuit court and appeals from such court to supreme court). See also notes 79-81 and accompanying text *infra*.

76. 128 So. 2d at 588-89 (citing FLA. CONST. art. V, § 4 (1885)), which provided for appeals from trial courts directly to the supreme court for "final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution."

In addition article V, § 4(2) authorized the supreme court to directly review "by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable" to the court.

77. 128 So. 2d at 588-89.

been any serious effort to extend the rule of agency disability to cases challenging the agency's own actions—an extension, as already observed, that is the hallmark of the judicial exclusivity theory. To the contrary, in *Florida Hotel & Restaurant Commission v. Marseilles Hotel*,⁷⁸ the supreme court ordered the circuit court to dismiss a petition to enjoin the Commission from holding a hearing on a charge that the hotel had illegally permitted gambling to take place on its premises.⁷⁹ The unavailability of their key witness,⁸⁰ the hotel argued, would render any further agency proceedings in violation of due process. The response of the supreme court was brief and to the point. Even assuming, *arguendo*, that the hotel's constitutional rights would be violated if compelled to defend the show cause order, the normal provisions "for judicial review of [the order]" were, the court held, "adequate to protect the hotel against denial of due process of law."⁸¹ Admittedly, this is not a statement by the court that the Commission was empowered to entertain the hotel's constitutional contention. Yet, the court required the hotel to exhaust its administrative remedies—indeed, the court in *Odham* cited *Marseilles Hotel* for this very conclusion.⁸² If the court had not considered those remedies adequate (*i.e.*, had the court not considered the agency competent to pass upon the due process question), its denial to the hotel of all access to the courts would have been inexplicable.⁸³ The decision, in short, cannot be squared with the court's refusal to invoke the exhaustion requirement in *Amrep* and *Gulf Pines* if those latter cases are seen to rest on the broad exclusivity principle. *Marseilles Hotel*, in other words, strongly suggests that the judicial exclusivity theory may be something of very recent vintage in Florida law.

78. 84 So. 2d 567 (Fla. 1956).

79. The proceedings to revoke the hotel's license were initiated pursuant to FLA. STAT. § 511.051 (1953).

80. The witness indicated that he would invoke his privilege against self-incrimination if called to testify. 84 So. 2d at 569.

81. *Id.* In addition the court held that the hotel lacked standing to invoke declaratory relief.

82. *Odham*, 128 So. 2d at 593 (citing *Marseilles Hotel*, 84 So. 2d at 569).

83. See also *Florida State Bd. of Medical Examiners v. James*, 158 So. 2d 574 (Fla. 3d DCA 1964), where the court dismissed a petition to enjoin the Board from conducting a disciplinary proceeding where the subject of that proceeding was also the subject of a pending criminal prosecution. Petitioner argued that because he might be compelled to give incriminating testimony in the administrative hearing, that hearing would deprive him of his constitutional rights in connection with the criminal prosecution. In dismissing the petition, the court relied on both *Marseilles Hotel* and *Odham*, especially emphasizing the statement in the latter that "[w]e must assume that these agencies will follow the mandates of the Constitution." *Id.* at 576 (quoting *Odham*, 128 So. 2d at 593). It concluded that petitioner was "merely speculating that he [would] be injured." *Id.*

B. *The Rise of the Exclusivity Theory*

Against this background, the decision of the District Court of Appeal, First District, in *Canney v. Board of Public Instruction*⁸⁴ came as something of a surprise. Without citation to authority and without explication, the court held that the school board had no power to pass upon the constitutionality of a dress code regulation which it had adopted. Moreover, because the agency was powerless to consider the question, it could not be raised upon certiorari to the district court of appeal.⁸⁵ According to the court, the petitioner's only recourse was a declaratory judgment action in the circuit court.⁸⁶ This is a dubious ruling at best.

There is, of course, nothing in *State Board of Equalizers* or its progeny that would support this decision. Where no statute but only an agency regulation is involved, there is no danger of an agency intruding upon a legislative judgment or impairing the veto process. Even assuming that a regulation merits the same presumption of validity as a statute,⁸⁷ an administrator's oath "to obey the constitution" would surely override that presumption when the administrator himself finds the rule repugnant to the constitution. This would be even more apparent if, as was the case in *Canney*, the challenge to the regulation rested upon court decisions issued subsequent to the promulgation of the regulation.⁸⁸ The decision, in short, would appear to presage the birth of some broad new principle; a principle which seems to suggest that the courts alone were empowered to settle constitutional questions.

In practical terms the decision defies rational explanation. Surely, it cannot mean that once an agency commences enforcement of its own regulation it must persist with that enforcement, even if convinced that it is acting unconstitutionally. Surely, it can drop the proceeding altogether. Likewise, if no enforcement proceedings are under way, the agency could take the initiative and withdraw the offending rule. But if the decision does not mean that the agency must persist in the enforcement or retention of an offending rule, then its basic effect is either to absolve the agency from all responsibility for the constitutionality of its acts or to prohibit

84. 231 So. 2d 34 (Fla. 1st DCA 1970).

85. This lack of agency "power" was a predicate upon which the court based its denial of certiorari. *Id.* at 38-39.

86. *Id.* at 38.

87. See text accompanying notes 69-70 *supra*.

88. The regulations were promulgated in 1967 and subsequent cases in other jurisdictions held similar regulations invalid. 231 So. 2d at 37, 38 nn. 1 & 2.

the agency from being forthright with its reasons for withdrawing the offending regulation and from employing formal quasi-judicial proceedings in making that decision. These consequences are nevertheless the inevitable result of the exclusivity theory.

Fortunately, *Canney* was reversed by the supreme court, but on other grounds.⁸⁹ The decision of the supreme court did, however, bring to a head two key ideas. First, it affirmed an emerging definition of the quasi-judicial function under the Constitution of the State of Florida. That function consisted solely in the exercise of decisionmaking by an administrative body according to the mode—the procedures—customarily associated with a judicial, as distinct from a legislative, body.⁹⁰ One was to look exclusively at the procedures employed in decisionmaking, not to the subject matter, in determining whether any particular question was within the “quasi-judicial” powers of an agency.⁹¹ Second, the court also established that under no circumstances would an agency exercising a quasi-judicial function be thought of as part of the judiciary.⁹² This meant that no agency functioning in that capacity, could violate article II, section 3, of the constitution, which provides: “No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”⁹³

These two propositions, far-reaching in their implications, set the stage for the development of two conflicting lines of authority, and ultimately invited a logic which would abandon all limitations upon the power of an agency to decide constitutional questions. Because there is no subject matter limitation within the definition of the quasi-judicial power found in the constitution and no encroachment upon the judiciary occurs when an agency exercises

89. *Canney v. Board of Pub. Instruction*, 278 So. 2d 261 (Fla. 1973). The issue on appeal was not whether the school board lacked authority to decide whether its dress code was unconstitutional. The issue faced by the court was whether the district court had erred in concluding that the school board, when acting in a quasi-judicial capacity, was part of the judicial branch of government and, therefore, exempt from the provisions of the Government in the Sunshine Law. FLA. STAT. § 286.0011 (1973). This question was answered in the negative, and the court reversed without discussing the authority of the board to declare regulations unconstitutional.

90. 278 So. 2d at 262-63.

91. The concept is implicit in the decision since the only limitations discussed by the supreme court are procedural. The court states that an administrative body may adjudicate “any party’s legal rights, duties, privileges or immunities” so long as the agency complies with the minimum requirements of the Administrative Procedure Act. *Id.*

92. According to the court, “[t]o hold otherwise would be to combine legislative and judicial functions in one body clearly contrary to the separation of powers doctrine.” *Id.* at 263-64.

93. FLA. CONST. art. 2, § 3.

that power, no attribute of the administrative function per se precludes an administrative agency from passing upon the constitutionality of a statute, or of any rule, regulation or order promulgated by the agency—no subordinate role theory, no broad ultra vires or lack of competence theories. Therefore, if such a limitation is to exist, it must be derived solely from the nature of the judicial function—solely because the judiciary has been given the exclusive power to entertain such questions.⁹⁴ This means, in turn, that if the exclusivity theory cannot stand, there can be no limitation whatsoever upon the power of an administrative agency to decide constitutional questions. Startling in the implied rejection of *State Board of Equalizers* and its progeny, the decision of the supreme court in *Canney* certainly set the stage for a drama that is far from over.

After the *Canney* prologue, the first act of the drama opens with the decision of the District Court of Appeal, First District, in *Department of Administration v. Department of Administration*⁹⁵ (DOA). There, an employee, charging that the Department's eligibility requirements for a certain position were discriminatory and in violation of the fourteenth amendment,⁹⁶ obtained from a hearing officer certain discovery orders which the Department appealed to the First District. Conceding that the officer had a general power to effect discovery, the court nevertheless vacated the orders in question because the officer was without power to entertain the particular constitutional questions toward which the discovery was directed.⁹⁷ According to the court, "neither the Division of Administration nor its hearing officer [had] power to declare a rule of the Division of Personnel unconstitutional."⁹⁸ For this proposition the court cited the decision of the supreme court in *Canney*.⁹⁹ No mention was made of the decision of the district court in *Canney*, which it was obviously following. Apparently, it interpreted the absence of express disapproval by the supreme court as implied approval of

94. Ironically, this need to turn to the theory of judicial exclusivity as the only basis upon which a denial of administrative power to adjudicate constitutional questions could be predicated, resulted from a broadening of the definition of the administrative function which the District Court of Appeal, First District, had pioneered. See, e.g., *Meiklejohn v. American Dist., Inc.*, 210 So. 2d 259 (Fla. 1st DCA 1968).

95. 326 So. 2d 187 (Fla. 1st DCA 1976).

96. U.S. CONST. amend. XIV, § 1, cls. 3 & 4. The proceeding was instituted pursuant to FLA. STAT. § 120.56 (1973) (current version at *id.* § 120.56 (Supp. 1978)).

97. The discovery orders were issued to enable the hearing officer to consider the challenge to the validity of the rule. The challenge was framed in due process and equal protection terms. The court stated that the hearing officer could not declare the rule invalid on those grounds. 326 So. 2d at 189.

98. *Id.*

99. The supreme court decision in *Canney* is discussed in notes 89-94 and accompanying text *supra*.

its own *Canney* decision on the point at issue in *DOA*.

Two months later the First District decided, in *Department of Revenue v. Young American Builders*,¹⁰⁰ that the Department of Revenue itself had no authority to consider whether a department rule¹⁰¹ violated the due process clause of the fourteenth amendment.¹⁰² This, the court made clear, was not based on statutory grounds,¹⁰³ but resulted from the fact that constitutionally the question could only be decided by a court. For this latter proposition, the court cited, paradoxically, both *State Board of Equalizers* and *DOA*.¹⁰⁴ The conceptual confusion of the court was clear.

Young American Builders was followed by *Department of General Services v. Willis*.¹⁰⁵ Apart from embracing the judicial exclusivity theory, the *Willis* decision is one of the most thoughtful

100. 330 So. 2d 864 (Fla. 1st DCA 1976).

101. The rule provided that the Department could calculate documentary stamp taxes on the total price of a home, including house and lot, when developed by a corporation which conveyed the lot to a homesteader and then built his house on it. The taxpayer corporation contended that the rule was facially unconstitutional because there was no opportunity for a hearing prior to assessment, and because the rule created an "irrebuttable presumption" that the transactions were "package deals." *Id.* at 865.

102. The issue arose in the context of the Department's appeal from the circuit court's denial of its motion to dismiss *Young American Builders*' injunctive action for lack of jurisdiction. *Id.*

The Department argued that jurisdiction did not lie in the circuit court because *Young American Builders* had not exhausted its administrative remedies. The First District rejected this argument, holding that since the agency had no power to consider the constitutional question presented, there was no need for the taxpayer to pursue its administrative remedies. *Id.*

103. That is, the court did not choose to predicate its decision on a negative implication from the express power to decide questions of improper delegation under former FLA. STAT. § 120.56(2) (1975) (amended 1976). For a discussion of § 120.56(2), see note 62 *supra*. In other words, the court did not argue that the legislature's grant of power to the agencies to consider the particular constitutional question of improper delegation was an implicit statement that the agencies could not consider other constitutional questions, i.e., due process challenges.

104. 330 So. 2d at 865. Other examples of this reasoning are found in *Department of Revenue v. Crisp*, 337 So. 2d 404, 406 (Fla. 1st DCA 1976), adhering to that decision in *Young American Builders* and *Department of Transp. v. Morehouse*, 350 So. 2d 529, 533 (Fla. 3d DCA 1977) (separation of powers doctrine bars agency determination of fourteenth amendment challenges).

105. 344 So. 2d 580 (Fla. 1st DCA 1977). In *Willis*, certain general contractors sought, in the circuit court, an injunction to restrain the Department from completing bidding and contracting procedures designed to obtain uniform interior components in public buildings. After its motion to dismiss for lack of jurisdiction was denied, the Department sought a writ of prohibition to prevent the circuit court from entertaining the complaint. The writ was issued.

The contractors' complaint alleged that these new procedures violated usual and acceptable standards for the award of contracts. The District Court of Appeal, First District, assumed, *arguendo*, that the complaint alleged that the action of the department violated FLA. STAT. § 255.29 (1975). There was no constitutional challenge. Judge Smith's opinion, however, in discussing the relationship between the APA and the traditional jurisdiction of the circuit courts, considered the power of agencies to pass upon constitutional questions.

contributions to the law of this state in recent years. Although the case did not involve a constitutional challenge to any agency action, it did, however, involve the exhaustion of remedies doctrine. In underscoring the importance of that doctrine, Judge Smith qualified his discussion with the statement by Chief Justice England in *Gulf Pines*.¹⁰⁶ Nothing, Judge Smith wrote, could "displace circuit court jurisdiction to enjoin enforcement of facially unconstitutional agency rules."¹⁰⁷ That jurisdiction was "a necessary concomitant of the judicial power vested in the circuit courts by . . . the Constitution."¹⁰⁸ This statement is an obvious allusion to the theory of judicial exclusivity.

What makes this statement particularly intriguing, however, is the manner in which it is juxtaposed to a discussion of the relationship between the exhaustion doctrine and the 1974 APA. In the Judge's view, the "wealth of Florida precedent"¹⁰⁹ supporting that doctrine was rendered more compelling in light of the new APA.

Forceful as those authorities are, they weighed administrative processes and remedies which were primitive in comparison to those available under the Administrative Procedure Act of 1974. Those decisions could not have calculated the adequacy, as we must, of an administrative process which subjects every agency action to immediate or potential scrutiny; which assures notice and opportunity to be heard on virtually every important question before an agency; which provides independent hearing officers as fact finders in the formulation of particularly sensitive administrative decisions; which requires written findings and conclusions on impact issues; which assures prompt administrative action; and which provides judicial review of final, even of interlocutory, orders affecting a party's interest.

The Act's impressive arsenal of varied and abundant remedies for administrative error requires judicial freshening of the doctrines of primary jurisdiction and exhaustion of remedies and greater judicial deference to the legislative scheme.¹¹⁰

Having issued this eloquent admission that the 1974 Act had rendered the administrative process more orderly, more rational and

106. See discussion accompanying notes 41-48 *supra*.

107. 344 So. 2d at 590.

108. *Id.* The judge further noted that while the 1974 Act had initially allowed an agency to consider questions of improper delegation, "[t]he 1976 Legislature [had] withdr[awn] that seeming incursion into the judicial function." *Id.* at 591.

Section 120.56(1) of the 1974 Act allowed administrative determination of constitutional attacks on a rule as "an exercise of invalidly delegated legislative authority." The 1976 Florida Legislature eliminated that portion of the provision thereby withdrawing the "seeming incursion." 1976 Fla. Laws ch. 76-131, § 6; see note 62 *supra*.

109. 344 So. 2d at 589.

110. *Id.* at 590.

more responsive to the dictates of law and the supervision of the courts, one might have expected the judge to have paused and demanded proof of some compelling principle or precedent before deciding that agencies were without power to review the constitutionality of their own actions. The judge's recognition that the new APA required a "judicial freshening" of the exhaustion doctrine seemed, at the very least, to warrant a closer look at *Odham v. Foremost Dairies, Inc.*¹¹¹ That this did not occur, that Judge Smith saw fit to embrace the broad new exclusivity principle, is not easily explained. Perhaps, it simply reflects a heightened mistrust of administrative government. Perhaps, it is explained by a desire to protect circuit court jurisdiction.¹¹² Perhaps, it simply reflects the fact that courts and attorneys who write court briefs do not always read or cite cases—they cite language. And, there is language in older decisions which, if not carefully analyzed in the context of what was actually being decided can be confused with the exclusivity principle. Witness the words in *State Board of Equalizers*: "The right to declare an act unconstitutional is purely a judicial power"¹¹³ Whatever the reasons, however, it seems plain that a new doctrinal rigidity had entered Florida law, obscuring all of the more pragmatic concerns for improving the quality of administrative government that might have otherwise controlled these cases. Ironically, all of this occurs in the face of a major legislative effort to render administrative agencies more responsive to their legal and constitutional duties. And, all of this occurred in the cases relied upon by the supreme court in its *Amrep* and *Gulf Pines* decisions.

