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The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and Historical Analysis of *L.R.C. v. Brown*

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The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and Historical Analysis of *L.R.C. v. Brown*

BY SHERYL G. SNYDER AND ROBERT M. IRELAND*

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INTRODUCTION

The decision of the Kentucky Supreme Court in *Legislative Research Commission v. Brown* (hereinafter *L.R.C. v. Brown*) has been called Kentucky's *Marbury v. Madison* because of the number of fundamental constitutional issues which were resolved by the Court in that case. The antecedents of the litigation are at least as old as the Constitutional Convention of 1890-91 (Constitutional Convention), and are at least as current as the nationwide era of legislative independence which has marked the the 1980's. Accordingly, the following analysis of the Court's decision attempts not only to review the legal issues involved in the case and the Court's disposition of them, but also to analyze both the historical backdrop and the historical impact of the case.

I. THE HISTORICAL BACKDROP

A. *The Constitutional Convention of 1890-91: A Reaction to Legislative Ascendancy*

A desire to control legislative excesses constituted the principal reason for the convocation of the Constitutional Convention. John D. Carroll, a delegate from Henry County, observed: "[E]xcept for the . . . abuses practiced by the Legislative Department of this State . . . no proposition to call a Constitutional Convention could ever have received a majority of the votes of the people of Kentucky."¹ Former Speaker of the Kentucky House of Representatives, William C. Owens of Scott County, told his delegate: "[E]very reform you attempt will turn to ashes . . . unless you do something to reform the Legislative Department."²

¹ I OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 1482 (1890) [hereinafter cited as DEBATES].

² II DEBATES, *supra* note 1, at 3821.

Reflecting a national problem, by 1880 the Kentucky legislature had become bogged down in local and private legislation to the neglect of the problems that affected the state as a whole. This preoccupation with local and private matters in part reflected traditional legislative concerns and in part represented newly institutionalized greed and corruption. American legislatures of the colonial and antebellum periods customarily dealt more with the petitions of individual citizens and their localities than with general concerns.³ What differed about the post-Civil War period in Kentucky and elsewhere was that the quantity of local and private matters had grown unmanageable.⁴ Further, a relatively new type of "private" petitioner, the business corporation, had begun to extract profitable immunities and other benefits from the legislature through the use of paid lobbyists, intense political pressure and, in all probability, legislative bribes.⁵

The General Assembly of 1883-1884 generated a typical legislative work product. Of the 1,640 statutes enacted, 1,471 were officially described as private or local laws and another sixty-nine in reality fit that description.⁶ Thus, 1,540 statutes, or nearly ninety-four percent, concerned local or private matters. Sample statutes included: "An act for the benefit of W.M. Davis, late sheriff of Clinton County";⁷ "An act to legalize the acts of the levy court of Webster County made for certain years";⁸ "An act to incorporate the Kentucky Paving and Contract Company";⁹ and "An act to prohibit the chasing of deer with dogs in Jackson County."¹⁰

All of this resulted not only in legislative inattention to the newly emerging problems of the Industrial Revolution, which demanded laws applicable to the entire state, but also in legislative inefficiency and incompetence. Confronted with several

³ R. LUCE, LEGISLATIVE PROBLEMS: DEVELOPMENT, STATUS, AND TREND OF THE TREATMENT AND EXERCISE OF LAWMAKING POWERS 538-49 (reprint 1971).

⁴ *Id.* at 532-92.

⁵ II DEBATES, *supra* note 1, at 2527-28 (statement of H.R. Bourland).

⁶ See 1883-1884 Ky. Acts.

⁷ Act of Apr. 30, 1884, ch. 1131, 1883 Ky. Acts 598.

⁸ Act of Apr. 30, 1884, ch. 1132, 1883 Ky. Acts 599.

⁹ Act of Apr. 30, 1884, ch. 1150, 1883 Ky. Acts 642-44.

¹⁰ Act of Apr. 30, 1884, ch. 1138, 1883 Ky. Acts 602.

¹¹ See III DEBATES, *supra* note 1, at 3868.

thousand bills each session and only a few months to consider them, legislators enacted many bills into law without even reading them.¹¹ This system produced statutes that conferred special privileges on a few, and legislation that was so sloppily drafted that it became the object of public ridicule.¹²

Not surprisingly, these deficiencies translated into political unrest that produced the Constitutional Convention of 1890-1891,¹³ and led to the election of delegates who were determined to eliminate as many of the legislative abuses as possible.¹⁴ To this end the Constitution of 1891 (Constitution) more resembles a code of laws than a constitution. Although constitutions typically consist of general declarations of powers, rights and limitations, the Constitution of 1891 contains very specific and detailed powers, rights and, especially, limitations. The document prohibits most types of local and private legislation by specifically proscribing twenty-eight types of such legislation and by generally making most other types of local and private laws difficult to enact.¹⁵ The Constitution also prohibits the legislature from granting tax immunities except to a few specified activities.¹⁶ In an effort to control the tendency of the legislature to

¹² A Garrard County lawyer, Robert M. Bradley, published a pamphlet in 1879 satirizing the entire Kentucky legislative process as being replete with semiliterate legislators and illogical, self-contradictory legislation. R. BRADLEY, *A SKETCH OF GRANNY SHORT'S BARBECUE AND THE GENERAL STATUTES OF KENTUCKY* (1879). At the Constitutional Convention of 1890-91 Governor Simon B. Buckner told his fellow delegates that he had received from the most recent legislature "a bill involving large interests . . . of the people of two large and populous counties, passed through both bodies of the Legislature in thirty-five minutes, . . . [t]he tenor [of which] was unknown entirely to almost every person in those two counties, although it involved their interests very materially." See III DEBATES, *supra* note 1, at 3868. Allying that probably "not ten men in the Legislature knew what they were voting on," Buckner declared that he vetoed the bill, a practice too seldom relied on by chief executives to restrain such ill-considered legislation. See *id.*

¹³ H. TAPP & J. KLOTTER, *KENTUCKY: DECADES OF DISCORD 1865-1900*, at 258-68 (1977).

¹⁴ *Id.* at 258-60.

¹⁵ See KY. CONST. §§ 59-60.

¹⁶ See KY. CONST. § 170. This was a direct response to previously successful efforts of such powerful lobbies as the Louisville & Nashville Railroad which had secured legislative exemptions from taxation, as an incentive for new railroad construction. See H. TAPP & J. KLOTTER, *supra* note 13, at 300.

create too many counties, ¹⁷ specific limitations were placed on the future establishment of counties.¹⁸

The delegates intended to make the legislature more efficient and less costly. For example, they required each bill to be printed and to be read at least once (and as often as three times), thereby reducing opportunities for clumsy draftsmanship.¹⁹ Believing that the elimination of most private and local law-making would reduce the time needed for legislative sessions,²⁰ the delegates specified that each legislative session could last for only sixty legislative days.²¹ They continued the 1850 Constitution's requirement that regular sessions be held biannually,²² and placed restraints on special sessions by giving the Governor exclusive power to convoke them and to determine their agenda.²³ To control and eliminate the problem of coping with job-seekers,²⁴ the drafters also limited to twenty-two the number of employees the legislature could hire.²⁵

Cynicism about the legislature's ability to control two perceived malefactors of the Industrial Revolution, corporations in general and railroads in particular, prompted the delegates to impose very specific limitations and obligations upon these two institutions and upon the legislature.²⁶ Corporations were prohibited from issuing watered stock,²⁷ required to have resident agents,²⁸ and restricted in their ability to own and hold real estate.²⁹ The legislature was required to enact an antitrust stat-

¹⁷ By 1890, Kentucky had more counties per acre than any state except the more densely populated Rhode Island. The legislature created only one additional county after 1891.

¹⁸ See KY. CONST. § 63.

¹⁹ See KY. CONST. § 46. See also KY. CONST. §§ 51, 55 (additional mechanical limitations upon the General Assembly's power).

²⁰ III DEBATES, *supra* note 1, at 3790 (statement of I.A. Spalding).

²¹ See KY. CONST. § 42.

²² See KY. CONST. § 36.

²³ See KY. CONST. § 80.

²⁴ See III DEBATES, *supra* note 1, at 4360-61, 4921-22 (statements of Charles Durbin and H.G. Petrie).

²⁵ See KY. CONST. § 249.

²⁶ See III DEBATES, *supra* note 1, at 3637 (statement of J.D. Clady).

²⁷ See KY. CONST. § 193.

²⁸ See KY. CONST. § 194.

²⁹ See KY. CONST. §§ 192, 210.

ute.³⁰ By general law, the legislature was required to provide for the revocation of the charters of domestic corporations which abused their powers,³¹ for the regulation of telephone and telegraph companies,³² and for the inspection of grain, tobacco and other produce.³³ The Constitution imposed on railroads the duty to maintain equal and uniform rates and services³⁴ and forbade them from operating nonrailroad businesses.³⁵ Fearful that the powerful railroad lobby would secure the abolition of the recently established Railroad Commission,³⁶ the delegates made that agency a constitutional body.³⁷ Afraid that future legislators would continue to avoid needed reform,³⁸ the delegates also required the General Assembly to enact a child labor law³⁹ and to establish a state reformatory for adolescent criminals.⁴⁰

Without discussion, the delegates incorporated into the Constitution essentially the same provisions about the separation of powers which had been in the original Constitution of 1792 and in its two successors, thereby preserving language that originally was probably intended to limit the legislature.⁴¹ Although the

³⁰ See KY. CONST. § 198.

³¹ See KY. CONST. § 205.

³² See KY. CONST. § 199.

³³ See KY. CONST. § 206.

³⁴ See KY. CONST. §§ 197, 213.

³⁵ See KY. CONST. § 210.

³⁶ See IV DEBATES, *supra* note 1, at 4984 (statement of Emery Whitaker).

³⁷ See KY. CONST. § 209. To curtail the legislative influence of the lobby, the delegates prohibited one of the lobby's favorite practices, the granting of free railroad passes to public officials. See KY. CONST. § 197; III DEBATES, *supra* note 1, at 3638-39 (statement of J.D. Clady).

³⁸ "Delegates to the convention attempted to anticipate future needs of the government and provide for them in specific sections of the constitution." H. TAPP & J. KLOTTER, *supra* note 13, at 266 (quoting T. CLARK, A HISTORY OF KENTUCKY 425 (rev. ed. 1960)).

³⁹ See KY. CONST. § 243.

⁴⁰ See KY. CONST. § 252.

⁴¹ The relevant sections provide:

Section 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Section 28. No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

KY. CONST. §§ 27, 28.

debates of the Constitutional Convention of 1792 were not recorded, it is clear that they took place at a time in which the separation of powers doctrine had taken on new and important meaning for American constitutional theorists and practitioners. By 1776 Americans had invented and developed the doctrine in order to resist encroachments by the executive branch.⁴² During the next sixteen years the legislative branch assumed so much power that theorists redefined the separation of powers doctrine to protect the executive and judicial branches from legislative encroachment.⁴³ Thus, when the Constitution of 1792 was adopted, the separation of powers doctrine had evolved into a limitation of the powers of the legislature.⁴⁴

While the framers of the Kentucky Constitution of 1891 did not dwell on the separation of powers provisions (sections 27 and 28), in debates on other issues they did make clear their devotion to the principles contained in those sections.⁴⁵ In their effort to curtail the practice of enacting private and local legislation, the delegates incorporated into the new Constitution a general provision specifying that "in all other cases where a general law can be made applicable, no special law shall be enacted."⁴⁶ Some delegates further suggested that a special committee of legislators "learned in law" be empowered at each legislative session to decide whether "a general law [could] be made applicable"⁴⁷ to a problem proposed to be solved by special legislation. Believing that this committee would represent an invasion by the legislature on the powers of the judiciary, the delegates rejected this proposal to avoid violating the separation of powers doctrine.⁴⁸ Despite great dissatisfaction with the Gov-

⁴² G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 157-58 (1969). See also text accompanying notes 209-12 *infra*.

⁴³ G. WOOD, *supra* note 42, at 446-54, 547-53.

⁴⁴ See M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 152 (1967).

⁴⁵ See, e.g., I *DEBATES*, *supra* note 1, at 1050 (statement of W. Hendrick).

⁴⁶ See KY. CONST. § 59(29).

⁴⁷ III *DEBATES*, *supra* note 1, at 4006 (statement of McDermott).

⁴⁸ In the words of Thomas S. Pettit, a prominent member of the convention, the proposed legislative committee "mingle[d] the judicial system with the legislative system . . . the theory of this government has always been for the purpose of keeping the several departments entirely independent one of the other. . . ." *Id.* Delegates also resisted the proposal because they believed it would involve an undue concentration of legislative power in the hands of a few select legislators. See *id.* at 4007-09, 4014-15 (statements of T. Pettit and C.F. Burnham).

ernor's pardoning power,⁴⁹ the delegates likewise rejected, as violative of the separation of powers doctrine, a proposal requiring the Governor to make an annual report on pardons to the legislature.⁵⁰

The Governor, whose office was not a strong one during the latter half of the nineteenth century, emerged from the Convention with greater power. Although the Governor lost the authority to appoint the Secretary of State⁵¹ and the Railroad Commissioners,⁵² he acquired the power to make line item vetoes,⁵³ to determine the agenda for special legislative sessions,⁵⁴ and to commute sentences of convicts.⁵⁵ Despite vigorous opposition,⁵⁶ the Governor retained the unconditional power to pardon,⁵⁷ one of the most complete in the nation.⁵⁸

In 1892, after Kentucky's highest court sidestepped a challenge to the final document,⁵⁹ the Constitution of 1891 was implemented. This document specifically limited the power of

⁴⁹ See I DEBATES, *supra* note 1, at 1088-90 (statement of C. Bronston).

⁵⁰ See *id.* at 1119 (statement of James Blackburn opposing the measure because it violated "[o]ne of the foremost ideas in our form of Government . . . that these three co-ordinate branches of Government are independent, the one of the other, and that neither [sic] shall be tributary to the other").

⁵¹ See KY. CONST. § 91.

⁵² See KY. CONST. § 209.

⁵³ See KY. CONST. § 88.

⁵⁴ See KY. CONST. § 80.

⁵⁵ See KY. CONST. § 77.

⁵⁶ See I DEBATES, *supra* note 1, at 240-48, 1087-1123, 1245-1301, 1318-50.

⁵⁷ See KY. CONST. § 77.

⁵⁸ C. JENSEN, *THE PARDONING POWER IN THE UNITED STATES* 15-16 (1922).

⁵⁹ After the voters had overwhelmingly ratified the new constitution in a referendum mandated by the legislature, the delegates reconvened in order to "correct grammatical mistakes, ambiguities and contradictions." IV DEBATES, *supra* note 1, at 5636, 5682-83. However, in the process they also made several substantive changes including making the office of Railroad Commissioner elective rather than appointive, see KY. CONST. § 209; IV DEBATES, *supra* note 1, at 5819-56, and deleting § 76 which had empowered the Governor to "appoint, with the advice and consent of the Senate, all State officers who are not required by this Constitution or the laws made thereunder, to be elected by the people," see IV DEBATES, *supra* note 1, at 5728. As explained by Charles J. Bronston, delegate from Fayette County and principal proponent of the § 76 revision, the deletion was necessary to avoid a conflict with what would be § 93 which specified: "Inferior State officers, not specifically provided for in this Constitution, may be appointed or elected, in such manner as may be prescribed by law, for a term not exceeding four years, and until their successors are appointed or elected and qualified." See *id.* at 5728-29 (quoting KY. CONST. § 93). Bronston stated that the Constitution of 1850 had not contained a provision similar to § 76 and that the provision had been

the legislature and, on balance, enlarged the power of the Governor.⁶⁰ More importantly, the Constitution gave future Governors, faced with much greater and unforeseen demands on state government, the opportunity to expand significantly the powers of their office. Because of the constitutional limitations, the legislature could not meet these demands, and it was thus left to the Governor to fill the void.

B. The Struggle For Legislative Parity

1. The Legislative Research Commission — From Research Assistance to Shadow Government

The Constitution of 1891 resulted in an imbalance of political power between the Governor and the legislature.⁶¹ Handicapped by its brief session⁶² and its lack of legal existence after its biennial adjournment,⁶³ the legislature was unable to gather sufficient information to evaluate legislative proposals submitted by the Governor. This lack of information gave the Governor a special advantage in affecting the biennial budget, and thereby all of state government.

A consensus arose that an entity should be created to provide the legislature with the requisite research during the interims between its sessions to enable its members to better discharge their legislative function. Consequently, the Legislative Research

included in the Constitution of 1891 only to permit the Governor to appoint the State Librarian. *Id.*

Because of these and other post-referendum revisions, a group of "voters and taxpayers" brought an action in the Franklin County Circuit Court to enjoin both the Public Printer from printing the new Constitution at public expense and the Secretary of State from preserving the document in the State Archives as the official Constitution of Kentucky on the grounds that it had been unconstitutionally revised after the voters had ratified it. The Franklin Circuit Court's refusal to issue an injunction was affirmed by the Kentucky Court of Appeals on the ground that the question was political and not judicial. *See Miller v. Johnson*, 18 S.W. 522, 524 (Ky. 1892).

⁶⁰ *See* notes 51-58 *supra* and accompanying text.

⁶¹ One might mark this era's beginning as the passage of the executive reorganization act in 1936, an act which Governor Chandler utilized extensively. Government Reorganization Act of 1936, CARROLL'S KY. STAT. ANN. §§ 4618-68 to -148 (Baldwin 1936).

⁶² *See* KY. CONST. § 42.

⁶³ *See* note 66 *infra* and accompanying text.

Commission (L.R.C.) was born in 1936 as the Legislative Council.⁶⁴ However, the very existence of the L.R.C. in 1936 was questionable under the Adjournment Clause⁶⁵ because “[a] legislative body ceases to exist at the moment of its adjournment.”⁶⁶

In addition to the question raised by the Adjournment Clause, there was a question under section 249 of the Kentucky Constitution concerning employment of the L.R.C.’s staff members. Section 249 expressly limits the number of employees who may be hired by the legislative department, and the L.R.C.’s staff vastly exceeds that number.⁶⁷ In the leading case construing section 249, *Shanks v. Julian*,⁶⁸ the Court extensively reviewed the portion of the Constitutional Convention Debates which led to the adoption of section 249, and noted that the Constitutional Convention voted down a provision which would have permitted the General Assembly to choose “such officers *as were necessary for the organization and work of the General Assembly*.”⁶⁹ Although recognizing the legislature’s need for additional help and the present day inadequacy of section 249, the Court held that the section prohibited the employment of staff members for the L.R.C.⁷⁰

⁶⁴ Act of Mar. 7, 1936, ch. 1, art. XXI, § 1, 1936 Ky. Acts 44-48 (Extra Session - Reorganization) (codified at CARROLL’S KY. STAT. ANN. §§ 4618-138 to -142 (Baldwin 1936)). See also Lloyd and Singleton, Kentucky Government, L.R.C. INFORMATIONAL BULLETIN No. 137 (1980).

⁶⁵ See KY. CONST. § 42.

⁶⁶ Legislative Research Comm’n v. Brown, 664 S.W.2d 907, 915 (Ky. 1984) (citing Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821)) [hereinafter cited as L.R.C. v. Brown]. Arguably this constitutional concern was mooted by the adoption of the Kenton Amendment, ch. 440, 1978 Ky. Acts 1400-01 (codified at KY. CONST. §§ 30a, 31a, 36a, 42a, 256). See also notes 113-17 *infra* and accompanying text.

⁶⁷ Section 249 provides:

The house of representatives of the general assembly shall not elect, appoint, employ or pay for, exceeding one chief clerk, one assistant clerk, one enrolling clerk, one sergeant at arms, one doorkeeper, one janitor, two cloakroom keepers and four pages; and the senate shall not elect, appoint, employ or pay for, exceeding one chief clerk, one assistant clerk, one enrolling clerk, one sergeant at arms, one doorkeeper, one janitor, one cloakroom keeper and three pages; and the general assembly shall provide, by general law, for fixing the per diem or salary of all of said employees.

KY. CONST. § 249.

⁶⁸ 280 S.W. 1081 (Ky. 1926).

⁶⁹ See *id.* at 1082 (emphasis in original).

⁷⁰ See *id.* at 1084, 1086. The Court considered the purposes of § 249 and the legislature’s need for help and stated:

In addition to the questions posed by section 249 and the Adjournment Clause, section 28 of the Kentucky Constitution prohibits a member of one department of government from serving in another department.⁷¹ Accordingly, had the L.R.C. been composed only of members of the legislature, and not been chaired by either the Governor or the Lieutenant Governor, its constitutionality would have been doubtful under section 28.

To circumvent these problems, the Legislative Council was created in 1936—with the Governor as its Chair—ostensibly as an agency within the executive department.⁷² The original Legislative Council was composed of fifteen members—five senators appointed by the Lieutenant Governor, five representatives appointed by the Speaker of the House of Representatives and five state officials appointed by the Governor.⁷³ The Legislative

In the light of . . . the debate in the convention on the adoption of this section as a part of our fundamental law, it is very clear that the purpose of section 249 was to forbid the employment of any help by the General Assembly other than that designated in that section. . . . It was thought by the convention that the help authorized by section 249 would be ample for any possible need thereafter of either house of the General Assembly, and, although the lapse of time and march of progress have demonstrated that the convention was mistaken in this, yet this argument . . . goes to the amending of section 249 rather than the ignoring of it.

. . . The main purpose of the section was economy. It may have turned out to be false economy, but, false or true, economy was its main purpose.

. . . .

. . . We have arrived at this conclusion with regret. We fully realize that the growth of this commonwealth since the adoption of the present Constitution, the development of its natural resources, the expansion of its mineral production; the increasing importance of its manufactories have all brought in their train numerous and perplexing problems, most of which call for the serious attention of and solution by the legislative body. With the growth of business, the need of help to dispatch it necessarily increases. No one who is acquainted with the immense amount of detail work which now confronts our legislative bodies can help but admit the need, at least in part, if not in its entirety, of the extra help provided for in these resolutions. It is to be regretted that the constitutional convention in its wisdom did not foresee our material growth and expansion and did not, at least in this particular, leave a freer rein to the General Assembly. But regrets or no, it did not and there is naught else for us to do until the people by their sovereign will change that instrument, but to abide in letter and in spirit by the mandates of the Constitution.

Id.

⁷¹ 664 S.W.2d at 924 (interpreting KY. CONST. § 28).