Inevitably, the development had to be challenged. Its precedential roots were virtually nonexistent, its pragmatic implications anomalous at best. It was not supported by any careful doctrinal analysis. It would inevitably encounter the choice posed by the decision of the supreme court in *Canney*,¹¹⁴ and in making that choice, it would inevitably confront the strictures of the separation of powers doctrine. The challenge was not long in coming.

C. *The Exclusivity Theory Under Attack*

The second act in our drama—the challenge to the exclusivity theory—opened with a case that involved only a statutory, not a

111. 128 So. 2d 586 (Fla. 1961). *Odham*, as noted above, teaches that where the statutory scheme for agency review and judicial supervision thereof provides adequate procedural protections, administrative remedies must be exhausted before resort to the court will be permitted. See notes 72-77 and accompanying text *supra*.

112. See discussion of *Amrep* and *Gulf Pines*, Section II *supra*.

113. 84 Fla. at 596-97, 94 So. at 683; see note 68.

114. See notes 89-94 and accompanying text *supra*.

constitutional, challenge to an agency rule. In *Department of Administration v. Stevens*,¹¹⁵ respondent, who had been "bumped" from his job by another employee with more "retention points,"¹¹⁶ as prescribed in guidelines issued by the Department of Health and Rehabilitative Services, challenged the guidelines as "rules"¹¹⁷ which had not been adopted in accordance with the rulemaking procedures required by the APA.¹¹⁸ The hearing officer agreed with the contention and declared the guidelines invalid.¹¹⁹ On appeal to the District Court of Appeal, First District, the Department argued that the hearing officer lacked constitutional authority to pass on the legality of an agency rule because that authority was exclusively a judicial function.¹²⁰ The District Court of Appeal, First District, disagreed and affirmed the hearing officer's decision.¹²¹

The Department, of course, was simply attempting to extend the exclusivity principle from constitutional to statutory questions. Absurd in its fuller implications—agencies could scarcely perform their duties without interpreting the controlling legislation—the Department's argument was still very logical. Moreover, it derived a certain potency directly from *Marbury v. Madison*.¹²² Later, we shall observe how Chief Justice Marshall predicated the whole of his argument for the power of judicial review upon the nature of the judicial function.¹²³ Courts decided particular cases according to the law. Thus, if it were alleged that the law of a statute was contrary to the superior law of the Constitution, a court could not avoid interpreting the Constitution if it were going to decide the case according to the law.¹²⁴ The duty of the Court, the Chief Justice asserted, was no different in a constitutional case than in a case where two statutes were alleged to be in conflict.¹²⁵ Now, of course, Marshall never claimed that the power of constitutional interpretation was exclusive to the courts. But if, following his reasoning, the

115. 344 So. 2d 290 (Fla. 1st DCA 1977).

"[R]etention" points are calculated on the basis of years of service and evaluations received during those years of service. This system in essence provides that when a layoff is to be made, an employee with greater retention points can "bump" or usurp the job of another employee in the same class.

Id. at 291.

117. FLA. STAT. § 120.52(14) (1975) defines "rule."

118. The Department admitted that its guidelines had never been adopted as a rule nor filed with the Department of State for publication in the Florida Administrative Code pursuant to FLA. STAT. § 120.54 (1975). 344 So. 2d at 292.

119. 344 So. 2d at 292.

120. *Id.* at 294.

121. *Id.* at 292.

122. 5 U.S. (1 Cranch) 137 (1803).

123. See discussion section IV(a) *infra*.

124. 5 U.S. (1 Cranch) at 176.

125. *Id.*

power to interpret the Constitution was merely an aspect of the power to interpret the law, and if, under Florida decisions, the power to interpret the constitution belonged exclusively to the courts, then surely the power to interpret statutes likewise belonged exclusively to the judiciary. The Department's syllogism, however foolish in its practical implications, was impeccable. Moreover, the Department cited precedent to support its contention. In *Otto v. Harlee*,¹²⁶ relied upon in *DOA*,¹²⁷ the Supreme Court of Florida treated the clerk of the circuit court as an administrative officer and held that the clerk could not be empowered to pass upon the legal sufficiency of a tax sale certificate. "[T]here can be no doubt," the court asserted, "that the exercise of such power is a judicial function and may not be legislatively delegated to nor may it be exercised by, an administrative officer."¹²⁸ One could, in sum, argue that the court had already forged a perfect equation between the power of an agency to consider the *constitutionality* of its own regulations and its power to consider the legality of those same regulations. It possessed neither.

Obviously, something had to give—either the exclusivity theory or common sense. Fortunately, common sense prevailed. In affirming the hearing officer's decision, the First District undertook to scrutinize the nature of the administrative function and its relationship to the judicial power. The court admitted that "[t]here is no well defined line of demarcation"¹²⁹ between the judicial function as vested in the judiciary by article V, section 1 of the Constitution of the State of Florida and the quasi-judicial functions which, under the same section, "may be granted" to "commissions established by law."¹³⁰ The court, however, adopted the definitions supplied by the supreme court in *Modlin v. City of Miami Beach*:¹³¹

If the affected party is entitled by law to the essentially judicial procedures of notice and hearing, and to have the action taken based upon the showing made at the hearing, the activity is judicial in nature. If such activity occurs other than in a court of law, we refer to it as quasi-judicial.¹³²

126. 119 Fla. 266, 161 So. 402 (1935).

127. 326 So. 2d at 187; see notes 95-98 and accompanying text *supra*.

128. 119 Fla. at 271, 161 So. at 404.

129. 344 So. 2d at 292.

130. See FLA. CONST. art. 5, § 1 which provides: "The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power connected with the functions of their offices."

131. 201 So. 2d 70 (Fla. 1967).

132. *Id.* at 74.

From this point, the argument against the Department's contention was straightforward. The essential test of an inherently judicial function is whether the power to decide must be exercised according to court-like procedures. The sole constitutional difference between the "judicial function" and the "quasi-judicial function" is whether the decisionmaking body is, in fact, a court or an agency. By legitimizing the "quasi-judicial" function, therefore, the constitution draws no distinction based upon the subject matter to be decided. It simply affirms that agencies may act like courts. It affirms that agencies may decide all questions that courts may decide, including whether an agency rule was promulgated in accordance with the APA.

This, of course, closes the gap left open in the decision of the supreme court in *Canney*.¹³³ Where the latter concluded there was nothing inherent in the constitutional definition of the administrative function that would withhold particular subjects from an agency, the court in *Stevens* held that there was nothing inherent in the judicial function having that effect. The implications for the exclusivity theory are devastating even though the court in *Stevens* arbitrarily refused, in a footnote, to apply the reasoning to constitutional questions.¹³⁴ It was only deciding that an agency could entertain a statutory challenge to its own rules.

A final point of interest in *Stevens* is the court's treatment of the separation of powers doctrine. It was obviously sensitive to the argument that if agencies could decide all statutory questions that courts might decide, so long as they operate in a "court-like" fashion, the separation doctrine as embodied in article II, section 3 of the constitution might be offended.¹³⁵ The answer to this argument, according to the court in *Stevens*, lay in the fact that the separation of powers doctrine does not divide all governmental decisionmaking into hermetically sealed categories. Florida, as other states, has embraced the Madisonian theory of checks and

133. 278 So. 2d 260 (Fla. 1973), discussed at notes 89-94 and accompanying text *supra*.

134. As the court noted:

We have previously held . . . that the power to adjudicate that a rule is unconstitutional is a judicial power rather than a quasi-judicial and such adjudication may not be made by an administrative officer or agency. *State, Dept. of Adm., etc. v. State, Dept. of Adm., etc.*, 326 So. 2d 187 (Fla. 1 DCA 1976). Also, it should be noted, as we have heretofore pointed out, that the Legislature by Chapter 76-131, Florida Statutes, withdrew from the hearing officer authority to determine the invalidity of a rule on the ground that the rule is an exercise of invalidly delegated legislative authority—a constitutional question.

344 So. 2d 290, 295 n.2 (1977).

135. FLA. CONST. art. 2, § 3 provides: "[N]o person belonging to one branch [of the state government] shall exercise any powers appertaining to either of the other branches *unless expressly provided herein*." *Id.* (emphasis added).

balances. Quoting Professor Davis and finding sanction for Davis' ideas in *Canney v. Board of Public Instruction*,¹³⁶ the court stated:

In the organic arrangements that we have been making in recent decades in the establishment and control of administrative agencies, the principle that has guided us is the principle of check, not the principle of powers . . . [T]he very identifying badge of the modern administrative agency has become the combination of judicial power (adjudication) with legislative power (rulemaking). But we have taken pains to see that the agencies report to and draw their funds from our legislative bodies, that the personnel of the agencies are appointed and reappointed by the executive, and that the residual power of check remains in the judiciary.¹³⁷

As noted, the court in *Stevens* avoided acknowledging the fuller implications of its reasoning for constitutional cases. Such avoidance was not so easy in two later District Court of Appeal, First District, decisions: *Department of Environmental Regulation v. Leon County*,¹³⁸ decided one day after *Stevens*, and *Balino v. Department of Health & Rehabilitative Services*,¹³⁹ decided three months later.

In *Leon County*, the First District upheld a hearing officer's discovery order, sought by the county in a rulemaking proceeding under section 120.54,¹⁴⁰ to support its charge that the Department's proposed rule was unconstitutional.¹⁴¹ The Department apparently argued that the facts paralleled those in *DOA*.¹⁴² If a hearing officer were powerless to entertain a constitutional challenge to an existing agency rule, he was equally powerless to entertain a constitutional challenge to a proposed rule and, therefore, powerless to authorize any discovery intended to aid that challenge. The First District, however, distinguished between a challenge to an *existing* agency rule, and a challenge to a *proposed* rule.

The Hearing officer's determination is similar to a determination by the legislature or a legislative committee that it will not favorably report or enact proposed legislation because it considers that if enacted the legislation would be unconstitutional. Once a statute or rule has been enacted or adopted, however, the determination of the constitutionality or unconstitutionality thereof re-

136. 278 So. 2d 260 (Fla. 1973).

137. 344 So. 2d at 294 (quoting 1 K. DAVIS, *supra* note 5, § 1.09).

138. 344 So. 2d 297 (Fla. 1st DCA 1977).

139. 348 So. 2d 349 (Fla. 1st DCA 1977).

140. FLA. STAT. § 120.54 (Supp. 1976).

141. 344 So. 2d at 298.

142. 326 So. 2d at 187, discussed at notes 95-98 and accompanying text *supra*.

quires the exercise of judicial power which is vested only in the courts.¹⁴³

That this distinction is unworkable becomes apparent if *Leon County* is compared with *Stevens*.

First, *Leon County* establishes that the asserted lack of agency power to entertain constitutional challenges is not the result of any presumed absence of agency expertise or intellectual competence to judge constitutional questions. It also extends the basic lesson of *Stevens*.¹⁴⁴ The principle that there are no subject matter limitations inherent in the concept of the "judicial power" or of the "quasi-judicial power" clearly applies, according to *Leon County*, to constitutional questions as well as to statutory questions. Agencies may decide any type of question—constitutional or not—that courts may decide so long as they do so according to the adjudicative mode specified by the APA. Finally, *Stevens* teaches that there is nothing inherent in the separation of powers that prohibits an agency, once it has promulgated a rule in its legislative mode, from later, while acting in its judicial mode (*i.e.*, quasi-judicially), deciding that the rule is contrary to a statute.¹⁴⁵ An agency may, in other words, strike down the "law" which it has made, if, in enforcing that "law," it finds the law to be repugnant to a "superior law," as Chief Justice Marshall put it.¹⁴⁶

From all of this, it would seem inescapable that if an agency has a duty to invalidate a rule repugnant to the "superior law" of a statute and if constitutional questions *per se* are not withheld from agency cognizance, the agency plainly has a duty to invalidate a rule repugnant to the "superior law" of the constitution. Indeed, if respect for law is essential, the agency's duty to the constitution is certainly as compelling as its duty to the legislature.

Ironically, *Leon County* actually proves the basic point if one merely follows through with the analogy that the court employed in drawing a distinction between existing and proposed rules.¹⁴⁷ If, when acting in the legislative mode, an agency may, by analogy to the legislature, refuse to enact a rule which it believes to be unconstitutional, surely, when acting in the judicial mode, it may, by analogy to a court, refuse to enforce an existing rule which it believes to be unconstitutional. *Stevens* reinforces this conclusion by emphasizing that nothing in the separation of powers doctrine pre-

143. 344 So. 2d at 298.

144. See notes 115-136 and accompanying text *supra*.

145. *Id.*

146. See 5 U.S. (1 Cranch) 137, 176 (1803) and text accompanying notes 122-25 *supra*.

147. 344 So. 2d at 298.

cludes such uniting of functions, provided the power does not go unchecked.¹⁴⁸ And surely, the broad right of judicial review guaranteed by the APA is precisely the check required by the separation doctrine.¹⁴⁹ Somehow, the exclusivity principle seems to be toppling under the weight of its own pragmatic and theoretical absurdities.

The final push comes from *Balino v. Department of Health & Rehabilitative Services*.¹⁵⁰ *Balino* was occasioned by the promulgation of regulations by the United States Secretary of Health, Education and Welfare, which set forth new and more restrictive criteria that nursing patients were required to meet in order to receive Medicaid funding.¹⁵¹ To implement these regulations, the Florida Department of Health and Rehabilitative Services first promulgated its own rules redefining the level of care to which those patients would be entitled.¹⁵² The Department then began to reclassify Florida's nursing home patients pursuant to the notice and hearing required by the federal regulations.¹⁵³ In the course of one of these "group hearings," the hearing officer determined that the due process clause of the fourteenth amendment required that the government bear the burden of proving that a patient should be reclassified,¹⁵⁴ citing the decision of the Supreme Court of the United States in *Goldberg v. Kelly*.¹⁵⁵ On appeal from a decision of the Department, overruling the hearing officer, the District Court of Appeal, First District, affirmed the hearing officer's decision as both within his power and as the only result "consistent with fundamental concepts of fairness."¹⁵⁶

It is, of course, true that *Balino* is different from *DOA* and *Young American Builders* because in the former case neither the federal nor the state regulations at issue explicitly assigned a burden of proof to either party. Perhaps then it is to be concluded that when an agency, while adjudicating a case, finds that its rules do not expressly cover an issue which must be decided on constitutional grounds, it has the power to rectify its own omission, *i.e.*, *Balino*. But, when the point to be decided is covered by an existing rule, it is powerless to rectify its own constitutional error, *i.e.*, *DOA*.

If this is the distinction to be drawn between the cases, it is, as

148. See note 136 and accompanying text *supra*.

149. See FLA. STAT. § 120.68 (Supp. 1978).

150. 348 So. 2d 349 (Fla. 1st DCA 1977).

151. *Id.* at 350.

152. *Id.*

153. *Id.* See generally 4 FLA. ADMIN. CODE 106-7.21 (repealed 1977).

154. 348 So. 2d at 350.

155. 397 U.S. 254 (1970).

156. 348 So. 2d at 351.

a practical matter, even more absurd than the First District decision in *Canney*.¹⁵⁷ It would mean that when an agency, engaged in adjudicating a particular case (i.e., acting in its quasi-judicial mode), encounters a constitutional question not previously decided by it either expressly or by implication in the promulgation of a rule, it may immediately proceed to decide the constitutional issue. But when, in such a situation, it encounters a constitutional question concerning an existing rule, it can only stop the proceedings, announce that it is adverting to rulemaking, and then decide whether to withdraw the offending regulation.

Quite apart from these pragmatic considerations, the theoretical implications of drawing a distinction between *Balino* on the one hand, and *DOA* and *Young American Builders* on the other, are devastating indeed. There is, as the supreme court has affirmed in *Modlin* and *Canney*, and as *Stevens*, *Leon County* and *Balino* also affirm, no subject matter distinction between the judicial and quasi-judicial power, so long as the agency is acting within the scope of its delegated authority. Therefore, if an agency, acting judicially, cannot in the name of adhering to the "superior law" of the constitution, correct its own legislative errors, surely one must doubt the power of the courts to invoke the same "superior law" in striking down errors made by a *co-equal branch of government*—the legislature. To affirm the power of judicial review, in other words, would seem to require that agencies be empowered to review the constitutionality of their own rules, so long as their decisions were subject to a final judicial scrutiny. And, if this is so, the theory of judicial exclusivity becomes nothing but a naked exercise of power by the courts, rooted not in reason, but in a confusion between the undoubted right of the courts to make the *ultimate* decision and a nonexistent right to make the *only* decision.

It is, of course, tempting to leave our subject at this point. But, we cannot do so. None of the decisions that cut away at the exclusivity theory have embraced the results dictated by their own logic. None have considered the alternative theories that might warrant imposing some limitations upon an agency entertaining a constitutional challenge to its own actions. Certainly, none of these decisions has considered whether those limitations can be reconciled with the broad principle that no subject matter limitation distinguishes the judicial from the quasi-judicial power. None has explored whether this latter principle should be extended to cases where the constitutional challenge is directed at a statute. In light of the long tradition following *State Board of Equalizers*, the impact

157. Discussed at notes 84-88 *supra*.

of this principle on the subordinate role theory surely deserves closer attention. There also remains the concern for circuit court jurisdiction that seems to have surfaced so strongly in *Amrep* and *Gulf Pines*. Finally, we cannot be unmindful of the strong pragmatic reasons which, in particular cases, may warrant withholding constitutional questions from agency decision. It remains to be seen, therefore, whether these concerns can be adequately met within the framework of the exhaustion of remedies doctrine, or whether there is a need for some form of constitutional barrier to agency action in such cases. Our inquiry, in short, has just begun. We start, therefore, with a brief look at the origins of judicial review as laid down in *Marbury v. Madison*, with special attention to the definition of the separation of powers doctrine that seems to emerge from that decision. This sets the stage for a fuller inquiry into the *Amrep* and *Gulf Pines* decisions and their animating concern for circuit court jurisdiction.

VI. THE THEORY OF JUDICIAL EXCLUSIVITY

A. *Marbury v. Madison and the Separation of Power Doctrine*

Among the more striking features of that great cornerstone of American constitutional law, *Marbury v. Madison*,¹⁵⁸ is the way in which Chief Justice Marshall hewed the power of the Court to judge the constitutionality of a statute out of the nature of the judicial function itself. This is apparent from the structure of the opinion. Even before addressing the principal question of the case, he was careful to demonstrate that the cause before him was a matter appropriate for judicial cognizance: Was Marbury asserting a legally cognizable right; was there a judicial remedy available; was mandamus available, or was the withholding of Marbury's commission a discretionary act which would either render mandamus inappropriate or signal a nonjusticiable political question?¹⁵⁹

The point is even more apparent from the arguments employed to establish that the Court could indeed pass upon the substantive constitutionality of the Judiciary Act of 1789.¹⁶⁰ "All those who have

158. 5 U.S. (1 Cranch) 137 (1803).

159. *Id.* at 154-73. Chief Justice Marshall disposed of each of the issues in turn. Marbury had a legally cognizable right to the commission because the right thereto "vested" when the President signed it. *Id.* at 161. Since Marbury had a right to the commission, and "a refusal to delivery [it was] a plain violation of that right, . . . the laws of this country afford[ed] him a remedy." *Id.* at 166. Finally, since the right to the commission had vested, the act of recording the commission was mandatory, not discretionary and since no other form of relief would have been sufficient, mandamus was appropriate. *Id.* at 170-73.

160. Judiciary Act of 1789, § 13, 1 Stat. 73. The Act authorized the Supreme Court "to issue writs of mandamus . . . [to] persons holding office, under the authority of the United

framed written constitutions,"¹⁶¹ the Chief Justice declared, necessarily contemplated the principle of constitutional supremacy under which any "[a]ct of the legislature, repugnant to the constitution, is void."¹⁶² At first blush, this may seem to beg the question. Constitutional supremacy was not at stake, only the question of who should decide "repugnancy," the courts or the legislature alone. At another level, however, it is plain that the "repugnancy" of which Marshall spoke was not "repugnancy" in the abstract, but the "repugnancy" that is asserted whenever a statute is called into question in an otherwise justiciable cause. If the courts were barred from deciding the issue of "repugnancy," as they would decide any other issue properly before them, the result, according to this argument, would be a certain diminution in constitutional supremacy. The key to the argument, however, is the abstraction of the power of review from the normal incidents of the judicial function. For, as we shall observe, it is this and this alone that saves the opinion from a charge of judicial usurpation. It constitutes the central theme of the opinion.

"It is, emphatically," the Chief Justice asserted, "the province and duty of the judicial department to say what the law is."¹⁶³ It was, however, not the law in general to which this duty related, but to the law as a "rule" for a "particular case."¹⁶⁴ The duty was a mere incident of determining which "rules govern the case." For a court to interpret the Constitution in order to determine whether the law of a statute conflicted with the "superior" law of the Constitution was, therefore, a task no different than that of interpreting two statutes alleged to be in conflict.¹⁶⁵

States." According to Marshall, this was a grant of original jurisdiction to issue writs of mandamus and as such conflicted with the constitutional grant of original jurisdiction to the Supreme Court only in "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction." U.S. CONST. art. III, § 2, cl. 2.

It has been argued that the Judiciary Act did not actually confer original jurisdiction and that, therefore, there was no need to reach the constitutional question. See Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 14-15.

161. 5 U.S. (1 Cranch) at 176.

162. *Id.*

163. *Id.* at 177.

164. "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.*

165. As the Chief Justice stated:

So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any

Moreover, "peculiar expressions of the constitution" demonstrated, in Marshall's view, that the power of substantive constitutional review was a necessary incident of a court acting as a court. The "judicial power" extended "to all cases arising under the constitution."¹⁶⁶ If the very authority of a court to entertain a case depended upon its engaging the Constitution, it was unthinkable that the court must nevertheless decide the case "without examining the instrument under which it arises."¹⁶⁷ Also, judges were required to take an oath "to support" the Constitution. This applied particularly "to . . . conduct in their official character."¹⁶⁸ "How immoral," the Chief Justice indignantly asserted, "to impose [the oath] upon them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support."¹⁶⁹

Others have argued that in a strict analytical sense these arguments may not necessarily demonstrate what the Chief Justice claimed for them.¹⁷⁰ Be that as it may, it is sufficient to observe that

ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Id. at 178.

166. *Id.*

167. *Id.*

168. *Id.* at 179.

169. *Id.*

170. Van Alstyne, *supra* note 160. Van Alstyne argues that Chief Justice Marshall's assertion that, "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation" is the principle of constitutional supremacy under which any act "repugnant to the constitution, is void," 5 U.S. (1 Cranch) at 176, only begs the question. Is it for the courts or the legislature to say whether its acts are repugnant to the Constitution? Marshall, in partial answer to the question, stated, "it is, emphatically, the province and the duty of the judicial department to say what the law is." *Id.* Hence, as an incident of determining which "rules govern the case," courts must consider whether an act conflicts with the Constitution, no differently than when two statutes are asserted to conflict. This argument, however, according to Van Alstyne, relies upon a certain distortion in the traditional perception of the judicial function. Is it the Court or the legislature that is empowered "to say what the law is"? The supremacy clause does not indicate which, if any, branch is to determine "what the law is." Nor do the traditional powers of a court to interpret statutes or to reconcile conflicting statutes imply a much broader power of substantive review. In those countries where courts are denied substantive review, they still retain power to interpret statutes. Where a statute does appear to the Court to conflict with the Constitution, it is still possible to avoid review by simply acknowledging that such questions were left to legislative or popular determination.

Van Alstyne also argues that Marshall's reliance on the judicial oath to uphold the Constitution as an argument for substantive review begs the question: What is the judicial role in upholding the Constitution? It may well be that the proper judicial stance under the Constitution is to defer to legislative determinations of "repugnancy." Moreover, judges are not the only officers of government required to take an oath.

Most importantly, according to Van Alstyne, Marshall fails in a logical sense to establish why, if given the underlying postulate of a written constitution or the broader postulate of a democratic society, constitutional interpretations by Congress or the Executive, in the exer-

the entire thrust of Marshall's opinion was to tie the power of substantive constitutional review to the normal function of the courts in deciding particular cases. There is not a word remotely suggesting that the claim of power in the courts implied a limitation upon the power of the other departments of government to interpret the Constitution in the discharge of their functions—not a word to support a theory of judicial exclusivity.

One may, however, go further and make the point more affirmatively. A claim of exclusive power would have been wholly incompatible with the opinion. Nowhere did the Chief Justice seek to reconcile his asserted power of judicial review with the "structural" constitution—the posited equality between the judiciary and the other departments of the government. This has tempted some to suggest that the decision may indeed have overstepped the bounds of the separation of powers principle.¹⁷¹ But, the charge cannot stand precisely because the Chief Justice was not claiming an exclusive power. He was only claiming a power incident to the usual exercise of the judicial function, a claim wholly conformable to the separation of powers doctrine as then understood, and hence a claim that did not need to answer a charge of usurpation.

The point can be made in a rather straightforward way. Even if the legislative function is viewed as only an enacting function, a denial of effectiveness to an act of Congress would, in all reality, be a denial of power to Congress. Hence, it could be argued that any assertion of power in the judiciary to supersede a prior legislative interpretation of the Constitution would constitute an assertion of judicial supremacy inconsistent with the purported equality of the branches. The argument, however, proves too much. If judicial review can be characterized as an assertion of judicial supremacy, an assignment of dispositive force to a legislative interpretation of the Constitution would clothe the Congress with a like supremacy over the judiciary. The argument, in other words, only serves to pose a dilemma which resolves nothing.

Possibly, of course, the way out of the dilemma would be to leave the ultimate determination of whether the legislature has transgressed the bounds of the Constitution to the people through the elective process. To the contemporary American mind, grown

cise of their respective functions, should not be definitive. Certainly, the Chief Justice did not deny, indeed could not deny, that Congress and the Executive were charged with the task of interpreting the Constitution when engaged in the function of enacting and executing laws. Van Alstyne, *supra* note 160, at 16-30. See generally R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969); see also Kessler, *Redressing the Balance: A Proposed Constitutional Amendment*, 1 HARV. J. PUB. POL'Y 87 (1978) (advocating a constitutional amendment to limit judicial review).

171. Van Alstyne, *supra* note 160, at 22.

accustomed to judicial review, this may seem an implausible solution. But it certainly was not so in 1803.¹⁷² On the other hand, this is not the only way out. Indeed, there is in fact no dilemma at all if one merely applies the separation of powers doctrine as the Chief Justice undoubtedly understood it.

To Marshall and his contemporaries, the hypothesized equality of the branches of government was not a structural norm in and of itself. It was rather an expression of the underlying Madisonian concept of a government constrained in its power over the people by the necessity of securing for any of its measures the concurrence of two, if not three, independent and potentially jealous departments.¹⁷³ Operationally, it has since found expression in the imagery of checks and balances. As such, it meant that any assertion of power by one department was to be judged according to its necessity in securing to that department a power to check the others—the power to render its nonconcurrence effective.

Seen in this light, it follows that to Marshall and his contemporaries, the danger of assigning preclusive force to a legislative interpretation of the Constitution would not lie in its implied assertion of legislative supremacy, but rather in its implied denial of power in the judiciary to check the legislature. Likewise, from this perspective the power of judicial review was obviously legitimate so long as it remained a defensive power. It stood within the boundaries of the separation doctrine as long as it remained merely a power to withhold judicial concurrence from a prior legislative or executive interpretation of the Constitution whenever the Constitution itself declared that concurrence to be necessary, namely, when the prior interpretation was called into question in an otherwise cognizable case or controversy. Obviously, this was the only power the Chief Justice was claiming for the courts. And, since this was the sum of his claim, his silence on the separation of powers question reflects nothing more than the fact that to Marshall and his contemporaries a charge that he had transgressed the boundaries of that doctrine was, at most, trivial.¹⁷⁴ If this is so, the Chief Justice's silence be-

172. *Id.*

173. The separation of powers was seen by Madison as a basic tenet of a free government. "The accumulation of all powers, legislative, executive and judicial, in the same hands, may justly be pronounced the very definition of tyranny." J. MADISON, A. HAMILTON & J. JAY, *THE FEDERALIST PAPERS* 301 (W. Kendall & G. Carey eds. 1965). The branches, however, can not be wholly unconnected. In order for one branch to limit effectively the exercise of power by another, there must be an overlapping of power. Each branch must yield power over to the other so that no one branch can become supreme. *Id.* at 308.

174. A perhaps broader view of substantive judicial review was espoused in *Cooper v. Aaron*, 358 U.S. 1 (1958). In *Cooper*, the Little Rock School Board sought a two-year postponement of a district court approved school desegregation plan, because of tense local

comes full of meaning for our subject. It means that if the power of judicial review should ever become something more than a defensive power, it would immediately encounter a serious question under the separation of powers doctrine. It means that if the "subject matter" of substantive constitutional interpretation were ever thought to so "inhere" in the judiciary as to be a subject for judicial cognizance alone—a subject given exclusively to the courts—then the power of judicial review might well constitute an assertion of judicial supremacy tantamount to usurpation.

From this point, the next question is plain: Does *Marbury v. Madison* mean that we must abandon the theory of judicial exclu-

conditions which had included the Governor's effort to prevent integration by use of the National Guard and the fact that the Negro children were still being guarded by federal troops. The Governor and other state officials of Arkansas had claimed that they were not bound by the Supreme Court decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), a case to which Arkansas was not a party. Faced with this affront to its power, the Court, in an opinion joined by all nine justices, found the actions of the state officials unconstitutional and ordered compliance with the principles of the *Brown* decision. In so holding, the Court relied upon the power of the judiciary to determine "what the law is." Quoting liberally from the opinion of Chief Justice Marshall, the Court concluded: *Marbury v. Madison* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States . . ." 358 U.S. at 18. *Cf. Powell v. McCormack*, 395 U.S. 486, 549 (1969) (the Court is the "ultimate interpreter of the Constitution"); *Baker v. Carr*, 369 U.S. 186 (1962) (same). Note, however, this is only a claim of a power to be obeyed on questions that the Court had previously decided. It was not a claim foreclosing the other departments from interpreting the Constitution. The courts may be the *ultimate* arbiters of constitutional meaning, but they are not the only arbiters.

In this sense, *Cooper* may properly be viewed as an exercise of judicial authority in defense of the judicial power.

The Supreme Court again asserted its authority "to say what the law is" in *United States v. Nixon*, 418 U.S. 683, 703 (1974) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). In *Nixon*, the Special Watergate Prosecutor had sought to subpoena certain of the Watergate tapes. The President sought to quash the subpoena on the basis of executive privilege. Since the Office of the Special Prosecutor was under the control of the Executive Branch, the Court's refusal to quash the subpoena could be viewed as an intrusion into an intra-branch dispute. The Special Prosecutor, however, had been given express authority to challenge the invocation of executive privilege by a regulation issued by the Attorney General. *Id.* at 694-96. Thus, the Court argued that the Executive Branch was bound by the regulation so long as it remained in force, and judicial enforcement of the regulation could not be viewed as an intrusion upon an exclusively Executive dispute. *Id.* at 697. Moreover, the issuance of subpoenas to obtain evidence in criminal prosecutions is a traditional function of courts and "[t]he impediment that an absolute unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." *Id.* at 707. Thus, the Court in *Nixon* was again only attempting to defend the integrity of the judicial branch, and it was not asserting constitutional supremacy. See Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and The Impeachment Process*, 22 U.C.L.A. L. Rev. 30, 34 (1974). See generally Foreword, *United States v. Nixon*, 22 U.C.L.A. L. Rev. 1 (1974).

sivity as applied to administrative agencies? Alternatively, is there something unique about administrative government—something about the functions it performs or its political character—that requires us to ignore the constraints of the separation of powers doctrine even though we could not do so if the legislature or executive, as such, were involved?¹⁷⁵

B. *The Question Narrowed*

In formulating an answer to this last question, it is important to be as specific as possible. For this purpose, it is useful, in turn, to note the precise differences under Florida law between a rule of total agency disability (*i.e.*, the rule of judicial exclusivity) and a rule which would require the party mounting a constitutional challenge first to exhaust his administrative remedies unless his case fell within one of the standard exceptions to that requirement.¹⁷⁶

Under a rule of total agency disability, any person with standing to raise the constitutional question could resort to the courts the moment that issue arose,¹⁷⁷ unless barred either by the existence of a dispositive nonconstitutional question in the case¹⁷⁸ or by the absence of ripeness.¹⁷⁹ Such a rule would then require the court to conduct what would fundamentally be a *de novo* proceeding since there would be no formal agency opinion on the constitutional point

175. This question admittedly fudges a bit. What has been said about the power of substantive judicial review of statutes apparently would also apply to the review of executive actions. And are not administrative bodies essentially components of the executive branch of government? This question need not be precisely answered. For the purposes of this article, it seems appropriate to exclude from discussion the Chief Executive—whether it be the President or, in Florida, the Governor—and deal solely with an archetypal administrative agency which could include the major departments of the executive branch as well as other so-called “independent” boards, commissions and miscellaneous administrative bodies.

176. See section VI B *infra*.

177. Arguably, this means that if a statute is dependent upon agency enforcement, the courts could intrude when: an agency first issues a proposed regulation; an agency first threatens to enforce an existing regulation; an existing regulation first affects a party sufficiently to give rise to standing; or, an agency first takes a recommended order under consideration.

178. In its decision in *Amrep*, the Supreme Court of Florida took pains to establish that the only question to be determined was the constitutional validity of the statute challenged; thus, there was no nonconstitutional question which could have been dispositive. 358 So. 2d at 1349. See also *Gulf Pines*, 361 So. 2d at 700, where the Supreme Court of Florida noted that the resolution of the litigation on nonconstitutional grounds obviated consideration of any constitutional issues.