⁷² *Id.* at 910.

⁷³ *Id.*

Council was empowered solely to engage in fact-finding and to employ a director and research assistants for that purpose.⁷⁴

In 1948, the Legislative Council was renamed the Legislative Research Commission, and its membership reduced to seven—the Governor as Chair, the President Pro Tempore of the Senate, the Speaker of the House of Representatives and the majority and minority floor leaders of both the Senate and the House.⁷⁵ The powers of the L.R.C. remained substantially the same as those of the Legislative Council, namely, fact-finding and research, and its new name well-described its role. In 1956, the Lieutenant Governor replaced the Governor as Chair of the L.R.C.⁷⁶

The very existence of the L.R.C. is an example of the “play in the joints” that is often essential for the operation of our system of government. The willingness of the legislative and executive branches to engage in the fiction that the L.R.C. was an agency of the executive department enabled the L.R.C. to function in the interim between sessions and to hire necessary employees to discharge its support functions without violating the Constitution.⁷⁷ However, with the gradual transformation of the L.R.C. from a titular executive agency conducting research into an administrative arm of the General Assembly, the forces that created *L.R.C. v. Brown* were set in motion.

Historians might trace this transformation to the 1963-67 gubernatorial administration of Louie B. Nunn, a Republican Governor in a predominantly Democratic state. There was an obvious incentive for Democratic legislative leaders to demand that a minority party Governor share power with them. In addition, during Nunn’s administration, two dominant Democratic political figures presided over the legislature: Lt. Gov.

⁷⁴ *Id.* In 1944, the membership of the Legislative Council was increased to sixteen persons—eight senators appointed by the Lieutenant Governor and eight representatives appointed by the Speaker of the House. The powers of the Legislative Council were expanded to include organizational functions prior to each regular session of the General Assembly, but the Council was limited to a total of sixty meeting days each biennium. Act of Mar. 18, 1944, ch. 149, 1944 Ky. Acts 317-20.

⁷⁵ See Act of Feb. 27, 1948, ch. 15, 1948 Ky. Acts 59-62.

⁷⁶ See Act of Mar. 12, 1956, ch. 7, art. XII, § 1, 1956 Ky. Acts (Special Sessions) 54-56.

⁷⁷ 75 Ky. Op. Att’y Gen. 142 (Feb. 18, 1975); 74 Ky. Op. Att’y Gen. 842 (Dec. 1, 1974); 73 Ky. Op. Att’y Gen. 817 (Dec. 11, 1973).

Wendell H. Ford and Speaker of the House of Representatives Julian M. Carroll. With these forces at work, it was inevitable that the role of interim committees of the L.R.C. began to expand during this era.

The next change occurred in 1974, after Ford had become Governor and Carroll had become Lieutenant Governor. The Lieutenant Governor was replaced as Chair of the L.R.C. by the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as co-Chairs.⁷⁸ Consequently, with all members of the L.R.C. being members of the legislature,⁷⁹ the L.R.C. became a legislative agency. Despite the obvious constitutional problems created by this legislative action, Governor Carroll chose not to challenge the action. Some would attribute Governor Carroll's decision not to challenge the L.R.C.'s new role to his being a product of the legislature and a champion of legislative independence. For example, he supported the Kenton Amendment which subsequently legitimized the interim committee structure of the L.R.C.⁸⁰ Other pundits would say that Carroll so dominated the legislature that the L.R.C.'s independence existed only in the statute books and legal challenges were unnecessary. In either event, the constitutional issues lurked undecided for a decade.

The ascendancy of John Y. Brown, Jr. to the governorship in December, 1979, signaled a legislative renaissance in Kentucky that strove to redress the nearly fifty-year old constitutional imbalance. As Governor, Brown quickly became a disciple of his father's long-time advocacy of legislative independence, a stance that suited his image as a non-traditional Governor who critics asserted was disinterested in the details of governance and especially in the legislative process.⁸¹ The legislative renaissance

⁷⁸ See Act of Apr. 1, 1974, ch. 353, 1974 Ky. Acts 675-76.

⁷⁹ The ex officio members of the L.R.C. are the President Pro Tempore of the Senate, the Assistant President Pro Tempore of the Senate, the Speaker of the House of Representatives, the Speaker Pro Tempore of the House of Representatives, the majority and minority floor leaders of the Senate and the House of Representatives, the majority and minority party whips of the Senate and the House of Representatives, and the majority and minority caucus chairs of the Senate and House of Representatives. KY. REV. STAT. ANN. § 7.090(1) (Bobbs-Merrill 1980) [hereinafter cited as KRS].

⁸⁰ See text accompanying notes 113-17 *infra* for a discussion of the Kenton Amendment.

⁸¹ See *Brown to Battle Huddleston in Senate Race*, The Courier-Journal (Louisville), Mar. 16, 1984, at A1, col. 3 (Metro ed.).

was continued when the 1980 General Assembly made extensive use of the interim committee system to keep a careful watch on the executive branch. These efforts coincided with a national trend of state legislative revitalization characterized by such actions as legislative vetoes of administrative regulations and the formation of interim legislative committees on capital construction projects.⁸²

The 1982 General Assembly moved more boldly into the national movement of legislative independence by enacting a group of laws, many patterned after laws recently enacted in other states. It amended Kentucky Revised Statutes section 7.090 [hereinafter referred to as KRS] to declare that the L.R.C. was "an independent agency of state government . . . which is exempt from control by the executive branch and from reorganization by the Governor."⁸³ It enacted a series of statutes that, *inter alia*, empowered the L.R.C. to veto administrative regulations issued by the Governor,⁸⁴ to nominate persons to the Governor for appointment to certain executive agencies,⁸⁵ to approve gubernatorial application for federal block grants,⁸⁶ to determine and/or review certain reductions in the state budget,⁸⁷ and to approve or disallow gubernatorial orders reorganizing the executive branch.⁸⁸ Further, the General Assembly empowered the Speaker of the House and the President Pro Tempore of the Senate to make appointments to certain boards and agencies of the executive department⁸⁹ and seemed to empower itself to enact laws during organizational sessions.⁹⁰

Perhaps chastened by the results of his abdication of power in the name of legislative independence, Governor Brown vetoed several of these statutes,⁹¹ only to have each of his vetoes over-

⁸² See *Consumer Energy Council v. Federal Regulatory Comm'n*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983); *Enourato v. New Jersey Bldg. Auth.*, 448 A.2d 449 (N.J. 1982); *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982).

⁸³ See KRS § 7.090(1) (1982); notes 99-123 *infra* and accompanying text.

⁸⁴ See notes 278-80 *infra* and accompanying text.

⁸⁵ See notes 223-26 *infra* and accompanying text.

⁸⁶ See note 339 *infra* and accompanying text.

⁸⁷ See notes 324-34 *infra* and accompanying text.

⁸⁸ See note 352 *infra* and accompanying text.

⁸⁹ See note 224 *infra*.

⁹⁰ See notes 110, 117 *infra*.

⁹¹ See *Leaders want changes in 2 bills to avoid veto, make peace with Brown*, The Courier-Journal (Louisville), Apr. 13, 1982, at A1, col. 1 (Metro ed.).

ridden by the General Assembly.⁹² Shortly thereafter, the L.R.C. filed suit for a declaratory judgment on the constitutionality of each of these statutes.⁹³ Governor Brown and Attorney General Steven L. Beshear counterclaimed to insure that every questionable statute was impleaded.⁹⁴

In their counterclaim, Governor Brown and Attorney General Beshear did not invoke the Adjournment Clause or sections 249 or 28 of the Kentucky Constitution to seek a decree abolishing the L.R.C. or its staff.⁹⁵ The Court therefore did not reach the issue of whether the L.R.C. could constitutionally exist. However, Brown and Beshear did contest the constitutionality of KRS section 7.090(1), which declared that the L.R.C. was "an independent agency of state government," asserting that this statute was tantamount to declaring either that the General Assembly could sit in continuous session via the L.R.C., or that L.R.C. was an unauthorized fourth branch of government.⁹⁶ Brown and Beshear conceded *arguendo* that the L.R.C. is a legislative agency and argued only that it must be limited to its historic fact-finding functions.⁹⁷ The Court agreed with Brown and Beshear, stating forcefully: "There is, simply put, no fourth branch of government."⁹⁸

2. *There is No Fourth Branch of Government*

The effort of Brown and Beshear to circumscribe the role of the L.R.C. rested primarily on the sixty-day limit on legislative sessions.⁹⁹ Their argument pointed to the dominant purpose of

⁹² See *A contentious House overrides seven vetoes and ignores another*, The Courier-Journal (Louisville), Apr. 14, 1982, at A1, col. 5 (Metro ed.).

⁹³ See 664 S.W.2d at 909; Brief for Appellees at 13, L.R.C. v. Brown, 664 S.W.2d 907 (Ky. 1984) [hereinafter cited as Brief for Appellees].

⁹⁴ See Brief for Appellees, *supra* note 93, at 13.

⁹⁵ See Reply Brief for Appellants at 7, L.R.C. v. Brown, 664 S.W.2d 907 (Ky. 1984) [hereinafter cited as Reply Brief for Appellants].

⁹⁶ See 664 S.W.2d at 910.

⁹⁷ See Brief for Appellees, *supra* note 93, at 26-36. Ironically, the L.R.C.'s Petition for Rehearing asked the Court to address the § 249 issue and overrule *Shanks v. Julian*. *Id.* at 35. The Court ignored this entreaty.

⁹⁸ 664 S.W.2d at 917.

⁹⁹ See KY. CONST. § 42. Their tacit concessions to the existence of the L.R.C. and the role of the interim committees implicitly recognized the impact of the Kenton Amendment, although for strategic reasons this was never expressly admitted.

the framers of the present Kentucky Constitution—to limit the power of the General Assembly.¹⁰⁰

The sixty-day limit on biennial sessions was the most significant restriction placed on the General Assembly by the Constitutional Convention. Under Kentucky's first two constitutions, the General Assembly met in annual sessions without restrictions as to length.¹⁰¹ Under the Constitution of 1850 the legislature met biannually for sixty-day sessions, but was empowered to extend the length of its session by "a vote of two-thirds of all the members elected to each house,"¹⁰² an action often taken by the legislature.¹⁰³ Thus, under prior constitutions, the legislature had the power to hold continuous sessions.

However, the framers of the present Constitution took that power away from the General Assembly and, for the first time in the history of Kentucky, put an absolute limit on the number of days that the legislature could sit.¹⁰⁴ They also eliminated the General Assembly's implicit right to determine the agenda for special sessions by expressly giving that right to the Governor, whose power to convene such sessions was renewed.¹⁰⁵ Thus, the

¹⁰⁰ See Brief for Appellees, *supra* note 93, at 26-36. See also text accompanying notes 1-60 *supra* for a discussion of the Constitutional Convention of 1890-1891. A contemporaneous decision of the Kentucky Court of Appeals said:

It is a matter of history that the object which, above all others, was sought to be attained by the adoption of the new constitution, was the placing of a check upon the power of the legislative branch. No one can compare that instrument with its predecessors without being struck by the almost countless restraints which are placed upon that power, and the safeguards provided against legislative usurpation. This central idea gives color and tone to the entire organic law. . . . When that instrument was before the people for adoption, there was debate and discussion over its provisions in the press and on the stump. . . . Practically the whole membership of the convention went upon the platform in its defense, and, while they differed in their estimates of its advantages, the burden of each argument was still that it was a shield to the citizen against legislative usurpation, encroachment, and abuse.

Pratt v. Breckinridge, 65 S.W. 136, 142 (Ky. 1901).

¹⁰¹ See KY. CONST. of 1799, art. II, § 17; KY. CONST. of 1792, art. II, § 24.

¹⁰² See KY. CONST. of 1850, art. II, § 24.

¹⁰³ See Defendant's Exhibit No. 4, Legislative Research Comm'n, Constitution of the Commonwealth of Kentucky Bicentennial Edition, Information Bulletin No. 112, p. ix, L.R.C v. Brown, 664 S.W.2d 907 (Ky. 1984).

¹⁰⁴ See KY. CONST. § 42.

¹⁰⁵ See KY. CONST. § 80.

concept of the General Assembly as a body sitting in continuous session was abolished by the framers of the Constitution in 1891.

This restriction has survived numerous attempts to delete or modify it. In modern times the General Assembly has thrice attempted to amend the Constitution to enable it once again to become "a continuous body," but each proposed amendment was defeated by the people. The Constitution proposed by the Constitution Revision Assembly in 1966 (and likewise rejected by the people) would have made the General Assembly "a continuous body."¹⁰⁶ In 1969, the legislative article of the Constitution Revision Assembly's draft, which also would have made the General Assembly "a continuing body," was submitted to the people as a separate amendment and was defeated.¹⁰⁷ In 1972, the General Assembly proposed the so-called annual sessions amendment which omitted any reference to the General Assembly as being a continuous body, but in 1973 it too was defeated.¹⁰⁸

When the Kenton Amendment passed, it had omitted the phrase making the General Assembly "a continuing body," as well as the provision for annual sessions. The Kenton Amendment provided only for the limited organizational session described in section 36 of the Kentucky Constitution, during which the General Assembly clearly cannot enact legislation.¹⁰⁹

The constitutional issue upon which many of the statutes were contested in *L.R.C. v. Brown* was what (if any) legislative power may an interim legislative committee (specifically the L.R.C.) exercise after expiration of the sixty-day limit on legislative sessions.¹¹⁰ The concern arises because "the legislative body

¹⁰⁶ See Act of Mar. 18, 1966, ch. 37, 1966 Ky. Acts 295-347.

¹⁰⁷ See Act of Mar. 27, 1968, ch. 201, 1968 Ky. Acts 825-26.

¹⁰⁸ See Act of Mar. 30, 1972, ch. 375, 1972 Ky. Acts 1640-41.

¹⁰⁹ See Kenton Amendment, ch. 440, 1978 Ky. Acts 1400-01.

¹¹⁰ *L.R.C. v. Brown*, 664 S.W.2d at 907, 914-16. Some 1982 statutes premised on the Kenton Amendment seemed to confer power upon the General Assembly to enact laws during an organizational session convened in off-numbered years pursuant to Ky. CONST. § 36, including the power to enact a law invalidating any administrative regulation promulgated since the last regular session of the General Assembly. See Act of Apr. 12, 1982, ch. 443, §§ 11, 12, 13(3), 14, 15, 16(3), 16 (5), 17 (codified at KRS § 6A.090, .100, .110(3), .120, .130, .140(3), .140(3), .140(5), .150). However, by the plain language

ceases to exist on the moment of its adjournment."¹¹¹

This issue has been previously litigated in various states when legislative councils, interim committees and other analogues to Kentucky's L.R.C. were formed. In every reported decision, the state appellate courts limited these interim legislative bodies to a fact-finding and oversight role. The courts invalidated attempts by interim committees to exercise the lawmaking power by asserting that their acts have the force of law, or to exercise executive powers by becoming involved in the administration of state government.¹¹²

of Ky. CONST. § 36, the General Assembly, when convened in organizational session during odd-numbered years, has only the power "of electing legislative leaders, adopting rules of procedure and the organizing of committees." The purported exercise of any other power by the General Assembly, when convened pursuant to Ky. CONST. § 36, is invalid. *L.R.C. v. Brown*, 664 S.W.2d 907 (Ky. 1984) Trial Court *Opinion and Judgment* at 18. Accordingly, the trial court held the foregoing 1982 statutes giving the legislature lawmaking powers during the organizational session void pursuant to Ky. CONST. § 26:

The provisions of [certain statutes], *insofar as they imply* that the General Assembly, when convened in organizational session, pursuant to Section 36, Ky. Const., may enact statutes or otherwise give force of law to its enactment when so convened, are void and unenforceable.

Id. at 21 (emphasis supplied).

On appeal, the L.R.C. acquiesced in this holding. Brief for Appellants at 20, *L.R.C. v. Brown*, 664 S.W.2d 907 (Ky. 1984) [hereinafter cited as Brief for Appellants]. Cf. *Trenton Graded School Dist. v. Board of Educ. of Todd County*, 129 S.W.2d 143 (Ky. 1939); *Stickler v. Higgins*, 106 S.W.2d 1008 (Ky. 1937); *Richmond v. Lay*, 87 S.W.2d 134 (Ky. 1935); *Royster v. Brock*, 79 S.W.2d 707 (Ky. 1935) (cases relating to limited lawmaking power during special legislative sessions).

¹¹¹ 664 S.W.2d at 915 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821)).

¹¹² See *In re Opinion of the Justices*, 19 So. 2d 10 (Ala. 1947); *Jewett v. Williams*, 369 P.2d 590 (Idaho 1962); *State ex rel. Jones v. Atterbury*, 300 S.W.2d 806 (Mo. 1957); *State ex rel. Judge v. Legislative Fin. Comm.*, 543 P.2d 1317 (Mont. 1975); *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982); *Advisory Opinion in re Separation of Powers*, 295 S.E.2d 589 (N.C. 1982); *State ex rel. McLeod v. McInnis*, 295 S.E.2d 633 (S.C. 1982); *State ex rel. Robinson v. Fluent*, 191 P.2d 241 (Wash.), *cert. denied sub nom* *Washington Pension Union v. Washington*, 335 U.S. 844 (1948); *State ex rel. Hamblen v. Yelle*, 185 P.2d 723 (Wash. 1947).

The cases from Montana provide an excellent example of the evolution of this area of the law. The Montana Supreme Court initially invalidated its Legislative Council, holding in *State ex rel. Mitchell v. Holmes*, 274 P.2d 611 (Mont. 1954), that the Montana constitutional provision limiting the legislature to sessions of 60-days' duration prohibited the exercise of any legislative power, including fact-finding and oversight functions, after adjournment. This decision was overruled in *State ex rel. James v. Aronson*, 314 P.2d 849 (Mont. 1957), in which the court upheld the existence of the Legislative Council, emphasizing that it could do nothing more than engage in fact-finding. When the Montana legislature later enacted a law giving an interim committee a role in adminis-

In *L.R.C. v. Brown*, the legislature contended that the constitutional basis for Kentucky's interim committee system is the "Kenton Amendment,"¹¹³ arguing that it conferred upon the L.R.C. and its interim committees the power to act legislatively between legislative sessions.¹¹⁴ Had the Court held that interim committees may exercise the lawmaking power, the General Assembly would have become a continuous body composed of the Senate and House of Representatives for sixty days and the L.R.C. for the remainder of the biennium.¹¹⁵

The Court recognized that the Kenton Amendment merely provides that the General Assembly may convene in odd-numbered years "for the purposes of electing legislative leaders, adopting rules of procedure and the organizing of committees."¹¹⁶ The Kenton Amendment does not empower those committees to legislate in the interims between sessions.¹¹⁷

The power of a legislature is the power to make laws, although necessary incidents to the lawmaking power are the fact-finding function and the informing function. The classic description of "legislative oversight" combines both the fact-finding function and the informing function of the legislative body. Legislators often exercise their fact-finding function through statutory interim committees which investigate the actions of the executive or judicial branches. They may exercise their informing function by exposing the results of their investigation to public scrutiny and debate. Through this process of ventilating issues, the executive branch may alter what it is doing. Alternatively,

tering the state budget between sessions, that statute was invalidated in *State ex rel. Judge v. Legislative Fin. Comm.*, 543 P.2d 1317 (Mont. 1975).

¹¹³ Act of Mar. 31, 1978, ch. 440, 1978 Ky. Acts 1400-01 (codified at KY. CONST. §§ 30a, 31a, 36a, 42a, 256).

¹¹⁴ Brief for Appellees, *supra* note 93, at 33.

¹¹⁵ *Id.* at 34.

¹¹⁶ See KY. CONST. § 36.

¹¹⁷ The wording of the Kenton Amendment must be contrasted with the wording of the "annual sessions amendment" that was defeated three times in the decade preceding adoption of the Kenton Amendment. The defeated amendment would have reverted to the language of pre-1891 constitutions and declared the General Assembly to be "a continuing body." Those words were deleted from the Kenton Amendment, leaving an historical gloss refuting the L.R.C.'s contention that the Kenton Amendment was intended to give interim committees lawmaking powers. See notes 106-09 *supra* and accompanying text.

the next session of the General Assembly may exercise its law-making power to correct what it perceives as incorrect. Thus, there is a clear distinction between "oversight" in the interim and "lawmaking" in the interim.¹¹⁸

Under section 42 of the Kentucky Constitution, Kentucky legislators may not exercise the lawmaking power after expiration of the sixty-day period for legislative sessions. Upon adjournment, Kentucky legislators may exercise only fact-finding and informing functions, which together constitute "oversight," not "lawmaking." The constitutional infirmity of the statutes invalidated in *L.R.C. V. Brown* was their attempt to empower the L.R.C. to go beyond oversight and exercise the lawmaking power after the constitutional limit of sixty days. The Court refused to permit the L.R.C. to be transformed into a fourth branch of government and to conduct annual sessions through the back door:

It is patently clear that the LRC as it currently exists, and as it has existed since 1974, is as appellants concede, an "arm" of the General Assembly. It is beyond cavil that the primary role, if not the exclusive role, of the LRC has been historically that of a research, fact-finding, secretariat and general support agency for the General Assembly. . . . The legislative power

A similar case arose when Alabama amended its constitution in 1947 to add an organizational session. Pursuant to that amendment, which is identical to Kentucky's Kenton Amendment, the Alabama legislature created interim committees. Suit was brought contending that these committees violated the prohibition against the legislative action after adjournment of either an organizational or regular session. The Alabama Supreme Court held:

An interim committee does not legislate, it merely makes inquiry and obtains data so that it may properly report to the regular session their findings. This, in our opinion, is not doing business within the meaning of the constitutional provision above noted, but is merely in preparation to that end when the Legislature reconvenes in its regular session.

In re Opinion of the Justices, 29 So. 2d at 13.

The L.R.C. erroneously cited this Alabama opinion for the proposition that, even absent the Kenton Amendment, the inherent powers of the General Assembly would enable it to confer upon the L.R.C. those powers conferred by the challenged 1982 statutes. See Brief for Appellants, *supra* note 110, at 26. That is obviously a misreading of the Alabama case which involved implementation of an organizational sessions amendment identical to the Kenton Amendment and not the exercise of any inherent legislative power. See ALA. CONST. § 1901.