179. Although in recent years Florida courts have seemingly ignored the “ripeness” doctrine, arguably cases such as *Nelson v. State Bd. of Accountancy*, 355 So. 2d 216 (Fla. 1st DCA 1978), *Harris v. Florida Real Estate Comm’n*, 358 So. 2d 1123 (Fla. 1st DCA 1978), and *Jones Constr. Co. v. Department of Gen. Servs.*, 356 So. 2d 43 (Fla. 1st DCA 1978) (*per curiam*), reflect a concern for that aspect of the timing of judicial intervention to which the doctrine is addressed.

at issue, no evidentiary record developed by the agency, and no agency findings of fact. Agency views would be presented only in the form of adversarial arguments.

In contrast, if the administrative exhaustion requirement were applied, all judicial incursions into the administrative process would be postponed until after the agency had rendered a reviewable decision on the constitutional issue.¹⁸⁰ Thereafter, if the constitutional issue turned on the particular facts of the case, the court would be required to look only to the primary evidence adduced in the agency hearings¹⁸¹ and would be compelled to adopt the agency's findings of fact so long as those findings were supported by substan-

180. A party who is unsuccessful on the constitutional challenge would not necessarily be required to remain in the administrative forum until the agency rendered a final decision on all aspects of the case. As *Gulf Pines* illustrates, in appropriate circumstances the courts could expedite judicial review of the constitutional question. See *Gulf Pines*, 361 So. 2d at 695.

181. Under the Administrative Procedure Act, the agency record shall consist of:

- a. All notices, pleadings, motions, and intermediate rulings;
- b. Evidence received or considered;
- c. A statement of matters officially recognized;
- d. Questions and proffers of proof and objections and rulings thereon;
- e. Proposed findings and exceptions;
- f. Any decision, opinion, proposed or recommended order, or report by the officer presiding at the hearing;
- g. All staff memoranda or data submitted to the hearing officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records;
- h. All matters placed on the record after an *ex parte* communication pursuant to s. 120.66(2); and
8. The official transcript.

FLA. STAT. § 120.57(1)(b)(5) (Supp. 1978). The required contents of the record are similar even if issues of material fact are not in dispute. Compare *id.* with *id.* § 120.57(2)(b).

The Act also gives the court power to remand for further agency action if "either the fairness of the proceedings or the correctness of the action [was] impaired by a material error in procedure or a failure to follow prescribed procedure." *Id.* § 120.68(8). The court may also "remand to the agency if it finds that the agency's action depend[ed] on any finding of fact . . . not supported by competent substantial evidence in the record." *Id.* § 120.68(10). Furthermore if there was

[no] hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts, the court shall order the agency to conduct a prompt, factfinding proceeding under this act after having a reasonable opportunity to reconsider its determination on the record of the proceedings.

Id. § 120.68(6).

By reading §§ 120.51(1)(b) and 120.68(10) in *pari materia* with § 120.68(8), the court would appear to have authority to remand for further agency factfinding if it wants a fuller, richer record to review. Cf. *Boyette v. State Professional Practices Council*, 346 So. 2d 598, 601 (Fla. 1st DCA 1977) (if "the findings of fact and conclusions of law of the agency are [not] supported by competent substantial evidence," the court must "set aside or remand . . ."); *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 586 (Fla. 1st DCA 1977), *appeal after remand*, 361 So. 2d 199 (remand required for further factual determination).

tial evidence on that record.¹⁸² Furthermore, rather than having only the arguments of adversaries, the court would have a written agency opinion on the constitutional point under review.¹⁸³ That opinion, of course, would not bind the court and, while the agency would hardly be a disinterested party, its views would be constrained—perhaps decisively constrained—by the need at least to appear objective.

If the case were heard in the first instance by a legally trained, independent hearing officer from the Department of Administration,¹⁸⁴ the agency would be constrained by more than the mere need to keep up appearances. It would have to take into account that officer's findings of fact, conclusions of law and any exceptions the parties might have filed to those conclusions. Should the hearing officer's determination be adverse to the agency's interests, the latter would clearly have to provide an objective, reasoned response to whatever the hearing officer had said.¹⁸⁵

In sum, under a rule of total agency disability, judicial review

182. If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of § 120.57 of the act, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. *The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.*

FLA. STAT. § 120.68(10) (Supp. 1978) (emphasis added).

183. *Id.* §§ 120.57(1)(b)(5)(f) (Supp. 1978), *quoted at* note 181 *supra*, .57(1)(b)(9). In the case of a challenge to a rule, this conclusion requires a careful consideration of § 120.56. That section allows persons to seek an administrative determination of the validity of a rule on the ground that it is an invalid exercise of validly delegated legislative authority (a purely statutory challenge). A hearing officer's order in such a proceeding, however, is deemed a final agency action. *Id.* § 120.56(5). Judicial review of that officer's determination is immediately available without further resort to the agency. *Id.* § 120.68(1). Before § 120.56 was amended in 1976, the subsection provided an additional constitutional ground for a declaration of invalidity: "that the rule is an exercise of invalidly delegated legislative authority." *Id.* § 120.56(1)(b) (1975), *amended by* 1976 Fla. Laws ch. 76-131 § 6. In spite of the fact that the question is whether the bypass of agency review of the hearing officer authorized under § 120.56 should nevertheless apply if a court subsequently decides that the constitutional question is administratively cognizable. A negative answer is urged. It would be important in such a matter to have an independent agency opinion, and, as amended, § 120.56 does not literally apply.

184. The Act creates an independent entity; the Division of Administrative Hearings, in the Department of Administration, to conduct administrative hearings. FLA. STAT. § 120.65 (Supp. 1978). The hearing officers must meet certain eligibility requirements before they qualify to conduct hearings. *See, e.g., id.* §§ 120.57(1)(b)(3), .65(2). A hearing officer, with the exception of a limited number of proceedings described in § 120.57(1)(a)(1)-(8), must be assigned to conduct any hearing "in which the substantial interests of a party are determined by an agency," unless waived, or unless the proceeding does not involve a "disputed issue of material fact." *Id.* § 120.57; Oertel, *Hearings Under the New Administrative Procedures Act*, 49 FLA. B.J. 356, 357 (1975).

185. An agency's failure to respond persuasively to the hearing officer's findings has several times resulted in a reversal of the agency decision. *See McDonald v. Department of Banking and Fin.*, 346 So. 2d 569 (Fla. 1st DCA 1977). *See also Moore v. Florida Constr. Indus. Licensing Bd.*, 356 So. 2d 19 (Fla. 4th DCA 1978).

would probably occur at an earlier point in time than under the alternative scheme, and the courts would have the advantage of building their own factual record and making their own findings of fact. On the other hand, under a rule requiring an initial submission of the constitutional question to the agency, the court would have a record which at the deliberative level—where factual conclusions are defined and legal assertions explained—would be considerably richer, hopefully more thoughtful and certainly more mature.

Seen in operational terms, our basic question narrows considerably. The general question of whether the courts alone should decide all constitutional questions arising out of the work of administrative government is, in operational terms, actually a question of whether the courts should invariably sacrifice the assistance of an agency record, built under the procedural constraints of the 1974 APA,¹⁸⁶ merely in order to develop their own factual record and make their own findings of fact. Phrased in these terms, the principle of judicial exclusivity would appear, at a practical level, to be something less than a vital bulwark of the judicial prerogative.

Indeed, viewed in practical terms, the doctrine of judicial exclusivity is of dubious value. In cases where the facts are in dispute, the courts are frequently required to make subtle, difficult judgments concerning the purposes and probable effects of the statute or rule being challenged. To prefer that an agency's views on such questions appear as the mere assertions of an adversary rather than as part of an agency record constructed under the procedural constraints of the APA would seem to be sheer folly. No less foolish is a rule that would deny to all individuals what could become, under proper judicial supervision, a prompt, reasonably inexpensive and possibly sufficient alternative forum for the adjudication of their rights, especially since that would not impair their ultimate right of resort to the courts. And, if immediate access to the courts were reserved for cases in which an administrative adjudication would be

186. The APA provides for: (1) a hearing within 14 days of notice (the required contents of the notice are more than sufficient to afford the noticed party an opportunity to prepare a response), FLA. STAT. § 120.57(1)(b)(2) (Supp. 1978); (2) an opportunity to present to the hearing officer "evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of fact and orders, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel," *id.* § 120.57(1)(b)(4); (3) the parties to receive transcripts at cost; (4) 10 days in which to respond to the recommended order; and (5) limitations on the agency's power to modify the hearing officer's findings. *See id.* § 120.57. Section 120.54 sets forth the procedures for adopting rules, which include notification of persons likely to be affected and authorization for any person "substantially affected" by the proposed rule to seek administrative determination of its validity. *Id.* § 102.54. That determination would be made under the procedural safeguards of § 120.57. Hearings under § 120.56 are also to be conducted in the manner provided in § 120.57. *Id.* § 120.56(5).

futile or otherwise suspect, the courts would be freed to devote their energies to perfecting the fairness and objectivity of these alternative forums. With overcrowded court dockets leaving judges precious little time for careful deliberation, such a step could also enhance the quality of our administrative law more generally. Indeed, if the rule of law is our ultimate concern, there is something positively perverse in the principle of judicial exclusivity. It destroys the sanctity of an administrative officer's oath. It is a clear signal that he really has no responsibility for independently and objectively assaying the constitutionality of his actions. That responsibility lies entirely with the courts and the bureaucrat is free to do what he can get away with, especially if those affected by his actions can ill-afford the costs and delays of a judicial appeal.

Nevertheless, whatever may be argued at the pragmatic level, there still remains the basic question of whether a *de novo* judicial trial is so critical to preserving the integrity of the judicial power, as such, that we must except from the lessons of *Marbury v. Madison* all constitutional questions arising out of the workings of administrative government. As already noted, if the Supreme Court of Florida's resort to the principle of judicial exclusivity in *Amrep* and *Gulf Pines* makes any sense at all, it does so only if viewed as an affirmative answer to this question—only if viewed as an attempt to preserve a trial *de novo* in all constitutional cases. Unfortunately, neither *Amrep* nor *Gulf Pines*, nor any other Florida case, explains why the right of trial *de novo* must be preserved. We must turn, therefore, to the federal experience, to the question addressed by the Supreme Court of the United States over forty-five years ago in the great case of *Crowell v. Benson*.¹⁸⁷

C. *Crowell v. Benson and the Use of Administrative Factfinding*

Crowell v. Benson involved a constitutional challenge to the Longshoremen's and Harbor Worker's Compensation Act,¹⁸⁸ which provided in part that the deputy commissioner's findings of fact, if supported by substantial evidence, would be conclusive in any subsequent judicial action to enforce or set aside a compensation award. The employer argued that this much of the Act denied him due process of law and constituted an unwarranted administrative intrusion upon the judicial power in violation of article III of the Constitution.¹⁸⁹ Writing for the majority, Chief Justice Hughes

187. 285 U.S. 22 (1932).

188. 33 U.S.C. §§ 901-50 (Supp. V 1975).

189. The district court agreed with the employer and stated:

I cannot conceive that Congress ever meant to deprive the employer of labor of the right to a fair judicial hearing before providing that his property might be

quickly disposed of the due process question by declaring that due process only required notice, a fair opportunity to be heard and that the deputy commissioner's findings of fact be supported by substantial evidence.¹⁹⁰

Article III, however, posed a more intricate problem. The Chief Justice began by drawing a distinction between public and private rights. In cases involving a public right—cases between the government and persons subject to its authority—Congress was free to commit the determination of all the controlling facts, constitutional or otherwise, to an executive body or to a legislative court, subject only to compliance with the substantial evidence test.¹⁹¹ In cases of private right—the liability of one individual to another—the same was also true, but only of facts pertaining to issues that were within “the contemplated routine of administration.”¹⁹² In both private and public right cases, questions of law were to remain for judicial determination.¹⁹³

The significance of this initial holding can scarcely be underestimated. It constitutes one of the principal cornerstones of modern

subject to the payment of any demands, and therefore I am inclined to treat these provisions found in the act as authorizing the court to go into the real facts and grant a hearing *de novo*, for it is only by so construing the act that I can hold it to be constitutional.

Benson v. Crowell, 33 F.2d 137, 142 (S.D. Ala. 1929).

190. 285 U.S. at 45-48.

191. *Id.* at 50.

192. *Id.* at 56.

193. The Chief Justice stated:

The contention under the due process clause of the Fifth Amendment relates to the determination of questions of fact. Rulings of the deputy commissioner upon questions of law are without finality. So far as the latter are concerned, full opportunity is afforded for their determination by the Federal courts through proceedings to suspend or to set aside a compensation order, section 21(b), by the requirement that judgment is to be entered on a supplementary order declaring default only in case the order follows the law (section 18), and by the provision that the issue of injunction or other process in a proceeding by a beneficiary to compel obedience to a compensation order is dependent upon a determination by the court that the order was lawfully made and served. Section 21(c). Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted *As the statute is to be construed so as to support rather than to defeat it, no such limitation is to be implied*

Id. at 45-46 (emphasis added).

In his reference to an independent judicial “determination of facts” the Chief Justice was clearly referring to *de novo* factfinding on the agency record, not to a judicial trial *de novo*, as his citation to *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) makes plain. For a discussion of this requirement, see note 203 *infra*. *A fortiori*, the Chief Justice concluded that the ultimate decision, on a question of law, would be for the Court to make. For a similar conclusion under article III, see 285 U.S. 49-50.

administrative law.¹⁹⁴ As the court recognized, the factfinding process had long been at the heart of the adjudicative process.¹⁹⁵ Yet, the delegation of the greater part of this vital function to an administrative tribunal, subject only to review for rationality under a substantial evidence test, did not, in the Chief Justice's opinion, represent an unconstitutional encroachment upon the judicial function.¹⁹⁶ The impact of this portion of the *Crowell* opinion on Florida law is apparent both in the judicial review provisions of the 1974 APA¹⁹⁷ and in the correlative provisions designed to ensure fairness in agency adjudications.¹⁹⁸

Unfortunately, this initial holding is too often obscured by the remainder of the Chief Justice's opinion and the quarrel it precipitated with Justice Brandeis. In cases involving a private right,¹⁹⁹ the initial administrative determination of facts pertaining to jurisdictional requirements of a constitutional nature could not, the Chief Justice thought, be assigned any degree of finality whatsoever. Those facts had to be tried by an article III court *de novo*, because reliance on administrative factfinding would threaten the "judicial power in requiring the observance of constitutional restrictions."²⁰⁰ He explained more fully:

The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province . . . does not require the conclusion that there is no limitation for their use, and that Congress could completely oust the courts of all determinations of fact by vesting the authority to mark them with finality in its own instrumentalities or in

194. L. JAFFE, *supra* note 18, at 87-90.

195. 285 U.S. at 57.

196. Emphasizing the expertise of administrative agencies, the Chief Justice wrote: Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to the task.

Id. at 46.

197. See FLA. STAT. § 120.68(9) (Supp. 1978), requiring a court either to set aside, modify or remand an agency decision if the latter is found by the court to have "erroneously interpreted a provision of law and that a correct interpretation compels a particular action." See also *id.* § 120.68(10), which provides in part: "The court shall . . . set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record."

198. See generally *id.* § 120.57.

199. 285 U.S. at 47.

200. *Id.* at 56.

the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, . . . upon the facts, and finality as to facts become in effect finality in law.²⁰¹

The argument, however, does not succeed on its own terms and has not survived the test of time. To understand why, it is first necessary to emphasize both the limited scope of the holding and the difficulties of ascertaining the cases to which it applies. Perhaps when viewed against the developing pattern of administrative government in 1932, the distinction between private and public rights was clear. This is no longer true. Even if a case involves a private dispute with contending claims of private right, it does not fall within the private right category if settlement of the dispute depends upon policies embodied in a regulatory statute. The point is amply illustrated by *Myers v. Bethlehem Shipbuilding Corp.*,²⁰² decided only six years after *Crowell*. In light of *Myers*, doubts immediately arise if Congress, in providing an administrative forum for the settlement of private disputes traditionally cognizable at common law, so much as "tinkers" with the traditional common law standard. And, since arguably this was the situation in *Crowell* itself, doubts now exist as to the scope of the rule even under the Longshoremen's and Harbor Worker's Act.²⁰³ Indeed, some com-

201. *Id.* at 57.

202. 303 U.S. 41 (1938). In *Myers*, the Court, per Justice Brandeis, held that the National Labor Relations Board (NLRB) was required to make the initial decision on a constitutional challenge to its jurisdiction in a case charging an employer with unfair labor practices. The Court also held that because the Wagner Act provided for "appropriate procedures before the Board" and for review by the Circuit Courts of Appeal to determine, *inter alia*, whether the NLRB's findings of fact were supported by substantial evidence, the Act provided for "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." Thus, what was essentially a dispute between an employer and a union over the latter's "private right" to unionize was changed by a congressional enactment pertaining to that right into a case of "public right" under which judicial review of the agency's factfinding could properly be limited to the substantial evidence test. That the union's rights were determinable in the first instance by an administrative body (NLRB) is, of course, immaterial since that was also the case in *Crowell*.