¹¹⁸ See generally 664 S.W.2d at 915-17.

lies solely within the province of the General Assembly *and its entire, publicly elected membership*. Our constitution makes that clear. Ky. Const. Sec. 29 states, “[T]he legislative power shall be vested in a House of Representatives and a Senate, which, together shall be styled the ‘General Assembly of the Commonwealth of Kentucky’.” Whatever else the LRC may constitutionally do, it may not legislate.

. . . .

Two major legal questions dominate this area: (1) can the General Assembly delegate its authority to legislate to the LRC and (2) can the General Assembly legislate through its agent, the LRC, while the General Assembly is in adjournment? The answers to these legal questions are inextricably intertwined and relate to the nature and role of the LRC.

. . . .

KRS 7.090(1) declares that the LRC is an “independent” agency of state government. This does not comport with our previous analysis of the nature of the LRC, nor does it comport with our constitution which recognizes only three branches of government.

There is, simply put, no fourth branch of government. The LRC was created by, is controlled by, and is a service type agency of the General Assembly. It is independent of the Governor; it is not subject to reorganization by the Governor, it is subject to the control of its creator, the General Assembly. It is an “oversight” and service organization for and on behalf of the General Assembly. As such, it is a part, albeit an important part, of the General Assembly, the legislative branch of government. It is part of the General Assembly by reason of its statutory birth and its statutory nourishing. We therefore, conclude that KRS 7.090(1), which declares the LRC to be an independent agency of state government is constitutionally invalid.¹¹⁹

In sum, the Court placed its imprimatur upon the “play in the joints” which the executive and legislative departments had long permitted by acquiescence. Relying *sub silentio* upon the

¹¹⁹ *Id.* at 911, 914, 916-17 (emphasis both in original and added) (footnotes omitted).

Kenton Amendment to disregard *Shanks v. Julian*,¹²⁰ the Court permitted the L.R.C. to exist as an agency of the legislative department and to engage in the service and fact-finding functions inherent in its support role.¹²¹ Upholding the statute which exempts the L.R.C. from reorganization by the Governor¹²² was simply a reiteration of the holding in *Brown v. Barkley*¹²³ that the Governor has no inherent power to reorganize government and has only the reorganization powers conferred by statute. Thus, while the L.R.C. is an agency controlled by the legislature, its powers have been properly limited to lending administrative support to legislators.

C. *Palmore's Prelude Opinions*

L.R.C. v. Brown was the third chapter in a separation of powers trilogy decided by the Kentucky Supreme Court during the Brown administration. The first two opinions, both written by then Chief Justice John S. Palmore, were *Ex parte Auditor of Public Accounts*¹²⁴ and *Brown v. Barkley*.¹²⁵ These opinions are important to understanding *L.R.C. v. Brown*, not only because they were decided in chronological proximity to it, but also because they obviously encouraged members of (and attorneys for) the General Assembly to believe that the legislation they enacted in 1982 would be upheld by the Palmore Court.¹²⁶

1. *Ex parte Auditor of Public Accounts*

The precise issue in *Ex parte Auditor of Public Accounts* was whether the elected Auditor of Public Accounts could audit the books and records of the Kentucky Bar Association (KBA).¹²⁷

¹²⁰ 280 S.W. 1081 (Ky. 1926). See text accompanying notes 68-70 *supra* for a discussion of the case.

¹²¹ See 664 S.W.2d at 917. See notes 285-91 *infra* and accompanying text for a discussion of the legality of interim committees in conjunction with a discussion of the Adjournment Clause.

¹²² See 664 S.W.2d at 917.

¹²³ 628 S.W.2d 616 (Ky. 1982).

¹²⁴ 609 S.W.2d 682 (Ky. 1980).

¹²⁵ 628 S.W.2d 616.

¹²⁶ See notes 192-205 *infra* and accompanying text.

¹²⁷ 609 S.W.2d at 682.

Kentucky has an integrated bar, so all practicing attorneys must pay dues to the KBA. The Auditor argued that these dues are therefore in the nature of occupational license taxes exacted by the Court through the Association, making them public funds.¹²⁸ The Auditor contended that he had the constitutional and statutory right and obligation to audit these allegedly public funds.¹²⁹

The Court held that the Auditor may audit any general fund monies appropriated to the judiciary by the legislature, but may not audit those revenues, including bar association dues, raised independently by the Court of Justice.¹³⁰ The Court reasoned that the language of the 1975 constitutional amendment known as the Judicial Article vested plenary control of the Court of Justice and the bar association in the Supreme Court.¹³¹

Instead of deciding the precise issue presented, the Court seized the opportunity to sound a clarion call asserting its own independence from the other two branches of government, particularly its fiscal independence from the Governor.¹³² In so doing, the Court wrote an essay on the separation of powers¹³³ which served as a prelude to *L.R.C. v. Brown*.¹³⁴ It also discussed the powers of lesser Executive Officers¹³⁵ in a fashion which served as a prelude to *Brown v. Barkley*,¹³⁶ and analyzed the

¹²⁸ *Id.* at 683-84.

¹²⁹ The Auditor had filed the case directly with the Kentucky Supreme Court. The Court held that there was an actual case or controversy, so its opinion was not advisory, and that, since the Court was a disputant, no lower court had jurisdiction. *Id.* at 683.

¹³⁰ *See id.*

¹³¹ *See id.* at 684.

¹³² *See id.* at 686. The Court asserted:

What we have in this case . . . are funds that have not been collected pursuant to any statute and have not been appropriated by the legislative body and are not subject to legislative appropriation. Both the Association and the Board of Bar Examiners exist solely by virtue of rules of this Court expressly and exclusively authorized by Const. Sec. 116. There is no constitutional authority by which they can be made accountable to either of the other two branches of government except for their stewardship of such funds or property as may come into their possession through [appropriations from the General Assembly].

Id.

¹³³ *See id.* at 684-85.

¹³⁴ 664 S.W.2d at 911-14.

¹³⁵ *See* 609 S.W.2d at 686-87.

¹³⁶ 628 S.W.2d at 621-22.

Court's power over its own budget¹³⁷ in a manner repeated in *L.R.C. v. Brown*.¹³⁸

In its discussion of the separation of powers, the Court emphasized the clarity of Kentucky's constitutional separation of powers provisions.¹³⁹ However, the Court then proceeded to denigrate the power of the Governor in language that cropped up in both *Brown v. Barkley* and *L.R.C. v. Brown*:

Sections 69-108 . . . provide for the executive branch of government and delegate certain specific and exclusive powers to its officers. Any further powers this branch of government may possess—that is, beyond those expressly delegated or necessarily implied by the Constitution itself—must be conferred upon it by *the legislative branch, which has all governmental authority not delegated elsewhere and not prohibited by the Constitution*.¹⁴⁰

In a prelude to its holding in *Brown v. Barkley* that the lesser Executive Officers have only those powers delegated to them by the legislature,¹⁴¹ the Court also denigrated the power of the Auditor of Public Accounts.¹⁴²

¹³⁷ See 609 S.W.2d at 685.

¹³⁸ See 664 S.W.2d at 926-28.

¹³⁹ See 609 S.W.2d at 684-85. The Court said:

[T]he Constitution . . . divide[s] all governmental authority among "three distinct departments, and each of them to be confined to a separate body of magistracy. . . ." Const. Sec. 27. *This distribution of authority concludes with an unusually forceful command*: "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances herein-after expressly directed or permitted." Const. Sec. 28.

Id. (emphasis added). Governor Brown quoted a portion of this language in his brief in *L.R.C. v. Brown*. See Brief for Appellees, *supra* note 93, at 16.

¹⁴⁰ 609 S.W.2d at 685 (emphasis added). See notes 195-205 *infra* and accompanying text.

¹⁴¹ See 628 S.W.2d at 624.

¹⁴² See 609 S.W.2d at 686-87. The Court said:

As we have previously demonstrated, the duties and responsibilities of the Auditor are those and only those legally prescribed by the legislature. Consequently, he has no inherent powers. For example, prior to the effective date of the Governmental Reorganization Act of 1936, KS 4618-68 et seq., the Auditor served only as the bookkeeper for the state. KS 4618-137 et seq. He had no authority or duty to conduct post or performance audits. These were the function of the State Inspector and Examiner. KS 1992b-59. The effect of the reorganization act was to transfer the duties

Finally, the Court seemed to go out of its way in *Ex parte Auditor* to assert its own control over the judicial budget. The Court of Justice, like all other arms of state government, was suffering from the revenue shortfall during Governor Brown's tenure. The Court used this case to set forth as constitutional dictum its view that the Chief Justice, not the Governor, controls the judicial budget.¹⁴³

In sum, *Ex parte Auditor* was the antithesis of judicial restraint. It resolved a rather narrow issue with so broad a brush that the opinion unnecessarily opened several new constitutional issues, one of which would soon be resolved in *Brown v. Barkley*.

2. Brown v. Barkley

If hard cases make bad law, then unnecessary cases make even worse law. *Brown v. Barkley* should never have been litigated and, not surprisingly, sowed the seeds of bad law. Fortunately, however, the bad law was never harvested because the Court overruled *Brown v. Barkley's* troublesome *dicta*, albeit *sub silentio*, in *L.R.C. v. Brown*.¹⁴⁴

of Auditor to the Department of Finance, to transfer the duties of the State Inspector and Examiner to the Auditor, and to abolish the office of State Inspector and Examiner. A clearer history of subjugation to the legislature cannot be found.

Id. at 687.

¹⁴³ See *id.* at 685. The Court stated:

[W]hereas the Governor's authority with regard to the presentation of a biennial budget to the General Assembly is purely statutory . . . the authority of the Chief Justice to submit the budget for the Court of Justice comes directly and expressly from the Constitution itself. Const. Sec. 110(5)(b). Hence that function can be neither assumed by nor delegated to the executive branch.

. . . .

The purpose and significance of the judicial budget is that it provides a means by which the legislative body may assess how much it must appropriate from the treasury for the operation of the judicial system. Once it has made that appropriation, the authority for and responsibility of determining the necessity for and the propriety of expenditures from that source rest exclusively with the judicial branch itself, and are not subject to executive or legislative regulation.

Id. (footnote omitted).

¹⁴⁴ See notes 192-205 *infra* and accompanying text.

Brown v. Barkley raised the chicken-and-egg questions inherent in statutes which permit Governors to reorganize the governmental structure previously created by the legislature. Since the United States Congress enacted the first executive reorganization act,¹⁴⁵ commentators have disagreed whether such statutes are constitutional. One viewpoint is that government is organized by statute and the power to reorganize government, being the power to amend those statutes, is a lawmaking power which cannot constitutionally be delegated to the chief executive.¹⁴⁶ Another viewpoint is that the chief executive has inherent power to reorganize executive agencies subservient to him and, therefore, that it is unconstitutional to permit the legislative branch to retroactively veto such a reorganization by joint resolution.¹⁴⁷ A third compromise view is that the chief executive has no inherent reorganization power, but may "faithfully execute" a law delegating that power to him.¹⁴⁸ At the federal level, the two branches of government have seen fit to avoid litigating these issues. Congress has permitted the President to effectuate reorganizations, and the President has permitted Congress by joint resolution to veto those reorganizations of which it disapproved.¹⁴⁹

A similar rapprochement existed in Kentucky until the Brown Administration. Kentucky's first reorganization act was enacted in 1936 during the administration of Governor A.B. Chandler.¹⁵⁰ The statute was unusually sweeping in its scope, permitting, for example, the abolition of agencies.¹⁵¹ Because the legislature was

¹⁴⁵ See Reorganization Act of 1932, ch. 314, §§ 401-408, 47 Stat. 413 (*repealed* 1966).

¹⁴⁶ See Note, *Administrative Law—Delegation of Legislative Power to President Under National Industrial Recovery Act*, 12 N.C.L. REV. 44, 44-45 (1933-34).

¹⁴⁷ Cf. Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064 (1981) (discussing Congressional limitations on the presidential removal power).

¹⁴⁸ See Note, *supra* note 146, at 46.

¹⁴⁹ See Nathanson, *supra* note 147, at 1089. *But see* E.E.O.C. v. Hernando Bank, Inc., 724 F.2d 1188, 1190 (5th Cir. 1984) (invalidating legislative veto while upholding remainder of Reorganization Act of 1977, 5 U.S.C. §§ 901-912 (1982)).

¹⁵⁰ See Government Reorganization Act of 1936, CARROLL'S KY. STAT. ANN. KRS §§ 4618-68 to -169 (Baldwin 1936).

¹⁵¹ See, e.g., KRS §§ 4618-150, -154, -163.

limited to biennial, sixty-day sessions, this statute gave the Governor virtually unlimited power to reshape state government. Only when the legislature reconvened biennially could it veto a Governor's reorganization of state government. Because the reorganization had become the *status quo* by that time, it was virtually impossible politically to unscramble the eggs.

The event that led to the litigation in *Brown v. Barkley* was Governor Brown's attempt to reorganize the Department of Agriculture, a department headed by an elected constitutional officer. The threshold issue in the case was whether KRS section 12.025(1)¹⁵² authorized the Governor to undertake such an action.¹⁵³

When enacted in 1960, KRS section 12.020 divided state agencies into three categories: "Constitutional Administrative Departments" headed by an elected constitutional officer, "Statutory Administrative Departments" reporting to the Governor and "Independent Agencies."¹⁵⁴ The Court stated that, when enacted in 1960, the Governor's power to reorganize state agencies under KRS section 12.025(1) did not extend "to those departments, including Agriculture, that were classified in KRS 12.020 as 'constitutional' rather than 'statutory.'"¹⁵⁵ The Court observed that, as enacted in 1960, the reorganization powers contained in KRS section 12.025(1) referred only to "statutory administrative departments" and not to "constitutional administrative departments."¹⁵⁶

Over the next twenty years the reorganization statute was amended several times, with resulting changes in the names of the categories of departments.¹⁵⁷ However, the 1980 General Assembly added a proviso to KRS section 12.020, which the Court construed to say that the Governor could not, "under KRS 12.025, transfer functions, funds, personnel, etc.," from

¹⁵² KRS § 12.025 repealed by Acts of 1982, ch. 447, § 23, effective Jan. 1, 1984, states in pertinent part: "[T]he governor may . . . (1) [e]stablish, abolish or alter the organization of any agency or statutory administrative department. . . ."

¹⁵³ *Brown v. Barkley*, 628 S.W.2d at 619.

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 619-20.

an administrative body headed by a "constitutionally elected officer."¹⁵⁸ Governor Brown argued that Agriculture was a statutory administrative department and, hence, within the scope of his reorganization powers.¹⁵⁹ The Court agreed that Agriculture and every other executive department were statutory in the sense of being created by statute.¹⁶⁰ However, the Court held that the General Assembly had not intended in 1960 to classify departments headed by elected constitutional officers as statutory departments for the purposes of the reorganization act and that the 1980 proviso reaffirmed this intent.¹⁶¹

The case should have ended on this issue of statutory interpretation. However, the Court was obliged to consider Governor Brown's argument that the power to reorganize the executive branch of government was an inherent executive power which could not be limited by the General Assembly.¹⁶² He argued that despite contrary legislation by the General Assembly, "the supreme executive power" conferred upon the Governor by section 69 of the Kentucky Constitution permitted him to reorganize departments headed by lesser Executive Officers.¹⁶³ In making this contention, the Governor ignored the homily that certain aspects of our constitutional system of government depend upon compromise and are too fragile to be litigated to their logical conclusions. When the Governor asserted an unbridled constitutional prerogative to abolish state agencies, he risked a holding by the Court that reorganization is a legislative power that can never be delegated to the Governor. Fortunately, the Court did not choose between extremes; it left the Governor those reorganization powers conferred upon the office by statute.¹⁶⁴

In deciding whether the Governor has inherent power to reorganize the executive branch, or only has such reorganization powers as are statutorily conferred upon the office, the Court in *Barkley* reached the politically and constitutionally solomonic

¹⁵⁸ *Id.* at 620.

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at 620 n.8.

¹⁶¹ *See id.* at 620.

¹⁶² *Id.* at 622.

¹⁶³ *Id.* at 620-22.

¹⁶⁴ *See id.* at 623.

conclusion that, while the power to reorganize government is executive in nature, it exists only to the extent created by statute.¹⁶⁵ Since the General Assembly has already organized the government, the Governor cannot displace that organization without enabling legislation.¹⁶⁶

In reaching this conclusion, however, the Court made several statements of constitutional law that were so unnecessarily sweeping in their scope that they inevitably led to the enactment of the 1982 statutes which produced the litigation in *L.R.C. v. Brown*.¹⁶⁷ For example, in *Brown v. Barkley*, the Court embellished the analysis first mentioned in *Ex parte Auditor of Public Accounts*,¹⁶⁸ that is, Executive Officers other than the Governor

¹⁶⁵ Despite the holding in *Brown v. Barkley* that reorganization is an executive power, the opinion in *L.R.C. v. Brown* refers to it as legislative in nature. See *L.R.C. v. Brown*, 664 S.W.2d at 930.

¹⁶⁶ The Court stated:

Whether the Governor, in the exercise of his authority as the "supreme executive power of the Commonwealth" (Const. Sec. 69), can do the same thing in the absence of legislative authority is another matter. Though we are satisfied that the transfer of an existing, legislatively-created function from one executive agency or department to another is essentially an executive action . . . and is not an exercise of legislative power by the chief executive, we do not believe that the chief executive has the power to do it without legislative sanction unless it is necessary in order for him to carry out a law or laws that the legislature has created without prescribing in sufficient detail how they are to be executed.

. . . .

. . . We do not doubt that if the General Assembly should pass a law that requires implementation, and appropriate funds for that purpose but omit specifying the manner in which it is to be carried out, the chief executive would be required to carry it out and have the right to choose the means by which to do it. That would not be so because of any implied or inherent power, however, but because it would be within the scope of authority and duty expressly conferred upon him by Const. Sec. 81.

In any event, whether the problem be largely semantic or otherwise, if it be postulated that the chief executive does possess implied or "inherent" powers, they would be subordinate to statute, as the inherent prerogatives of the Attorney-General were so held in *Johnson v. Commonwealth*, 291 Ky. 829, 165 S.W.2d 820 (1942). This means, we think, that when the General Assembly has placed a function, power or duty in one place there is no authority in the Governor to move it elsewhere unless the General Assembly gives him that authority. And in this case, as we have indicated already, KRS 12.025 does not give him that authority.

628 S.W.2d at 622-23.

¹⁶⁷ See notes 223-26 *infra* and accompanying text.

¹⁶⁸ See 609 S.W.2d at 687.

are geldings, having only those powers conferred upon them by the General Assembly.¹⁶⁹ The Court further held that the General Assembly could diffuse executive power among these elected Executive Officers and thereby weaken the Governor.¹⁷⁰ The Court noted that once those functions are conferred by the legislature, the empowered Executive Officers may discharge them without any interference by the Governor.¹⁷¹ This question had never before been litigated in Kentucky and therefore constituted a considerable diminution of the power and influence previously possessed by the Governor. The Court's opinion appears to be constitutionally sound; the unsoundness of *Brown v. Barkley* inheres in Governor Brown's decision to litigate the issue.¹⁷²

¹⁶⁹ The Court observed:

It is interesting to observe that in dealing with the General Assembly, and with the office of Governor the Constitution speaks in terms of "powers," but with regard to the Sec. 91 officers mentions only "duties" and "responsibilities." Except for the Attorney-General . . . and . . . Secretary of State . . . , the other officers named in Const. Sec. 91 have only such powers and responsibilities as are prescribed by statute. . . .

628 S.W.2d at 622.

¹⁷⁰ The Court stated:

[T]hese independent executive offices provide convenient receptacles for the diffusion of executive power. As the Governor is the "supreme executive power," it is not possible for the General Assembly to create another executive officer or officers who will not be subject to that supremacy, but it definitely has the prerogative of withholding executive powers from him by assigning them to these constitutional officers who are not amenable to his supervision and control.

Id. (emphasis added).

¹⁷¹ The Court noted:

To round out this analysis of the respective powers and duties of the Governor, the General Assembly, and the officers established by Const. Sec. 91, we need to consider the relationship between the Governor and the Const. Sec. 91 officers. That the Const. Sec. 91 officers are to be elected by the people suggest that, whatever their duties, they are not answerable to the supervision of anyone else. This inference finds support in that provision of our Constitution (Sec. 78) which empowers the Governor to *require information* in writing from the officers of the executive branch upon any subject relating to the duties of their offices. Had the framers of the Constitution intended the Governor to have any further authority over these officers, Sec. 78 would have been unnecessary and, indeed, an anomaly.

Id. at 623 (emphasis in original).

¹⁷² The dilemma arises from the fact that KY. CONST. § 69 grants the Governor

In addition to telling the General Assembly in unambiguous terms that it could diffuse the executive powers of the Governor among the various Executive Officers, the Court proceeded bluntly to denigrate the power of the Governor in words that appeared again and again in *L.R.C. v. Brown*:

It is interesting as well as instructive to consider the constitutional contrast between the executive and judicial branches in their respective relationships to the legislative branch. Whereas the judicial branch must be and is largely independent of intrusion by the legislative branch, the executive branch exists principally to do its bidding.¹⁷³

As fate would have it, the opinion in *Brown v. Barkley* was rendered on March 5, 1982, when the 1982 General Assembly was in session considering the bills that were later to be at issue in *L.R.C. v. Brown*.¹⁷⁴ The dicta in *Brown v. Barkley* concerning the separation of governmental powers obviously encouraged the legislators to enact these bills.

The legislators' enthusiasm was further bolstered by a curious event which occurred after the *Brown v. Barkley* opinion was issued. The Court's original opinion contained the following statement:

The real power of the executive branch springs directly from the long periods between legislative sessions, *during which interims the legislature is powerless to function and must, perforce, leave broad discretionary powers to the chief executive*. It is ironic, but a historical fact of life, that in the past most chief executives have used this very power, *given to them by the legislature*, to influence the actions of individual legislators and thus exercise control over the legislative process itself.¹⁷⁵

"supreme executive power" and therefore all other executive officers are "subject to that supremacy." See *id.* Thus, at what point would diffusion of executive power by the General Assembly under § 91 violate § 69 prerogatives? Cf. *Rouse v. Johnson*, 28 S.W.2d 745, 752 (Ky, 1930) (concluding that the Governor's power to fill executive vacancies under § 152 was limited to vacancies in elective offices),

¹⁷³ 628 S.W.2d at 623 (emphasis added).

¹⁷⁴ See notes 223-26 *infra*.