203. The *Crowell* rule, requiring a trial *de novo* on certain questions has been limited and criticized. See, e.g., *Del Vecchio v. Bowers*, 296 U.S. 280 (1955) (*de novo* rule not applicable to question of whether death was accidental or suicidal); *South Chicago Co. v. Bassett*, 309 U.S. 251 (1940) (rule not applicable to question of whether decedent was crew member and therefore beyond scope of Act); *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162 (1933) (rule not applicable to question of whether injury arose out of or in the course of employment); *L'Hote v. Crowell*, 286 U.S. 528 (1932) (rule not applicable to question of whether claimant is a dependent widow or mistress); *Associated Indem. Corp. v. Shea*, 455 F.2d 913, 914 n.2 (5th Cir. 1972) ("Whether any vestige of validity remains of the extensively criticized *Crowell* doctrine is extremely doubtful. Suffice it to say that although the Supreme Court has not expressly overruled *Crowell*, it simply does not follow it."); *Morrison-Knudsen Co. v. O'Leary*, 288 F.2d 542 (9th Cir.), *cert. denied*, 368 U.S. 817 (1961) (*Crowell* does not require

mentators have suggested that the Supreme Court has all but expressly overruled this facet of Chief Justice Hughes' opinion.²⁰⁴ We need not go so far. We merely suggest that the constitutional grounding for Chief Justice Hughes' broader concern for fundamental rights has shifted decisively from article III—a concern for the integrity of the judicial power, as such—to the “due process” clause, precisely as Justice Brandeis in dissent thought it should.²⁰⁵

At the same time, it is also suggested that the shift was inevitable. First, the Chief Justice's attempted exception for constitutional facts in private rights cases was wholly incompatible with the great cornerstone of administrative law which he carved out in the initial portions of his opinion. Recall that the Chief Justice thought that all questions of law must remain for a court to review *de novo*.²⁰⁶ At the same time, in justifying his constitutional facts private rights exception, he emphasized how facts can blend into and critically

trial *de novo* as to navigable waters where there is no real issue of fact and no new evidence to be presented which is not already in record).

204. See generally Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055 (1932); Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?* 98 U. PA. L. REV. 163 (1949).

205. The quarrel with Justice Brandeis is important, it not only further illustrates the difficulties of drawing the distinctions upon which the Chief Justice relied, but also set the stage for the further evolution of the law along the lines suggested by Justice Brandeis. The Chief Justice clearly stated that a trial *de novo* was required only with regard to constitutional questions of a jurisdictional nature—questions that were “a condition precedent to the operation of a statutory scheme.” 285 U.S. at 54-55. In *Crowell*, only two questions fell into this category: whether the complainant's injury occurred on the navigable waters of the United States, and whether a relationship of master-servant existed between the parties. *Id.* at 55-56. According to the Chief Justice, this latter issue was jurisdictional because “in the absence of any other justification,” the relationship of master-servant “underlies the constitutionality of” Congress' effort to impose liability without fault upon the respondent. *Id.*

In dissent, Justice Brandeis took issue with the jurisdictional fact analysis. He argued that although the employment relationship might have been constitutional, it was “not jurisdictional.” *Id.* at 84-88 (Brandeis, J., dissenting). In other words, even if a distinction could be drawn between constitutional questions of a jurisdictional nature and those of a more substantive character, Justice Brandeis felt that the Court had drawn the line in the wrong place and, in so doing, had established a precedent that threatened to bring all constitutional issues within the purview of the *de novo* fact finding requirement. Accordingly, he rejected any suggestion that the grant of judicial power under article III limited the Congress' power to vest factfinding authority in an administrative tribunal. Instead, he wrote:

The “judicial power” of article 3 of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that Article nothing which requires any controversy to be determined as of first instance in the federal district courts If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.

Id. at 87-88.

206. See discussion at note 195 and accompanying text *supra*.

shape decisions on the law. "Finality as to facts," the Chief Justice declared, "becomes in effect finality in law."²⁰⁷ But, if these two propositions are accepted, then administrative finality in any case, whether it involves a constitutional or a nonconstitutional fact, or whether it involves a private or a public right, would "sap the judicial power" and "establish a government of a bureaucratic character alien to our system"²⁰⁸ as readily as it might when the factfinding pertained only to a constitutional issue in a private rights case. And obviously, if constitutional questions are more "fundamental" and therefore merit a greater degree of judicial independence in factfinding, that would seem to apply equally to both public and private rights cases. In short, the Chief Justice simply could not reconcile his attempted justification for the exception with the scheme established under his initial holding, and it is the latter that has survived.

Second, if there is a need for the courts to exhibit a special solicitude towards judicial factfinding, that need would appear to be rooted more in a concern for the individual and for the protection of his rights than in a concern for protecting the judicial power, as such. The power and independence of the judiciary, in other words, is only a means to an end, any requirement for a judicial trial *de novo* of constitutional facts would, therefore, reside more properly in due process than in article III.

This analysis of *Crowell* provides several important lessons for the Supreme Court of Florida. The rational core of the *Amrep* and *Gulf Pines* decisions, it will be recalled, consists of reading into the judiciary article of the Constitution of the State of Florida a requirement that all constitutional facts be determined pursuant to a judicial trial *de novo*.²⁰⁹ If one adheres to this conclusion, then the *Crowell* analysis demonstrates that all facts—whether constitutional or not—must also be subject to a trial *de novo* requirement. To hold to its *Amrep* and *Gulf Pines* decisions, in other words, would require the Supreme Court of Florida to depart from Chief Justice Hughes' fundamental principle of administrative law. It would be required to declare the judicial review provisions of the 1974 APA unconstitutional to the extent that those provisions might foreclose resort to the circuit courts even in nonconstitutional cases.²¹⁰ Such a departure, in turn, would also radically undermine the assumptions that largely explain the reforms of the 1974 Act. While greater procedural fairness in agency proceedings may be a worthwhile end in itself, procedural requirements can be costly

207. 285 U.S. at 57.

208. *Id.*

209. See discussion at note 57 and accompanying text *supra*.

210. See FLA. STAT. § 120.68 (Supp. 1978).

when they cause delays in carrying out important public objectives. And obviously, the need for greater procedural safeguards becomes far less urgent and justifiable if all administrative adjudications are to be tried *de novo* once they reach the courts on review. Surely, the drafters of the 1974 Act did not entertain any such possibility and would be compelled to reconsider their 1974 decision in light of this change.

If, on the other hand, the Supreme Court of Florida is unwilling to go so far—to retry all adjudicated administrative decisions *de novo* and thereby invalidate the judicial review provisions of the 1974 Act—*Amrep* and *Gulf Pines* deserve a quiet burial. Nor can they be saved from such interment by resort to the due process clause.²¹¹ As the federal cases show, due process requires a judicial trial *de novo* in a very limited category of cases indeed, and even in some of those cases the proposition is not wholly free from doubt.²¹²

211. The very nature of interpreting the due process clause involves a balancing of conflicting values and interests as they emerge from their particular context. It presages a case-by-case approach that rarely supports as broad a rule as *Amrep* and *Gulf Pines* purport to lay down. This conclusion is derived from the Supreme Court of the United States' "reminder that the broad generalities of the Bill of Rights, especially the due process clause, constitute the basic framework for a society committed to an 'ordered liberty.'" See Stotzky & Swan, *Due Process Methodology and Prisoner Exchange Treaties: Confronting an Uncertain Calculus*, 62 MINN. L. REV. 733, 750-51 (1978). See also discussion at note 212 *infra*, and accompanying text.

212. The only examples, apart from a few situations under the Longshoreman's and Harbor Worker's Act that were involved in *Crowell*, (but see note 205 *supra*), are habeas corpus proceedings, traditionally a very special device for collaterally attacking both administrative and judicial decisions, and citizenship determinations in deportation proceedings. See, e.g., *Ng Fung Ho v. White*, 299 U.S. 276 (1922). The constitutional status of the trial *de novo* requirement in the latter instance, however, has never been reaffirmed because it is now embodied in legislation. 8 U.S.C. § 1105(a)(5)(B) (1976) (hearing *de novo* on nationality claims in deportation proceedings).

More frequently the federal courts will, without holding a trial, make their own "findings of fact," from the agency record. They will, in other words, engage in *de novo* judicial "factfinding," but without a judicial trial *de novo*. Thus, in 1920, the Supreme Court of the United States held that a utility that challenged a rate order by a state agency as confiscatory, in the state courts, was entitled to the independent judgment of the judicial tribunal as to both law and fact, although the court in so doing was to be bound to the agency record. Without such judicial review, the Court held, the party challenging the agency's order would have been deprived of due process of law. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920). The *Ben Avon* doctrine was reaffirmed in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 28 (1936), where judicial review was applied in the federal courts to a federal administrative rate order. Chief Justice Hughes, in writing for the majority, stated:

Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority

But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party

In sum, even such rational core as can be ascribed to these two decisions, is a core bereft of any sound theoretical foundation

carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established.

Id. at 52-53. Like *Ben Avon*, the *St. Joseph* decision was grounded on a desire to guarantee the parties' due process rather than on the notion that only article III courts could resolve such disputes.

Kenneth Davis has written that "[t]he Ben Avon doctrine in the federal courts has gradually died." 4 K. DAVIS, *supra* note 5, § 29.09 (1958 & Supp. 1970). Other commentators have taken exception to this. Frank Strong argued that in certain areas involving constitutionally guaranteed rights, the courts will review the factual conclusions drawn by the initial "factfinder." Strong, *The Persistent Doctrine of "Constitutional Fact"*, 46 N.C. L. REV. 223 (1968).

Thus, in jury cases, the courts may review the facts. *See, e.g., Cassell v. Texas*, 339 U.S. 282, 283 (1950); *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939); *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935) ("[W]henver a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter controls the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."). *Contra, Akins v. Texas*, 325 U.S. 398, 402 (1945).

Cases involving allegations of forced confessions invoke the same rule. *See, e.g., Payne v. Arkansas*, 356 U.S. 560, 562 (1958) ("[W]here the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record to determine whether the claim is meritorious."); *Lisenba v. California*, 314 U.S. 219, 237-38 (1941) ("The performance of [the duty to make an independent examination of the record] cannot be foreclosed by the finding of a court, or the verdict of a jury, or both.>").

Contempt of court in the free speech/fair trial context has required an examination of the allegedly damaging statements. *See, e.g., Craig v. Harney*, 331 U.S. 367, 373-74 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).

The same independent appellate review requirements have been advanced in cases involving trial by newspaper and libel. *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (libel); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel). *See generally Sheppard v. Maxwell*, 384 U.S. 333 (1966) (trial by newspaper); *Estes v. Texas*, 381 U.S. 532 (1965) (same); *Irvin v. Dowd*, 366 U.S. 717 (1961) (same).

Finally, the area of obscenity has required appellate courts to independently examine the facts as presented to the trial court. In *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964), the Court reaffirmed the principle that, in obscenity cases, as in all other cases involving rights derived from first amendment guarantees of free expression, independent constitutional judgment on the facts of each case is required. In a footnote, the Court cited *Ng Fung Ho* and *Crowell* for the proposition that constitutional adjudication in the area could not be relaxed by reliance on a "sufficient evidence" standard of review. "Even in judicial review of administrative agency determinations, questions of 'constitutional fact' have been held to require de novo review." *Id.* at n.6.

The essential point, however, is that none of these cases lend any support whatsoever to the decision by the Supreme Court of Florida in *Amrep* and *Gulf Pines*. The district courts of appeal are every bit as competent as the circuit courts to undertake independent "factfinding" on the agency record. Indeed, what these cases actually suggest is how far the *Amrep* and *Gulf Pines* decisions deviated from our constitutional traditions and from the basic question that should have been addressed. If the Supreme Court of Florida was genuinely concerned with protecting individual rights, it should have addressed the question of whether, in such cases, the district courts were constitutionally required to engage in *de novo* "factfinding" on the agency record; *i.e.*, whether the limitation of the substantial evidence test contained in FLA. STAT. § 120.68 (Supp. 1978) could constitutionally be applied in such cases. The court devoted itself instead to the essentially trivial task of protecting the right of a trial *de novo* in the circuit court.

whether one searches the judiciary article of the Constitution of the State of Florida or the due process clause. Nor can they be sustained as exercises in wise policy. The sweeping assertion that constitutional questions belong exclusively to the judiciary cannot, in the long run, enhance the quality of administrative law or the quality of administrative justice in this state. On a pragmatic level, both decisions are a step backward from the advances achieved with the 1974 Act. And in the end, both decisions transgress the limitations upon the judicial power that inhere in the separation of powers doctrine. They rest, to put the point bluntly, upon an assertion of judicial supremacy tantamount to judicial usurpation.

V. CHALLENGES TO STATUTES AS APPLIED AND TO AGENCY ACTIONS:
HEREIN THE LACK OF COMPETENCE AND ULTRA VIRES THEORIES

A. *Introduction*

If the theory of judicial exclusivity should be abandoned because of its dubious pragmatic and theoretical implications, our attention must turn to the alternative precepts that have, from time to time, been employed to limit the role of agencies in the resolution of constitutional disputes. As already explained, these latter are based upon a number of practical and institutional considerations that reflect the unique place and other characteristics of the administrative function within our system of government. They are not predicated upon some hypothesized need to protect the judicial function.

In pursuing these alternatives, the "ultra vires" and lack of competence theories are dealt with first.²¹³ These two are treated together with the subordinate role theory²¹⁴ left for section VI, because they alone purport to reach beyond challenges to the facial validity of a statute and, selectively at least, to preclude agencies from judging the constitutionality of a statute *as applied* or of their own actions. If these two precepts are discredited as limitations upon the basic powers of an agency, then one must conclude that an agency is constitutionally free to entertain all such challenges. At the same time, even if the pragmatic considerations underlying these precepts do not give rise to a barrier of constitutional dimensions, they are not to be ignored. There still remains the question of whether they may properly warrant bypassing an agency in particular cases—whether and when they should be employed as exceptions to the exhaustion of administrative remedies require-

213. See section I(a) *supra*.

214. See *Id.*

ment. Stated another way, this part of our inquiry is, in large measure, focused upon the question of whether the pragmatic factors underlying the ultra vires and lack of competence theories should be treated merely as elements in deciding whether an initial submission to the agency in particular case is sound policy or whether they should be elevated to a broad constitutional disability for all cases.

In addressing this question one must once again resort to federal decisions. Even when, in such cases as *Leon County*²¹⁵ and *Balino*²¹⁶ the Florida courts have attempted to limit the rule of total agency disability, they have failed to take account of these alternative theories. Although the logic of these cases points to the rejection of all constitutional imitations in favor of a truly discriminating use of the exhaustion of remedies doctrine, the courts have expressly refused to follow their logic to its conclusion. Moreover, they do not attempt to evaluate whether the exhaustion doctrine can be employed to meet all of the practical considerations that may, on occasion, warrant circumventing an agency in constitutional cases.

B. *The Legacy of Myers v. Bethlehem Shipbuilding Corp.*

A study of the modern development of the exhaustion of remedies doctrine under federal law can properly start with the decision of the Supreme Court of the United States in *Myers v. Bethlehem Shipbuilding Corp.*²¹⁷ *Myers* was decided against the background of what then appeared to be a deliberate and massive campaign of employer resistance²¹⁸ to efforts by the National Labor Relations Board (NLRB) to implement the Wagner Act.²¹⁹ That background, however, cannot detract from the basic theoretical teachings of the opinion.

In *Myers*, the lower courts had enjoined the NLRB from holding a hearing to determine whether an employer, by maintaining a "company union," had interfered with the unionization of its employees in violation of the Wagner Act.²²⁰ The lower courts agreed with the employer's argument that since the company was not engaged in interstate commerce, the Act could not be constitutionally

215. 344 So. 2d 297 (Fla. 1st DCA 1977).

216. 348 So. 2d 349 (Fla. 1st DCA 1977).

217. 303 U.S. 41 (1938). For the leading pre-*Myers* decisions, see *Pacific Tel. & Tel. Co. v. Seattle*, 291 U.S. 300, 304 (1934); *Federal Trade Comm'n v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927); *Farncomb v. Denver*, 252 U.S. 7, 12 (1920); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 230 (1908).

218. See generally L. JAFFE, *supra* note 18, at 433.

219. 29 U.S.C. § 151 (1964).

220. 303 U.S. at 46.

applied to the case. On appeal, a unanimous Supreme Court held that the district court lacked jurisdiction to entertain that question.

Although relying in part upon the doctrine of exclusive administrative jurisdiction,²²¹ the seminal import of the opinion is found in the Court's use of the exhaustion of remedies doctrine. The employer contended that because the NLRB hearing would cause it irreparable injury and that because the injury stemmed from an assertion of jurisdiction in violation of the Constitution, the district court had to be empowered to enjoin an otherwise lawless act. Writing for the Court, Justice Brandeis' response was concise and direct.