¹⁷⁵ See *Brown v. Barkley*, No. 81-SC-592-DG, slip op., at 13-14 (Ky. Mar. 5, 1982).

Legislative leaders proceeded immediately to interrogate the Chief Justice about this portion of the opinion when he appeared before the Appropriations and Revenue Committee on behalf of the judicial budget.¹⁷⁶ Within a few days, the Court *sua sponte* modified the opinion by deleting the statement that the legislature is "powerless to function" in the interims and substituting the following sentence: "The real power of the executive branch springs directly from the long periods between legislative sessions, *during which interims the legislature customarily has left broad discretionary powers to the chief executive.*"¹⁷⁷ The Court's *sua sponte* modification of the *Barkley* opinion, together with its statements that "the executive branch exists principally to do its [the legislature's] bidding"¹⁷⁸ and that "the General Assembly has all the powers not denied to it or vested elsewhere by the Constitution,"¹⁷⁹ understandably encouraged attorneys advising the legislature to assume the *Palmore* Court would uphold the 1982 statutes then being enacted.¹⁸⁰

One primary reason why that prediction was not fulfilled is the dramatic change in composition of the Supreme Court between *Brown v. Barkley* and *L.R.C. v. Brown*. Thus, before analyzing the portions of the opinion in *L.R.C. v. Brown* which overrule *sub silentio* the aforementioned statements in *Brown v. Barkley*, it is important to discuss the historical happenstance of the Court's change in membership between the rendering of those two opinions.

3. *Procedural Skirmishes in L.R.C. v. Brown: Old Court—New Court*¹⁸¹

In November, 1982, while *L.R.C. v. Brown* was winding its way from the trial court to the Supreme Court, four of the

¹⁷⁶ See The Courier-Journal (Louisville), Mar. 13, 1982, at E7, col. 1 (Metro ed.).

¹⁷⁷ See 628 S.W.2d at 623 (emphasis added).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ For a discussion of the pertinent statutes, see notes 223-26 *infra* and accompanying text.

¹⁸¹ Cf. ARNDT M. STICKLES, *THE CRITICAL STRUGGLE IN KENTUCKY, 1819-1829* (1929) (discussing a similar "old court-new court" controversy occurring in the early nineteenth century in Kentucky).

seven seats on the Supreme Court changed hands, with three of them being won by Judges of the Court of Appeals.

Chief Justice Palmore and Justice Marvin J. Sternberg had announced their retirement and did not stand for re-election. The seat vacated by Chief Justice Palmore was won by Court of Appeals Judge William N. Gant. The seat vacated by Justice Sternberg was won by Jefferson Circuit Judge Charles M. Leibson. After Justice Robert O. Lukowsky died, Governor Brown appointed John J. O'Hara to the Court. O'Hara was defeated for election, however, by Judge Donald Wintersheimer of the Court of Appeals. Justice Boyce Clayton was also defeated by Court of Appeals Judge Roy Vance.

These changes in the Court's composition were significant in many respects. Chief Justice Palmore and Justice Lukowsky had intellectually dominated the Palmore Court, with dissenting opinions being a rare occurrence. Also, when the intermediate Kentucky Court of Appeals was created in 1975, the friction between it and the Palmore Court was instantaneous. The Kentucky Supreme Court promulgated rules that denigrated the Court of Appeals, such as requiring memoranda instead of briefs,¹⁸² preventing the Court from deciding for itself which of its opinions to publish,¹⁸³ and preventing its judges from sitting in the districts from which they were elected.¹⁸⁴ The Kentucky Supreme Court also published opinions expressing criticism of Court of Appeals' opinions in uncharacteristically blunt language.¹⁸⁵ Many Court watchers therefore predicted that, having chafed under the Palmore regime, the three justices arriving from the Court of Appeals would be reluctant to follow the former Chief Justice's excessive rhetoric in *Brown v. Barkley*.

The change in the Court's composition, however, did not become effective until December, 1982. The delay produced a litigation stratagem by the L.R.C. which is an interesting histor-

¹⁸² For a discussion of KY. R. APP. P. 1.095 [hereinafter cited as RAP], see Martin, *Kentucky's New Court of Appeals*, 41 KY. BENCH & B. 8, 29 (April 1977).

¹⁸³ See KRS § 21A.070(19) (Baldwin 1984); KY. R. CIV. P. 76.28(4) [hereinafter cited as CR].

¹⁸⁴ See KY. S. CT. R. 1.030(7)(b) [hereinafter cited as SCR].

¹⁸⁵ See, e.g., *Robinson v. Murlin Phillips & MFA Ins. Co.*, 557 S.W.2d 202, 204 (Ky. 1977).

ical footnote. The Kentucky Rules of Civil Procedure permit the appellant to bypass the Court of Appeals and move to transfer the case directly to the Supreme Court.¹⁸⁶ As soon as the trial court entered its judgment, the L.R.C. made such a motion.¹⁸⁷ Attempting to have its appeal heard by the Palmore Court, the L.R.C. also moved the Supreme Court to dispense with the requirement of additional briefs and to permit submission of the case on the briefs filed in the trial court. The only proceeding in the Supreme Court would have been an oral argument before the Palmore Court.¹⁸⁸

The historical footnote is that this request was seriously considered by some members of the "old Court." There was even discussion of the old Court and new Court sitting *en banc* at oral argument and all eleven Justices joining in the decision, a stratagem that had no apparent purpose other than permitting Chief Justice Palmore to author the opinion of the Court after the expiration of his term.

Attorneys for the executive branch, seeking to avoid that result, filed a strongly worded response to the motion.¹⁸⁹ After this response was filed, the Court immediately ruled that the request to dispense with briefs would be denied and the case

¹⁸⁶ See CR 76.18.

¹⁸⁷ The judgment of the Franklin Circuit Court was entered Nov. 3, 1982.

¹⁸⁸ The Motion to Transfer Appeal From The Court of Appeals to the Supreme Court was made Nov. 6, 1982. Paragraph 10 of the L.R.C.'s Motion to Transfer requested that the Supreme Court:

a) Dispense with the requirement of printed briefs required by the Rules and to accept the briefs filed in the Franklin Circuit Court as the briefs in this Court;

b) Rule on this Motion without the necessity of a response to Respondents and to deem said Motion to be controverted;

c) Advance the times for oral arguments, and all other hearings in this case; and

d) Enter an Order transferring the Record directly from the Franklin Circuit Court to this honorable Court.

Motion to Transfer Appeal From The Court of Appeals to the Supreme Court of Kentucky at 4, L.R.C. v. Brown, 664 S.W.2d 907 (Ky. 1984).

¹⁸⁹ The Response said, in part:

The decision this Court will be called upon to make may well serve as a blueprint for Kentucky's system of government for generations to come. That decision should not appear to those future generations to be flawed by having been made with undue haste.

would proceed under ordinary procedural rules.¹⁹⁰ Thus, the case was argued to and decided by the new Court.¹⁹¹

4. *The Sub-Silentio Overruling of Brown v. Barkley Dicta in L.R.C. v. Brown*

Despite the language of section 28 of the Kentucky Constitution directing that each branch may exercise only its own powers and may not exercise the powers of another branch, except as expressly permitted by the Constitution, the legislature argued in *L.R.C. v. Brown* that the General Assembly may exercise all governmental powers (whether legislative, executive or judicial) not expressly reposed in some other body.¹⁹²

. . . [W]ith the impending change in the composition of this Court, LRC's motion presents a serious issue of judicial administration. Even if this Court were to so expedite this case that briefing time was curtailed and oral arguments were heard in early December, preparation of a reasoned opinion adequately explaining this Court's decision to the public would prevent the parties' petitions for rehearing from being determined by the Court as presently constituted. Whether the new Court deferred to its predecessor by denying rehearing, or granted the rehearing, the circumstances would present the unseemly inference that the result in this most important case could depend more upon the identity of the Justices than upon neutral principles of law. That appearance should be avoided in every case, but it should especially be avoided in a case having the political ramifications that are inherent in this appeal. The only way for the Court to avoid such an inference is for the Court to handle this case according to the Rules applicable to other cases.

Response by Respondents to Movant's "Motion to Transfer Appeal From Court of Appeals to Supreme Court" Filed November 5, And to Advance the Case, Dispense with Briefs in This Court, Etcetera at 3-4, *L.R.C. v. Brown*, 664 S.W.2d 907 (Ky. 1984).

¹⁹⁰ Order Granting Transfer, Establishing Briefing Requirements and Scheduling Oral Arguments, Nov. 15, 1982, C.J. Stephens, *L.R.C. v. Brown*, 664 S.W.2d 907 (Ky. 1984).

¹⁹¹ The last significant act of the Palmore Court was to choose Palmore's successor. Interestingly, it was the new Chief Justice, Robert F. Stephens, who authored *L.R.C. v. Brown*.

¹⁹² See Brief for Appellants, *supra* note 110, at 16-17. In its Brief, the L.R.C. asserted "that the legislature possesses all powers and authority to act which are not specifically denied it by the Constitution and has the authority to act in exercising those powers." *Id.* at 17 (citing *Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1980); *Duke v. Boyd County*, 7 S.W.2d 839 (Ky. 1928); *McCreary v. Fields*, 147 S.W. 901 (Ky. 1912); *Bullitt v. Sturgeon*, 105 S.W. 468 (Ky. 1907)).

The testimony of the principal sponsors of the statutes contested in this litigation, especially the testimony of former Speaker Pro Tempore Thomason, clearly evidenced this misinterpretation of the Constitution:

The L.R.C. predicated its theory of constitutionality on the dictum in *Brown v. Barkley* that “[i]t is axiomatic that under our Constitution the General Assembly has all powers *not denied to it or vested elsewhere* by the Constitution.”¹⁹³

The L.R.C. asserted this statement meant that all governmental powers of whatever kind (executive, legislative or judicial) reside in the General Assembly except where a particular attribute of a power is specifically vested by the Constitution in another branch of government.¹⁹⁴ The obvious fallacy in the L.R.C.’s contention was two-fold. First, sections 27 and 28 of the Kentucky Constitution respectively confine the General Assembly to exercising legislative power and deny it the right to exercise executive or judicial power. Second, *all* of the executive power and *all* of the judicial power are “vested elsewhere by the Constitution”¹⁹⁵: section 69 of the Constitution vests the “[s]upreme executive power in . . . the Governor” and section 109 of the Constitution vests “the judicial power . . . exclusively in one Court of Justice.” Thus, after considering the pertinent constitutional provisions, a literal reading of the excerpt from *Barkley* does not support the L.R.C.’s expansive interpretation of it.

The cases relied upon by the L.R.C. actually stand for the proposition that the General Assembly, *in exercising its lawmaking power*, may legislate on any subject in any manner except

A. (Mr. Thomason): I don't think there is a constitutional provision that specifically relates to the Legislature. I think it's the absence of a constitutional provision that allows the Legislature to create the Legislative Research Commission, because all other powers . . . reside in the Legislature that are not specifically granted to the Executive or Judicial Branch.

Q. 13 (Mr. Combs): Would you agree that the Legislature only has legislative function?

A. Under the Constitution as interpreted recently in the *Brown versus Barkley* decision, I would say that the Legislature has all functions that are not specifically granted to the Governor or that are not specifically granted to the Judicial Branch. All other powers are inherent in the Legislature. Whether you term them legislative functions or whatever they're still in the Legislature.