The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or theoretical injury until the prescribed administrative remedy has been exhausted. The rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter. Obviously, the rule requiring exhaustion of administrative remedies cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.²²²

The broader implications of *Myers* can be readily stated. The constitutional issue in the case was of a jurisdictional nature. Yet, Justice Brandeis explicitly rejected the argument that the agency lacked authority to entertain an action until its constitutional power to consider the case was judicially established. Agencies, like courts, possess jurisdiction to determine their own jurisdiction even if the question rises to constitutional status and a court of law is available to settle the matter.

In this context, it is to be noted that although the constitutional outcome of the case would inevitably have turned on its particular facts—a detailed factual record was clearly required—it was not an issue in which the ultimate interpretation of the facts would have been especially facilitated by agency expertise. Courts had long been accustomed to drawing the line in particular cases between interstate and intrastate commerce. The exhaustion doctrine thus was not so much directed at securing for the court the benefit of the agency's views. It was directed at preserving the integrity of the administrative machinery itself because the agency had been selected by Congress for carrying out its will. Its purpose was insti-

221. *Id.* at 48.

222. *Id.* at 50-52.

tutional preservation. In *Myers*, the Supreme Court unequivocally assigned this institutional purpose a higher priority than any purpose served by having threshold jurisdictional questions submitted directly to the courts.

A more contemporary application of this priority is found in *Schlesinger v. Councilman*.²²³ In *Schlesinger*, the Supreme Court of the United States ordered dismissal of a petition to enjoin a court martial proceeding even though the lower courts had found that the military tribunal lacked constitutional jurisdiction over the petitioner. The Court held that the constitutional issue must be decided in the first instance by the military court.²²⁴ Citing *Myers*, the Court read the exhaustion doctrine as an expression of the practical need to respect and preserve the integrity of the other branches of government. In this aspect, the Court made clear that the doctrine draws upon the same notion of comity that underlies the rule requiring state prisoners to exhaust their available state remedies before seeking federal habeas relief.²²⁵

As an expression of this larger institutional need to respect the administrative process, the exhaustion doctrine can also be viewed as a device to foster a greater sense of constitutional responsibility within the agency itself, a purpose that may be strongly commended to the Florida courts.

Another striking feature of Justice Brandeis' *Myers* opinion is his repeated assurance that under the Wagner Act, the NLRB was required to follow fair procedures, due process of law, and that ultimately the courts of appeal could review the adequacy of the procedures actually employed in the case. The NLRB's capacity to conduct a fair hearing and to make a competent judgment on the constitutional issue was clearly a factor in the decision.²²⁶ But, the adequacy of the Board's procedures and its substantive competence were only factors to be considered on a case-by-case basis in determining whether the exhaustion doctrine should be applied. Judicial solicitude for fairness and competence was not, in other words, to be elevated into a general theory disabling all agencies in all cases

223. 430 U.S. 738 (1974).

224. The Court rested its decision primarily on the exhaustion of remedies doctrine. The reference by the Court to the distinct place of the military establishment in American society was merely an attempt to bolster the conclusion based upon that doctrine. If a distinction can be drawn between an article I court and the archtypal administrative agency because the military court has no executive or legislative type functions; that distinction would seem to be marginally relevant to our subject. At most it would appear to work in as a factor to be taken into account on a case-by-case basis under the exhaustion of remedies doctrine. See section VI(b)(1) *infra*.

225. 420 U.S. at 55-57.

226. 303 U.S. at 49.

from entertaining constitutional questions.

A comparison between *Myers* and Justice Harlan's thoughtful concurring opinion in *Oestereich v. Selective Service System Local Board No. 11*,²²⁷ illustrates the point. In *Oestereich*, the Court decided to grant pre-induction judicial review of a regulation which the Board had relied upon to revoke the petitioner's statutory exemption from military service.²²⁸ Concurring in that decision, Justice Harlan pointed out that both the regulation and the underlying statute²²⁹ were being challenged on constitutional grounds.²³⁰ He then observed:

[T]he composition of the Boards, and their administrative procedures, render them wholly unsuitable forums for adjudication of these matters: local and appeal boards consist of part-time, uncompensated members, chosen ideally to be representative of the registrant's communities; the fact that a registrant may not be represented by counsel in Selective Service proceedings . . . seems incompatible with the Board's serious consideration of such purely legal claims. Indeed the denial of counsel has been justified on the ground that the proceedings are nonjudicial. . . .

To withhold pre-induction [judicial] review in this case would thus deprive petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure.²³¹

The contrast between *Oestereich* and *Myers* makes the point. Assured of the competence and procedural fairness of the NLRB, Justice Brandeis was willing to insist that the company exhaust its administrative remedies before resorting to the courts. Harboring doubts regarding the competence and procedural fairness of the Selective Service System, Justice Harlan was willing to have the courts intrude to review the petitioner's classification. There is, in short, no broad rule of agency disability rooted in some general assumption regarding the competence of and procedures employed by all administrative agencies. Each case is to be decided on its own

227. 393 U.S. 233, 239 (1968).

228. Military Selective Service Act of 1967 § 6(g), 81 Stat. 100 § 1(a), 50 U.S.C. App. § 456(g) (1968), which exempts from training and service students preparing for the ministry. The petitioner, a theological student, had been classified as IV-D by the Board pursuant to that statute. Because he returned his registration certificate to the government "for the sole purpose of expressing dissent from participation by the United States in the war in Vietnam," the Board declared him delinquent for failure to have his draft card in his possession and changed his classification to I-A. 393 U.S. at 234-35.

229. See note 228 *supra*.

230. 393 U.S. at 239-42. The challenge was based on first amendment and due process grounds.

231. *Id.* at 242-43.

merits within the framework of the exhaustion of remedies doctrine.

For the Florida courts, there is wisdom in such a rule. Echoes of that wisdom can already be found in *Florida Hotel & Restaurant Commission v. Marseille Hotel Co.*²³² The procedural guarantees of the 1974 APA only serve to reawaken those echoes. A line between cases to which those guarantees apply and cases exempt from their strictures serves as an appropriate point from which to start in fashioning one important outer boundary on the exhaustion requirement.

Overall, the ultimate lesson of *Myers* and its progeny seems clear. The pragmatic and institutional factors underlying the ultra vires and lack of competence theories do not give rise to any constitutional ordinance. As a result, there is no broad federal rule denying an administrative agency the power to entertain constitutional challenges to its own actions or to a statute as applied. In the reasons for all of this lies a wisdom that strongly recommends a comparable rule to the Florida courts; a wisdom that also underscores the soundness of *Leon County* and *Balino*.

C. A Special Exception—The “Futility” Rule

Before turning to the one matter that remains for us to consider—the subordinate role theory and the question of challenges to the facial validity of a statute—we pause to observe a further refinement in the treatment by the *Myers* case of the ultra vires theory, the rise of what might be called a “futility” exception to the exhaustion of remedies doctrine. The first tentative predicates for such an exception are already to be found in the Florida cases. More importantly, the very existence of the exception underscores the extent to which the federal courts have adjured the use of broad constitutional ordinances, such as the lack of competence and ultra vires theories, in favor of a more discriminating application of the exhaustion doctrine. The exception also cuts deeply into the need for a general rule of agency disability based upon the subordinate role theory.

*Allen v. Grand Central Aircraft Co.*²³³ provides the principal illustration. In *Allen*, the aircraft company sought to enjoin a proposed hearing by the Wage Stabilization Board and its subsidiary organs, arguing that the Defense Production Act did not authorize the establishment of the administrative machinery, including the Board itself, which was to judge its alleged violations of that Act. The company also contended that it was not required to exhaust its administrative remedies because “the administrative authorities

232. 84 So. 2d 569 (Fla. 1956). See notes 78-83 and accompanying text *supra*.

233. 347 U.S. 535 (1954).

who seek to determine its case have no lawful right to do so.”²³⁴ The Court appeared to accept this argument since it reviewed the merits of the case and held that the administrative machinery was fully authorized. In so doing, the Court made no attempt to distinguish the *Myers* case, despite the fact that the company’s argument was almost an exact replica of the subject matter jurisdiction or ultra vires argument advanced in *Myers*.

Nevertheless, in spite of commentary to the contrary,²³⁵ a clear distinction seems apparent. There is an obvious difference between a challenge to the right of an agency to hear all cases (*i.e.*, a challenge to its existence) and a challenge to the agency’s jurisdiction in a particular case. To accommodate that difference—to reconcile *Myers* with *Allen*—it is necessary, however, both to reject any broad ultra vires limitation on the power of an agency to determine its own jurisdiction and to carve out a discrete, but important exception to the exhaustion doctrine based upon a practical fact: agencies are not likely to rule themselves out of existence however fair their hearing procedures and however objective they may attempt to be. The controlling concept is “futility.” Courts simply will not require an individual to pursue an administrative remedy that is highly unlikely to be forthcoming.²³⁶

Additional usages of the futility exception can and will be found in some of the decisions discussed later.²³⁷ Here we only observe its use in the more recent case of *Gibson v. Berryhill*.²³⁸ There, in a suit brought under title 42, section 1983 of the United States Code,²³⁹ the Court did not require the petitioner to exhaust his state administra-

234. *Id.* at 540.

235. See K. DAVIS, *supra* note 5, at 384-85 (3d ed. 1972). Note *Fuchs* distinguishes *Myers* and *Allen* on a different and quite inadequate ground.

236. For a discussion of the concept of “futility” in a slightly different context, see L. JAFFE, *supra* note 18, at 446-49.

237. See section VI(b)(1) *infra*.

238. 411 U.S. 564 (1973).

239. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). The gravamen of the complaint in *Gibson* was that the Board, because it was biased, could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law. The Court acknowledged that, in other cases, it had held that state administrative remedies did not have to be exhausted if the plaintiff stated a cause of action under § 1983. *Damico v. California*, 389 U.S. 416 (1967); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963). The Court suggested, however, that the *McNeese* exception to the exhaustion doctrine might not apply in cases where, as in *Gibson*, there was a pending action brought by the state before one of its own agencies and where “the individual charged [would] be deprived of nothing until the completion of that proceeding.” *Gibson*, 411 U.S. at 574-75. Justices Marshall and Brennan, who concurred in the result, excepted to this suggestion, stating that *McNeese* had firmly settled the inapplicability of the exhaustion doctrine to any suit brought under § 1983. *Id.* at 581. See also L. JAFFE, *supra* note 18, at 885 (4th ed. 1976).

tive remedies because his federal cause of action was predicated upon a contention that the state administrative board to which he would remanded was "unconstitutionally constituted."²⁴⁰ Plaintiff was challenging the very right of the Board, as constituted, to exist. Of more importance, however, is the extent to which a further application of the basic concept has already gained a foothold in Florida law. In *Department of General Services v. Willis*,²⁴¹ the District Court of Appeal, First District, denied injunctive relief because the petitioners' had failed to exhaust their administrative remedies. In the course of its discussion, the court took care to analyze why the case did not fall within that exception to the exhaustion doctrine reserved for agency errors "so egregious or devastating that the promised administrative remedy was too little or too late."²⁴² On its face there are, quite obviously, a number of difficulties with an exception formulated in this fashion. It would appear to require a court to engage in a *sub silentio* decision of the merits of a case. The notion of a "devastating" error can, under certain circumstances, be quite perverse.²⁴³ In his further analysis, however, Judge Smith refined his meaning and skillfully avoided these difficulties. He observed:

No lack of general authority in the Department is suggested; nor is it shown, if that is the case, that the Act has no remedy for it. No illegal conduct by the Department is shown; nor, if that is the case, that the Act cannot remedy the illegality. No departmental ignorance of the law, the facts or the public good is shown; nor, if any of that is the case, that the Act provides no remedy for it. No claim is made the Department ignores or refuses to recognize relators' substantial interests, or refuses to afford a hearing, or otherwise refuses to recognize the relators' grievance is cognizable administratively. The respondent contractors have made no showing that remedies available under the Act are inadequate.²⁴⁴

Notice, in this catalog, that the judge was careful to combine each possible charge of illegality or abuse of discretion by the Department with the necessity of showing that the Department itself

240. 411 U.S. at 575.

241. 344 So. 2d 580 (Fla. 1st DCA 1977).

242. *Id.* at 590 (citing 3 K. DAVIS, *supra* note 5). See also *Odham v. Foremost Dairies, Inc.*, 128 So. 2d 586 (Fla. 1961).

243. Presumably, this part of the exception implies an inquiry into the magnitude of the injury that would result if the agency were permitted to pursue its course to the point of final action. Yet there is always the possibility that when large private interests may suffer as a result of agency action, more latitude must be awarded to the agency if it is to secure the essential regulatory purpose set forth by the legislature.

244. 344 So. 2d at 591.

was incapable of remedying the fault. The essence of the exception, in other words, is not the magnitude of the error or its consequences standing alone, but the character of the error juxtaposed to the remedial capabilities of the agency. As part of this calculus, magnitude and consequence, "egregiousness" and "devastation," take on a more manageable meaning. An egregious error is one where the difficulty of the question is so slight that an agency error becomes evidence of incompetence or a willful disregard of duty. As such, the error is also evidence that resort to the agency's own corrective process is likely to prove futile. It is an error which renders the court so skeptical of the agency's purposes or capabilities that judicial intervention becomes necessary in order to secure the basic rights of the effected parties. Also, placed in this calculus, the consequences of the error—"devastation"—begin to make sense. The more devastating the consequences, the more confidently a court can attribute an otherwise egregious agency error to a willfulness or incompetence meriting judicial intervention.

If this is so, then Judge Smith's opinion has succeeded in casting the limits of the exhaustion doctrine in terms which the federal courts have long employed—the "futility" exception.²⁴⁵ It is an open invitation for the Florida courts to draw upon the rich federal experience in their continuing refinement of Judge Smith's important initiative.

More immediate to our subject, the further development of Florida law along these lines would meet many of the pragmatic concerns that underlie all three of our alternative theories. It would do so, however, without erecting a broad, inflexible constitutional ordinance that had the disadvantage of withholding from agency cognizance cases in which the practical problem did not exist. For example, there may be challenges to the constitutional jurisdiction of an agency so devastating in their implications for agency power that an adverse agency decision is predictable and submission of the question to the agency futile. Arguably, this is precisely the situation, and the only situation, where resort to the ultra vires theory would be justified. By treating the matter more selectively under an exception to the exhaustion doctrine, however, the courts could at once meet the real problem and avoid erecting an inflexible constitutional ordinance that would withhold all jurisdictional issues from an agency, even those it can properly decide.

Likewise, Judge Smith's analysis is directly addressed to the case where an agency has exhibited such a lack of procedural and

245. See generally B. SCHWARTZ, *ADMINISTRATIVE LAW* 500-02 (1976).

substantive competence that it cannot be trusted to reach a defensible decision on the constitutional point at issue; a submission to it would be futile. Again, however, treated case-by-case under an exception to the exhaustion doctrine, the practical problem can be adequately met without having to resort to an inflexible constitutional ordinance that inappropriately assumes a general lack of agency competence.

Finally, the *Allen* case itself is addressed to the situation which, more than any other, has given rise to the subordinate role theory—the situation where an agency is asked to pass upon the validity *vel non* of the very statute (or regulation) from which its existence is derived. The incongruity of an agency deciding such a question is largely responsible for the theory. Yet, that very incongruity also demonstrates the futility of the submission. So once again, an exception within the framework of the exhaustion of remedies doctrine may meet the practical problem without necessitating a broad rule withholding from agency cognizance all cases challenging the facial validity of a statute, even cases where an initial agency decision might be useful.

In sum, it may have to be recognized that the alternative theories of agency disability are actually inadequate substitutes for a truly mature and sophisticated application of the exhaustion of remedies doctrine, and that the ultimate answer to those theories lies in the further evolution of that doctrine.²⁴⁶ Before tendering this possibility as a final word, however, a closer examination of the subordinate role theory is necessary.

VI. CHALLENGES TO THE FACIAL VALIDITY OF A STATUTE

A. *The Rule and the Theory: A Study in Judicial Ambivalence*

In examining the decisions of the Supreme Court of the United States dealing with the question of whether administrative agencies possess the power to entertain challenges to the constitutionality of a statute on its face, several points emerge. In no instance has the Court affirmatively declared that such a challenge must first be submitted to an agency for decision. It has even paid a certain lip service to the rule that agencies are constitutionally powerless to entertain such questions. Yet, it has never vouchsafed the reason for such a rule. Certainly, it has never embraced the subordinate role theory. And more than once, its opinion in support of a decision not to require submission to the agency reflects more a studied avoid-

246. See section VI *infra*.

ance of the rule than a reliance upon it. The record, in short, fairly suggests a certain judicial ambivalence toward the rule; an ambivalence more than adequate to invite a closer look at the problem.

The investigation may properly begin with the Supreme Court's first important encounter with the exhaustion doctrine after *Myers*—the cases dealing with the wartime Renegotiation Act.²⁴⁷ In *Aircraft & Diesel Equipment Corp. v. Hirsch*,²⁴⁸ the company combined its nonconstitutional attack upon a decision of the War Contracts Price Adjustment Board with a challenge to the constitutionality of the Renegotiation Act itself. The Court dismissed the petition because of the failure of the company to appeal to the Tax Court, a legislative court empowered to try Renegotiation Act cases *de novo* on appeal from the Board.²⁴⁹ Because Tax Court review was the means established by Congress for securing a rapid and expert resolution of highly technical matters,²⁵⁰ it could not, the Court emphasized, be avoided.

Nevertheless, the presence of a constitutional challenge obviously worried the Court. Writing for the majority, Justice Rutledge called attention, in a footnote, to the legislative history in which Congress had anticipated that the Tax Court would pass upon all questions "constitutional and otherwise."²⁵¹ The Justice then carefully disavowed any need to decide what particular questions were appropriate for Tax Court review or what degree of finality would attach to its factual and legal conclusions. It was sufficient, the Justice thought, to decide only that some Tax Court review was required.²⁵² Neither the presence of a constitutional challenge to the statute nor proof of irreparable injury warranted by-passing that court. In fact, he argued, the presence of a constitutional issue supplied an additional "strong reason for not allowing [the] suit." If referred to the Tax Court, it was possible, the Justice noted, that the contractor would win on statutory grounds, thereby avoiding the need to decide the constitutional question.²⁵³

Although *Hirsch* plainly raised a number of highly complex factual and legal questions of a nonconstitutional nature upon which a Tax Court judgment was needed, the intriguing question is why the Court refused to decide whether the Tax Court was also empowered to entertain the constitutional issue? Substantial ques-

247. See Renegotiation Act, 50 U.S.C. app. § 1191 (1970).

248. 331 U.S. 752 (1947).

249. *Id.* at 765.

250. *Id.* at 767-69.

251. *Id.* at 769 n.30.

252. *Id.* at 771.

253. *Id.* at 772.

tions had been raised concerning the validity of the Renegotiation Act. At the time, a definitive decision on that point was a matter of some urgency.²⁵⁴ Precisely for this reason, however, for the Court to have combined its refusal to pass on the validity of the Act with a declaration that the Tax Court was powerless to do so, would only have exacerbated what already seemed a questionable exercise in judicial avoidance. On the other hand, to have instructed the Tax Court to consider all issues, including the constitutional point, would have been a bold step unnecessary to the Court's immediate objective of sending the contractor back through proper channels. Wisely, perhaps, Justice Rutledge simply noted the legislative history, refused to decide the scope of the Tax Court's powers and predicated his resort to the exhaustion requirement on the more neutral grounds of orderly administration.

Admittedly, the unwillingness of the Court to endorse the traditional rule prohibiting agencies from judging statutes is closely tied to the unique circumstances of the case. Nevertheless, its very uniqueness is instructive. The Court was plainly convinced on pragmatic grounds that Tax Court review was necessary. Having made that decision, the traditional rule became an embarrassment. The case illustrates, in other words, how inappropriate the traditional rule can be if a court feels compelled to manage its relationship with an administrative agency on a more pragmatic level.²⁵⁵ It also illustrates a certain judicial reluctance to permit a rule resting upon nothing more than abstract theory to interfere with pragmatic good sense.

This tendency to gravitate toward operational realities, and away from any rigid theoretical postulate, is even more apparent in *Lichter v. United States*²⁵⁶ decided one year after *Hirsch*. In *Lichter*, unlike *Hirsch*, the time for appeal to the Tax Court had expired. Application of the exhaustion doctrine to all the issues in the case, therefore, would have been tantamount to a ruling that the contractor had waived both his statutory and constitutional claims. This the Court refused to do. It concluded that the statutory claims were barred, but not the constitutional claims. Having come this far, the

254. The *Hirsch* decision was the second case brought to the Supreme Court testing the validity of the Renegotiation Act. In *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945), the contractor's failure to join the Government as an indispensable party, resulted in dismissal of the suit without opinion on the constitutional issue. The constitutionality of the Act was ultimately upheld the year following *Hirsch* in *Lichter v. United States*, 334 U.S. 742 (1948), and two other cases the Court decided in a consolidated opinion. *Pownall v. United States*, 334 U.S. 742 (1948); *Alexander Wool Combing Co. v. United States*, 334 U.S. 742 (1948). See generally L. JAFFE, *supra* note 18, at 669.

255. See *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 20-22 (1973).

256. 334 U.S. 742 (1948).

stage was obviously set for the Court to explain that the constitutional claim in *Lichter* was not barred because the Tax Court was powerless to entertain that claim. Nothing of the sort occurred, however. The traditional rule was not even mentioned. The entire explanation rested upon the nature of the constitutional question and its importance in light of the special wartime conditions under which the Act had been passed. The contractor had not challenged the wartime power of Congress to regulate prices or to limit profits. Rather, it had argued that the fault lay in the use of the compulsory renegotiation procedure to effect that goal. That procedure, the court acknowledged, was capable of "gross abuse." Hence, it was especially incumbent upon the Court to assure that the procedure employed both in form and execution, met constitutional standards,²⁵⁷ and no mere failure to prosecute a timely Tax Court appeal would be allowed to stand in the way of that scrutiny. Again operational realities—a concern for justice and protection of basic rights—rather than some abstract theory regarding agency power, was the touchstone of decision.

Following the Renegotiation Act cases, the Court's next instructive encounter with the exhaustion doctrine in the context of a challenge to the facial validity of a statute was in *Public Utilities Commission of California v. United States (P.U.C.)*.²⁵⁸

In *P.U.C.*, the United States sought a declaratory judgment to the effect that a California statute regulating rates charged by intrastate carriers for the transportation of government property violated the supremacy clause.²⁵⁹ California asked that the petition be dismissed because of the failure of the Government to exhaust its available state administrative remedies. Writing for the majority, Justice Douglas dispensed with this motion as follows:

We know the statute applies to shipments of the United States. We know that it is unlawful to ship at reduced rates unless the commission approves those rates. The question is whether the U.S. can be subjected to the discretionary authority of a state agency for the terms on which it can make arrangements for services to be rendered to it. That issue is a constitutional one that the commission can hardly be expected to entertain. If, as in *Aircraft & Diesel Equipment Corp v. Hirsch* . . .

257. *Id.* at 786-93.

258. 355 U.S. 534 (1957).

259. The statute prohibited carriers from charging federal, state or local governments reduced rates without prior approval by the Commission. The United States sought a declaratory judgment that the statute was facially unconstitutional under the supremacy clause because the statute prohibited the federal government from negotiating rates for the transportation of its property without state approval. *Id.* at 538-39.

and *Allen v. Grand Central Aircraft Co.* . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy should plainly be pursued. But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right. In that posture the case is kin to those that hold that failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this court of a judgment of conviction under such an ordinance.²⁶⁰

Although it is possible to read into this statement the affirmation of some broad rule prohibiting administrative agencies from considering all facial challenges to a statute, that would be a doubtful interpretation at best. The argument is not cast in terms of the agency's lack of power, but in terms of a more pragmatic exception to the exhaustion doctrine.

This is especially apparent in the way in which Justice Douglas changed his characterization of the question on the merits. When, in the opinion, he actually engaged in deciding the merits of the case, that issue consisted, he said, of whether California's policy of regulated rates actually conflicted with federal procurement statutes—whether federal law mandated a system of negotiated rates incompatible with the pricing system of California.²⁶¹ On the other hand, when addressing the state's motion to dismiss for failure to exhaust state administrative remedies, the Justice characterized the issue on the merits very differently. It consisted, he said of "whether the United States can be subjected to the discretionary authority of a state agency."²⁶² The shift is a telling one. When deciding the merits of the case, the issue was simply whether federal and state policies actually conflicted. But when the Justice moved to decide whether to submit that issue to the agency for an initial decision, he recharacterized the issue the agency would be deciding—the issue on the merits—as whether the agency itself had authority over the federal government. A question of conflicting policies had become a question of administrative authority.

The latter, of course, is quite inaccurate. The authority of the agency was entirely dependent upon whether the policy of Califor-

260. *Id.* at 539-40 (citations omitted). *Hirsch* and *Allen* are discussed at notes 233-240, 248-255 and accompanying text *supra*.

261. 355 U.S. at 544. The majority found that such a conflict existed and that it was "as clear as any that the supremacy clause . . . was designed to resolve." *Id.*

262. *Id.* at 539.

nia conflicted with federal law. That was the only question in the case and would have remained so even if California had not employed an administrative agency to implement its policy. Precisely because the change in characterization is so inaccurate, however, the Justice's purpose becomes all the more obvious. By recharacterizing the substantive issue that the agency would be required to judge as an issue relating to the agency's own authority, the Justice was able to argue that submission to the agency would be futile. The recharacterization allowed him to invoke a wholly pragmatic, rather than purely theoretical, rationale for refusing to apply the exhaustion doctrine.

The words used reveal the animating thought: the issue was one the agency could "hardly be expected to entertain."²⁶³ Quite simply, Justice Douglas was using the futility of the submission to reinforce, if not supplant, some more abstract rule predicated upon a lack of agency power.

Equally important is the Justice's allusion to cases refusing to interpose the exhaustion doctrine as a bar to a constitutional defense in a criminal prosecution.²⁶⁴ By explicitly equating the plaintiff in a civil suit with a criminal defendant, Justice Douglas evoked the very concern for justice and protection of individual rights that was the dominant theme in *Lichter*.²⁶⁷ Similarly, although Justice Harlan's concurrence in *Oesterich* noted that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies,"²⁶⁵ he made no effort to justify that conclusion. Instead, he moved immediately to his pragmatic argument—the lack of procedural and substantive competence in the Selective Service Boards to pass on the constitutional question raised.²⁶⁶

Finally, Justice Douglas' argument against application of the exhaustion doctrine in *P.U.C.* returns full circle to *Hirsch*. "We know the statute applies to shipments of the United States,"²⁶⁷ Justice Douglas stated, "we know that it is unlawful to ship at reduced rates unless the Commission approves those rates."²⁶⁸ There were, in other words, none of the factual intricacies or complicated questions of statutory interpretation which, in *Hirsch*, so strongly pointed to the necessity of Tax Court review.²⁶⁹

Now, of course, *Hirsch*, *Lichter*, *P.U.C.* and Justice Harlan's

263. *Id.*

264. *Id.* at 540 (citing *Staub v. City of Baxley*, 355 U.S. 313, 319 (1957)).

265. 393 U.S. at 242; see notes 227-31 and accompanying text *supra*.

266. 393 U.S. at 242 (Harlan, J., concurring).

267. *Id.* at 242-45.

268. 355 U.S. at 539.

269. *Id.*

Oesterich concurrence cannot be read as abandoning a general prohibition against administrative agencies judging the facial validity of a statute. Yet, these opinions do reveal a pragmatic strain that cuts away at any broader theoretical lack of agency power. When intricate, nonconstitutional questions of fact and law counselled resort to the agency, circumstances controlled the decision and abstract questions of agency power were sidestepped. When considerations of justice, integrity of constitutional rights, absence of agency procedural or substantive competence, or futility of a submission to the agency urged immediate judicial review, the Court has simply said so, shying away from announcing any inflexible theory of agency disability that might prevent the courts from responding to each case as justice and good government require. Certainly, there is no mention in any of these opinions of the theoretical subordination of agencies to the legislature or even of the incongruity of an agency second-guessing the legislature.²⁷⁰

B. *The Efficacy of the Rule: Fixing the Boundaries of Agency Power*

To repeat, nothing said so far demonstrates that the Supreme Court has abandoned a general rule prohibiting agencies from passing upon the facial validity of statutes.²⁷¹ Certainly, the mere absence of theoretical explication and an inclination to rely upon more pragmatic considerations does not prove that the rule has been jettisoned or that it is unsound. Not infrequently, in our system, however, the picture of thoughtful judges shying away from a broad rule and refusing to invoke or defend its theoretical underpinnings is a signal that matters are ripe for change. All that remains is for the need for change to be made explicit and the occasion for change to offer itself.

With regard to the need for change, a further exploration of factfinding in constitutional litigation raises two closely related questions: (1) what are the actual boundaries of agency power that, under the subordinate role theory, are so sternly dictated by the

270. See section V *supra*.

271. Admittedly, we have not canvassed all of the utterances of the Supreme Court on the subject under discussion. Nevertheless, the cases reviewed may rightfully be called the leading decisions. And, except in two recent decisions, none of the Court's later utterances suggest a need to modify the conclusions thus far reached. In the two exceptions, more preclusive language does indeed occur; words suggesting that agencies lack "power," or "competence" or "jurisdiction" to entertain facial attacks upon a statute. Actually, however, these cases are more instructive upon a later point in our discussion. See *Weinberger v. Salfi*, 422 U.S. 749, 765-67 (1975); *Johnson v. Robison*, 415 U.S. 361, 367-69 (1974), discussed at notes 286-93 and accompanying text *infra*.

separation of powers doctrine; and (2) are those boundaries, in fact, compatible with the separation of powers doctrine? In the end it is suggested here that this boundary line is coterminous with the principal limits on the exhaustion of administrative remedies requirement, but unlike that requirement yields perverse results wholly out of keeping with the separation of powers doctrine.

1. THE BOUNDARY LINE OF AGENCY POWER

In tracing the actual boundaries of agency power that the subordinate role theory would seem to prescribe, it is instructive to compare the case where no administrative agency is involved with the case where the constitutional challenge pertains to a statute mandating some proposed or anticipated administrative action. The result is revealing. First, the boundary line of agency power under the subordinate role theory is a precise track of normal summary judgment practice.²⁷² If, in a case not involving an agency, a court would deny summary judgment on the question of whether a statute was unconstitutional on its face and would put that question over for trial, the subordinate role theory would not bar an initial submission of the same question to an agency in the case where administrative action was involved.

Second, the comparison reveals a large measure of similarity between the standards that normally govern summary judgment practice and the criteria employed in applying the exhaustion of administrative remedies requirement.²⁷³ While there may be subjective differences,²⁷⁴ in terms of objective criteria, all the differences between summary judgment and the exhaustion requirement have no analytical significance whatsoever under the subordinate role theory.²⁷⁵

Taken together then, these two observations lead to the conclusion that the formal boundary line of agency power under the subordinate role theory appears to be, in all relevant parts, conterminous with the exhaustion of remedies requirement. The theory, in short, serves only to endow the limits of the exhaustion doctrine with constitutional status, a result that is wholly perverse in its effects.

272. See section VI(a) *supra*.

273. See section VI(b)(2) *infra*.

274. Subjectively, of course, where the alternative is expert, administrative factfinding, judges may be inclined to treat the pleadings, affidavits and their own powers of judicial notice as less dispositive of factual questions than where the alternative is a judicial trial.

275. See section VI(a)(1) *supra*.

It should be emphasized that the fact that a court, upon invoking the exhaustion doctrine, will dismiss the case for lack of subject matter jurisdiction but, upon denying summary judgment, will retain jurisdiction for purposes of the trial, is a distinction without analytic significance for our subject.

To demonstrate this we start with two examples not involving an administrative agency. As framed by the pleadings, each case involves only a challenge to the facial validity of a statute. In the first example, summary judgment would be denied because there are disputed questions of fact. In the second case, while the pleadings disclose no factual dispute, summary judgment might still be denied for reasons that will appear.

As the first example, consider the complaint alleging that in light of the intended and actual effects of the statute it is facially defective (*i.e.*, that under no set of circumstances can it survive constitutional scrutiny), and an answer conceding that were the statute to have the effects alleged, it would be facially invalid, by denying that it actually has any such disabling intent or effect. Consider, in other words, a case framed by the pleadings as a facial challenge but a case in which the constitutional decision is likely to resolve into a decision on the facts, a situation not uncommon where the challenge rests upon the due process or equal protection clause. In such a case, if the pleadings, affidavits and judicially noticeable facts fail to resolve the factual dispute, motions for summary judgment, of course, would be denied and the case put over for trial.

The second example, consisting of a facial challenge where, under the pleadings, there appears to be no factual dispute but upon which summary judgment might still be withheld, is suggested by Justice Harlan's dissent in *P.U.C.*²⁷⁶ Recall that the pleadings in that case posed what certainly seemed a facial attack within the meaning of the traditional rule. Justice Douglas, writing for the majority, certainly assumed that there was no factual dispute.²⁷⁷ But Justice Harlan refused to be bound by appearances. He turned first to the merits of the case and found that the alleged conflict between the policies of California and federal law were subject to grave doubts. He doubted that Congress intended to set aside all forms of state price regulation, that the California statute would necessarily interfere with the functions of the federal government,²⁷⁸ and he was far from sure how the state would interpret and apply its statute and what its effects would be.²⁷⁹ In his judgment, therefore, reference to the California commission was essential.²⁸⁰

276. *Public Utils. Comm'n v. United States*, 355 U.S. 534, 546-53 (1957) (Harlan, J., dissenting).

277. *Id.* at 539.

278. *Id.* at 543.

279. *Id.* at 548-49.

280. Justice Harlan added that such a reference "would not be to permit the state Commission or courts to pass upon the statute's constitutionality. That of course, is the ultimate responsibility of this Court." *Id.* at 549 (emphasis added). This statement was not,

Setting aside the fact that an administrative agency was involved, the contrasting ways in which Justices Douglas and Harlan formulated the controlling legal issue is a stern reminder of how often and how decisively factual assumptions can shape legal questions. It demonstrates that courts must be alert to the possibility that the factual assertions may conceal other issues upon which a fuller record is required. It is not that the factual assertions in the pleadings can never be trusted. The point is, rather, that a court is not invariably required to grant summary judgment merely because on the face of the pleadings there appears to be no disputed issue of fact.

Now, assume that in our examples an administrative agency was involved—that the statute under attack was being used as the predicate for some proposed or anticipated agency action. If summary judgment were denied, would the subordinate role theory foreclose submission of the case to the agency for an initial decision in lieu of judicial trial? Would the court be compelled to put the case over for trial, rather than dismiss it under the exhaustion doctrine? A negative answer seems clear. The critical point is that under such circumstances there always exists the possibility that the facts as adduced either at trial or before the agency will reveal a much narrower basis for decision than that formulated in the pleadings—a decision confined to the constitutionality of the statute *as applied*. Had this possibility been made explicit by the pleadings, *Myers*²⁸¹ and the subordinate role theory²⁸² both teach that the case should be submitted to the agency.²⁸³ The result should be no different merely because the pleadings frame the issue too broadly, as the inherent probabilities of the case demonstrate.

If the agency only invalidates the statute as applied, it could no more be accused of second-guessing the legislature than in the *Myers* situation. To look only at the pleadings, therefore, and hold

however, an assertion of a lack of constitutional power in either the state agency or state courts. State courts certainly have the power and the duty to interpret the Federal Constitution. Instead, the passage refers to the particular procedural situation within which the state agency or court would be dealing with the *P.U.C.* question. Reference back to state authority would be for a determination as to whether the state statute would or could be implemented to avoid interfering with federal operations. That determination would, however, as the Justice notes, "ultimately" be a matter on which the Supreme Court would have the final word.

281. 303 U.S. at 41; see section V(b) *supra*.

282. See section VI(b) *supra*.

283. A further possibility occurs when the pleadings frame both a facial challenge to the statute and a challenge to the statute as applied. In such instances, the challenge to the statute as applied would evidently fall under the *Myers* rule and the agency would initially decide the case. This being the case, the agency should also be empowered to handle the facial challenge to the statute at the same time.

the agency powerless in such an instance, would be to ignore the reality underlying the decision and to sacrifice the very real contribution the agency might make.

If, however, a narrower ground for decision does not emerge—if the agency determines that under no circumstance revealed by the record can the statute be sustained—that would not in itself establish that the agency had contradicted the legislature. Since the agency, working chiefly through the adjudicative mode, is likely to have had a more focused, if not fuller and more accurate record than was available to the legislature, it cannot be said to have contradicted the latter until it is first established how the legislature would have decided on the basis of the agency record. That will always remain a wholly speculative inquiry. Thus, at the time the decision on submission must be made, the possibility offensive to the subordinate role theory is entirely speculative, while the in-offensive possibility (*i.e.*, a decision on the statute as applied), is very real. Under these circumstances the subordinate role theory itself should not be thought to bar the submission. This is all the more so, since whatever the agency decides, its deliberations may be of great assistance to a court on review.

In sum, the boundary line of agency power under the subordinate role theory is not to be discovered solely by reference to the issues as framed in the pleadings. Even if a case is framed as a facial challenge, it would still lie within the bounds of agency power under that theory as long as, under normal summary judgment practice, a court might decide that a further factual inquiry was warranted. The agency would possess full authority to make that inquiry and to reach its own legal conclusions from the record adduced. Only if summary judgment seemed appropriate would the subordinate role theory place the case beyond the agency's constitutional purview.

At this point the coincidence between summary judgment practice and the exhaustion of remedies criteria should be fairly obvious. While it is true that factual questions may sometimes be submitted to an agency more for reasons of institutional respect and comity than because of the agency's special expertise,²⁸⁴ it is still the need to settle a factual question that triggers the exhaustion requirement as it does a denial of summary judgment. It may also be true that the exhaustion requirement will be applied if there are intricate and uncertain questions of statutory interpretation while, in the absence of an agency, the court, upon summary judgment, must resolve those issues itself. But this is not a distinction pertinent to our subject. The very uncertainties regarding the meaning of the

284. See notes 224-227 and accompanying text *supra*.

statute obviates any danger of the agency contradicting the legislature in a manner offensive to the subordinate role theory. Analytically, those uncertainties can be treated as just a special type of factual question underlying the constitutional issue. Equally immaterial is the fact that under the exhaustion doctrine a case may be withheld from an agency because the submission would be futile.²⁸⁵ These exceptions serve to withhold, not to submit, a case to the agency and by definition cannot run afoul of the subordinate role theory.

In short, with respect to all of the criteria that may have some bearing upon the purposes served by the subordinate role theory (*i.e.*, avoiding any contradiction of the legislature), summary judgment practice and the exhaustion requirement coincide completely. As a result, our basic equation between the boundary line of agency power under the subordinate role theory and summary judgment practice can be restated as an equation between that theory and the exhaustion of administrative remedies doctrine. If, in a case posing a facial challenge, the need for a further factual inquiry, including an inquiry into the meaning of the statute, dictates that all administrative remedies be exhausted, the agency under the subordinate role theory would have full constitutional authority to entertain the case. If, however, no factual inquiry warranted the exhaustion of those remedies, the theory would hold that the agency lacked power to hear the case. Apart from the special exceptions, the theory does no more than endow the limits on the exhaustion doctrine with constitutional status.

This is precisely the lesson that seems to emerge from *Weinberger v. Salfi*.²⁸⁶ In that case, a widow challenged a decision by the Department of Health, Education and Welfare, denying her certain survivor's benefits under the Social Security Act, because she had been married for less than the statutorily prescribed nine months before her husband's death. This requirement, she contended, established a facially invalid "irrebuttable presumption."²⁸⁷ Before addressing the merits of the contention, the Supreme Court held that judicial review as was appropriate even though the widow had failed to exhaust her right of appeal to the Secretary.²⁸⁸ Writing for the majority, Justice Rehnquist stated:

We have previously recognized that the doctrine of administrative exhaustion should be applied with regard for the particular administrative scheme at issue Exhaustion is generally

285. See discussion section V *supra*.

286. 422 U.S. 749 (1975).

287. *Id.* at 763.

288. *Id.* at 763-64.

required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own error, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. Plainly these purposes have been served once the Secretary has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. Once a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the Secretary's administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest.²⁸⁹

The constitutionality of the statute was, the Justice said, "beyond [the Secretary's] jurisdiction" to determine.²⁹⁰ Repeated elsewhere in the opinion, this is perhaps the most unequivocal assertion of agency disability found anywhere in the Court's utterances on the subject.²⁹¹ But, did the Justice intend it to embrace all cases posing a constitutional challenge to a statute, or only the type of case at hand? Certainly, he was careful to establish that further administrative proceedings were unnecessary under the exhaustion of remedies doctrine. Judicial intervention would not, he pointed out, adversely affect the efficient functioning of the agency or prevent it from correcting its "own," as distinct from Congress', errors.²⁹² There was no need for a further factual record, or for consulting the special experience or expertise of the agency.²⁹³ There would have been an element of futility in a presentation to the agency. It would not have assisted the courts in their task, and there was no nonconstitutional basis upon which to satisfy the widow's claim.

289. *Id.* at 765-67.

290. *Id.* at 765.

291. *Cf. Johnson v. Robison*, 415 U.S. 361 (1974) (statute declaring factual and legal decisions of Veterans' Administration final, conclusive and permitting no judicial review, interpreted by Court as not prohibiting the courts from adjudicating the constitutionality of congressional enactments because constitutionality of statutory limitation was not an attack on an administrative decision, but on a congressional decision).

292. This appears to be a recognition of the broader notion of comity or of preserving the integrity of the agency as the legislatively created adjudicator in cases where the agency's own action or the statute as applied is the subject of the constitutional challenge.

293. Justice Rehnquist evidently realized that a possible reason for submitting the case to the agency, even if summary judgment had been appropriate, was the need for the court to have the benefit of the agency's experience and expertise on matters of statutory interpretation. Thus, he seems to be drawing the line at a point where the only issue remaining is constitutional or where the problems of statutory interpretation are minimal requiring no

Certainly, it is possible to read the Justice as equating the limits of agency power with the limits of the exhaustion doctrine. At the very least, the pragmatic factors underlying that doctrine supply the principal benchmarks for measuring the scope of the agency's constitutional authority. Whether this also means that the Justice had abandoned all more abstract theories of agency power is unclear. It is clear, however, that if further factfinding would have facilitated the constitutional inquiry, the Court was prepared to require a hearing before the Secretary, and the Secretary would have been fully empowered to issue an initial opinion regarding the validity of the statute. In short, even if some abstract theory of agency power was implicit in the Justice's opinion, the boundaries under that theory are precisely as we have drawn them under the subordinate role theory—along a line fixed by the exhaustion of remedies doctrine.

2. THE THEORY AND THE BOUNDARIES REEXAMINED

Against this background, we can now suggest that possibly the exercise of caution apparent in the opinions prior to *Weinberger*, signaled a deeper unease with the traditional rule itself. Perhaps it reflects a sense that in a substantial number of cases framed as facial challenges to a statute, a broad rule of agency disability would be arbitrary and unwarranted and, if so, that perhaps the rule was unwarranted in all cases. That is the remaining question. Is it necessary to follow Justice Rehnquist and clothe the line drawn by the exhaustion of remedies doctrine with constitutional status? Stated another way, must an agency, presented with a facial challenge to a statute, invariably dismiss the case upon concluding that it could decide the merits on the basis of the pleadings and affidavits?

The question can be sharpened by putting it into the procedural context of Florida law. Consider the case of a person adversely affected by some administrative act, whether final or intermediate, who could invoke the declaratory or equitable jurisdiction of a court, but whose sole challenge to that action was predicated upon the facial invalidity of the enabling statute.²⁹⁴ One may readily concede that under normal criteria the exhaustion requirement would not be applicable to such a case,²⁹⁵ provided that there were no nonconstitutional grounds upon which relief could be granted and the chal-

special expertise. This difference between exhaustion and summary judgment is not material to the purposes of the subordinate role theory. See discussion pp. 604-05 *supra*.

294. See, e.g., *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695 (Fla. 1978).

295. Since the case could be decided on summary judgment, review in the district courts of appeal would be appropriate. If, because of a disputed issue of fact, the case could not be

lenge could be disposed of on the basis of the pleadings and affidavits.

Why, however, should the line marked by the exhaustion doctrine be given constitutional status? Why should the challenger be barred from submitting the question to the agency should he choose to do so? He may find that route cheaper and more expeditious. It may facilitate the maintenance of a good ongoing relationship with the agency. He may, even if the decision goes against him, feel that he has had his "day in court." Surely, permitting recourse to the agency would represent the salutary addition of another adjudicative forum in which the people of the state could air their grievances. It would reenforce the bureaucracy's sense of responsibility toward the constitution. It would make for the more orderly disposition of cases which contain additional issues properly submissible to the agency. And, while the agency decision would not be binding upon the courts in that or any other case and would have no narrowing effect on the scope of judicial review,²⁹⁶ a carefully reasoned agency opinion could be of considerable assistance to the courts were the issue eventually brought to them.

At the same time, there is little or no danger that agencies could exploit this power to avoid legislative policies with which they disagree. Even now, an agency can "sit-on" a statutory mandate with which it disagrees until someone challenges its inaction by proposing a rule,²⁹⁷ by requesting a declaratory statement²⁹⁸ or by challenging an order which ignores the legislative mandate. In these situations, an agency decision invalidating the statute would almost certainly be taken to the courts immediately. Even in situations, however, where the private challenger claims that the statute is invalid and the agency agrees, there may be other parties to the action who will appeal.²⁹⁹ If not, the agency decision can be brought to the courts if affirmed in response to a request for a declaratory statement³⁰⁰ or if relied upon, whether expressly or not, in another case.

decided on summary judgment, the district court could require the agency to conduct a prompt factfinding proceeding. FLA. STAT. § 120.68(6) (Supp. 1978).

296. The issue is one of *law*, entitling agency opinions to no more deference than their inherent persuasiveness indicates. See generally *id.*

Also, because such a case would not involve any disputed issues of fact, the proceeding would be governed by FLA. STAT. § 120.57(2) (Supp. 1978). Since § 120.57(2) does not provide for hearing officers, perhaps the section should be amended. See, e.g., *id.* § 120.57(1).

297. See *id.* § 120.54.

298. See *id.* § 120.65.

299. Section 120.68(1) provides for judicial review of a final agency action by any adversely affected party. Section 120.52(1) (b) defines "party" as one who by "constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding." Thus arguably a petition for judicial review of an agency action need not always be brought by a party who was involved in the proceedings at the agency level. It is likely, however, that the courts would construe this language to permit only parties to the agency proceedings to seek judicial review.

In sum, since we deal here only with facial challenges determinable upon a motion for summary judgment, it is not proposed that an adversely affected party be denied immediate access to the courts. We deal only with whether that person should be denied the option of going to the agency. Plainly, the absence of a factual dispute, including an interpretive dispute on the statute, means that an agency decision invalidating the statute would contradict the legislature's judgment. The question, therefore, is whether the theoretical subordination of an administrative agency to the legislature represents so compelling an expression of the separation of powers doctrine that we must bar all access to the agency despite the considerable benefits that such access could yield. The answer, it is urged, is a resounding negative. The subordinate role theory is rooted upon a fundamental misconception of the separation of powers doctrine. Were the theory harmless, the misconception could be tolerated. But, it is not harmless and should be abandoned.

To demonstrate the misconception, all one need do is recall the meaning of the separation of powers doctrine as it emerged from *Marbury v. Madison*³⁰¹ and as it was applied in *Department of Administration v. Stevens*.³⁰² There is, *Stevens* held, no general subject matter distinction between the judicial and the quasi-judicial power. The critical concept is checks and balances. Whatever question a court may decide, an agency has the power to decide so long as it acts in the judicial mode and so long as its decision is reviewable by a court and its functions subject to legislative revision. If there is something incongruous about an administrative agency, whose powers are derived from the legislature, second-

300. The Administrative Procedure Act provides: "Each agency shall provide by rule the procedure for the filing and prompt disposition of petitions for declaratory statements as to the applicability of any statutory provision or of any rule or order of the agency Agency disposition of petitions shall be final agency action." FLA. STAT. § 120.565 (Supp. 1978). Surely any agency decision invalidating a statute is a decision concerning "the applicability" of the statute. There is no literal requirement that the party submitting a petition to the agency be adversely affected by the agency rule or statutory provision. Since the disposition of the petition becomes final agency action, the party submitting the petition would be entitled to judicial review pursuant to FLA. STAT. § 120.68 (Supp. 1978).

The Model Rules of Procedure adopted by the Administration Commission provides:

A declaratory statement is a means for determining the rights of parties when a controversy, or when doubt concerning the applicability of any statutory provision, rule or order has arisen before any wrong has actually been committed. The potential impact upon petitioner's interests must be alleged in order for petitioner to show the existence of a controversy or doubt.

FLA. ADMIN. CODE § 28-4.05. Although this rule requires the petitioner to show the existence of a controversy or doubt, § 120.565 places no such burden upon the petitioner. A serious question exists, in other words, as to whether the Administrative Commission has, through its model rules, attempted to limit the standing of petitioners for declaratory statements beyond the intent of the legislature.

301. See notes 158-175 and accompanying text *supra*.

302. See notes 115-133 and accompanying text *supra*.

guessing the latter's judgment, the incongruity is more apparent than real.

Because the separation of powers doctrine is less concerned with preserving to each of the departments their own peculiar functions than with preserving the necessity of departmental concurrence, it is the limitations upon the exercise, not the functional classification, that determines whether an act exceeds the powers of an agency. It is, therefore, a non sequitor to say that an agency has intruded upon the legislative province when, in allegiance to the constitution, it refused to obey a statute. To conclude that the intrusion is forbidden misses the whole point of the system.

Practically, of course, the refusal of the agency to obey the statute is the final word unless a court requires or prevents the agency action, or unless the executive or the legislature withdraws the authority or resources necessary for action or removes or impeaches the responsible agency officials. The important point, however, is that this reality conforms to the theory. Should the executive or the legislature refuse to check the agency, or should the agency's decision never be challenged in a court, there exists, by silence, the concurrence which is the sole purpose and requirement of the separation of powers doctrine. Should the court agree with the agency decision, the requisite concurrence is obviously met. In either event, the agency, in both reality and theory, had full power to judge the statute.