Trial Record at 125-26, *L.R.C. v. Brown*, 664 S.W.2d 907 (Ky. 1984). These legislators obviously read *Brown v. Barkley* literally and based all the statutes contested in *L.R.C. v. Brown* upon the resulting misinterpretation of the Constitution.

¹⁹³ 628 S.W.2d at 623 (emphasis added). Cf. *Ex parte Auditor*, 609 S.W.2d at 684.

¹⁹⁴ See Brief for Appellants, *supra* note 110, at 16-17.

¹⁹⁵ 628 S.W.2d at 623.

insofar as the Constitution restrains the lawmaking power.¹⁹⁶ The L.R.C.'s interpretation of these cases had been rejected in *Sibert v. Garrett*.¹⁹⁷ In *Sibert*, the General Assembly had enacted a statute arrogating the executive power of appointing members of an agency of the executive branch. The Court rejected the same argument which the L.R.C. would later extrapolate from *Brown v. Barkley*, saying:

[T]he Legislature may perform all *legislative* acts not expressly or by necessary implication withheld from it, but it may not perform or undertake to perform executive or judicial acts, except in such instances as may be expressly or by necessary implication directed or permitted by the Constitution of the particular state. To adopt the latitudinous construction that the Legislature may do anything not expressly or impliedly prohibited by the Constitution would to our minds at once destroy the separation of the powers of government into the three great departments.¹⁹⁸

In *L.R.C. v. Brown*, the Court had to reconcile *Sibert* and *Barkley*. Chief Justice Stephens deftly accomplished that task by reasserting the rationale of *Sibert* and overruling the obiter dictum in *Barkley*, while stating that nothing in *Barkley* could reasonably be read to contradict *Sibert*:

Appellants urge this court to adopt a so-called liberal construction of the separation of powers doctrine and argue that the General Assembly is the "dominant" branch of government. In support of this argument, they claim that in *Brown v. Barkley*, . . . we denigrated the power of the Governor and gave the General Assembly a dominant role in the tripod, by allegedly giving to the General Assembly all "residual" powers. We do not agree and we do not so interpret *Barkley*.

In *Barkley*, following a lengthy discussion of the inherent or implied powers of the Governor, we said:

The extent that the Governor has any implied or inherent powers in addition to those the Constitution expressly gives him, it seems clear that such unexpressed executive

¹⁹⁶ See 628 S.W.2d 616; 147 S.W. 901; 105 S.W. 468; 7 S.W.2d 839. See also 664 S.W.2d at 913-14.

¹⁹⁷ 246 S.W. 455 (Ky. 1922).

¹⁹⁸ *Id.* at 457.

power is subservient to the overriding authority of the legislature. . . .

Practically speaking, except for those conferred upon him specifically by the Constitution, his powers like those of the executive officers created by Const. Sec. 91, are only what the General Assembly chooses to give him. . . .

These words, plus the following, are seized upon by appellants in their argument as proof that somehow, this Court has sawed off one of the legs of the tripod, viz., that of the executive, and that we have made that branch of government less than equal to the other two branches. Appellants remind us that we also said in *Barkley*:

It is axiomatic that under our Constitution *the General Assembly has all powers not denied to it or vested elsewhere by the Constitution*. . . . Whereas the judicial branch must be and is largely independent of intrusion by the legislative branch, the executive branch exists principally to do its [the legislature's] bidding. . . .

The inference appellants draw from this language is that the General Assembly possesses all powers and authority to act which are not specifically denied it by the Constitution and has the authority to act in exercising those powers. It is argued that *all powers*, residual in nature, belong to the legislative branch. We do not agree.

To place this interpretation on that language would be tantamount to saying that we were repealing Sections 27 and 28 of the Kentucky Constitution. We would in effect be eliminating the separation of powers doctrine. We would reach a result which would fly in the face of history and the legal precedents of this Commonwealth. Our review of that doctrine's history and our description of its language most assuredly confirm this. Nothing in *Barkley* can be construed to deny the existence of the doctrine of separation of powers and the equality of the three coparceners in government. Implicit in *Barkley* is that the General Assembly as the legislative branch, has all powers *which are solely and exclusively legislative in nature*. To argue that any other power is given to the General Assembly simply won't wash. The power referred to in *Barkley* is *legislative power and legislative power only*.¹⁹⁹

¹⁹⁹ 664 S.W.2d at 913.

When the provisions of Kentucky's Constitution are considered together,²⁰⁰ it is clear that the legislative, executive and judicial powers are delegated exclusively to the legislative, executive and judicial branches, respectively. The sole exceptions to this rule are those instances in which the Constitution "expressly" provides otherwise.²⁰¹ Accordingly, except in those instances where the Constitution expressly confers an executive or judicial power upon the General Assembly, it may exercise only legislative power.²⁰²

The other basis upon which the L.R.C. asserted the validity of the 1982 statutes was its contention that the Governor is but a conduit through which the legislature controls state government.²⁰³ This view rested on Palmore's statement in *Brown v. Barkley* that the Governor "exists principally to do its [the legislature's] bidding."²⁰⁴ But the notion that the Governor is merely an agent of the General Assembly was as erroneous as it was audacious. The Office of Governor exists to faithfully execute the laws enacted by the General Assembly.²⁰⁵ Thus, the executive branch is an agent of the law, not of the legislature.

²⁰⁰ See KY. CONST. §§ 27, 28, 29, 69, 109.

²⁰¹ See KY. CONST. § 28. There are instances in which the Constitution expressly deviates from a pure separation of powers. For example, the judicial power to try impeachments is given to the Senate. See KY. CONST. § 67. That does not mean that governmental powers cannot be classified as intrinsically executive, legislative or judicial. It means only that the Constitutional Convention chose to allocate those particular functions to a particular branch. To make sure those would be the only deviations from the principle of separating powers, the framers included § 28.

²⁰² As stated by the Court in *Pratt v. Breckinridge*, 65 S.W. 136 (Ky. 1901):
From this it seems clear that the makers of the constitution intended the legislature to discuss and enact laws, and to do nothing else. . . .

It is not to be supposed for a moment that, in vesting the general assembly with legislative power, it was imagined by the convention or the people that that body, by the mere passage of a so-called act conferring upon itself powers which properly belonged to the other departments, could usurp their functions. If it can do so, then we do not live under a constitutional government, but the general assembly, like the British parliament, is supreme.

Id. at 140 (emphasis added).

²⁰³ See 664 S.W.2d at 913.

²⁰⁴ See 628 S.W.2d at 623.

²⁰⁵ KY. CONST. § 81. See 664 S.W.2d at 919.

II. THE OPINION IN *L.R.C. v. Brown*: "KENTUCKY'S *Marbury v. Madison*"

After Governor Brown's vetoes were overridden, the lawsuit was commenced on June 14, 1982, when the L.R.C. filed a petition for a declaration that the various statutes were enforceable.²⁰⁶ Governor Brown and Attorney General Beshear filed a counterclaim impleading additional statutes in order to ensure resolution of the entire controversy.²⁰⁷

The Court rejected the common description of the controversy as a power struggle between the executive and legislative branches. Instead the Court correctly analyzed the issue as whether the General Assembly could delegate to the L.R.C. certain powers to be exercised while the General Assembly is adjourned.²⁰⁸ The fundamental question presented in *L.R.C. v. Brown* related primarily to the constitutional role of the L.R.C. in state government and secondarily to the scope of the Governor's duty to faithfully execute the laws.

A. *The Fundamental Constitutional Principles*

The dispositive questions in *L.R.C. v. Brown* related predominantly to two principles: (1) the separation of governmental powers mandated by sections 27 and 28 of the Kentucky Constitution and (2) the sixty-day limit on the General Assembly's biennial sessions and the constitutional requirement of bicameralism. Accordingly, before discussing the statutes which the Court invalidated, it is necessary to analyze these basic constitutional principles.

²⁰⁶ See Brief for Appellees, *supra* note 93, at 13; statutes cited *infra* notes 223-26 and accompanying text.

²⁰⁷ "In their pleadings, all parties admitted that there was a justiciable controversy presented as to each statute impleaded. A two-day evidentiary hearing was held before the Franklin Circuit Court . . . in which members of the legislature and members of the Governor's Cabinet testified regarding their understanding of the meaning and practical effect of the contested statutory provisions. Following that, all parties submitted detailed briefs, and oral arguments were heard. On November 3, 1982, Judge Williams rendered his Opinion and Judgment," invalidating every statute at issue. Brief for Appellees, *supra* note 93, at 13-14. The L.R.C. appealed and the appeal was transferred directly to the Supreme Court on Appellants' motion. *Id.* at 14. See notes 186-88 *supra* and accompanying text.

²⁰⁸ See *L.R.C. v. Brown*, 664 S.W.2d 907, 909 (Ky. 1984).

1. *The Separation of Powers Provisions Are Strictly Construed in Kentucky*

The provision expressly incorporating the doctrine of separation of governmental powers into Kentucky's Constitution was drafted by Thomas Jefferson,²⁰⁹ and composed the first two paragraphs of Kentucky's first, second and third Constitutions.²¹⁰ Jefferson's words appear in the present Constitution of Kentucky immediately after the Bill of Rights²¹¹ and form "an unusually forceful" Separation of Powers Clause.²¹²

Despite the clarity of Kentucky's separation of powers doctrine, the L.R.C. contended that the provisions should be lib-

²⁰⁹ The significance of Jefferson's authorship is that the Constitution of the United States does *not* contain an express separation of powers provision such as KY. CONST. §§ 27, 28. In fact the federal Constitution, drafted principally by James Madison, contained neither a Bill of Rights nor an express separation of powers provision. These were the two principal objections of Thomas Jefferson to Madison's document. See THE FEDERALIST, Nos. 47, 48 (J. Madison). *Contra* THE FEDERALIST, No. 50 (A. Hamilton). The First Congress submitted the Bill of Rights to the States as the first ten amendments to the federal Constitution. However, Jefferson's other proposed amendment, an express separation of powers provision, was not added to the federal Constitution. It is against that historical backdrop that one must judge the importance of the fact that Thomas Jefferson personally wrote Kentucky's separation of powers provisions. A detailed account of Jefferson's authorship of this provision is contained in *Commissioners of Sinking Fund v. George*, 47 S.W. 779, 785 (Ky. 1898) (Du Relle, J., dissenting). See also *Rouse v. Johnson*, 28 S.W.2d 745, 752 (Ky. 1930) (Willis, J., dissenting).

²¹⁰ See KY. CONST. of 1792 art. I, §§ 1, 2; KY. CONST. of 1799 art. I, §§ 1, 2; KY. CONST. of 1850 art. I, §§ 1, 2.

²¹¹ See KY. CONST. §§ 27, 28 which are set out in note 41 *supra*.

²¹² *Ex parte Auditor of Public Accounts*, 609 S.W.2d 682, 684 (Ky. 1980). See also *Sibert v. Garrett*, 246 S.W. 455 (Ky. 1922). In *Sibert*, the Court stated:

Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does our Constitution, which history tells us came from the pen of the great declaimer of American independence, Thomas Jefferson, when delegates from Kentucky, just after it was admitted to the Union, waited upon him, and he penned for them the substance of what is now section 28 . . . of our Constitution, containing an affirmative prohibition against one department exercising powers properly belonging to the others, and which without it contained only the negative prohibition found in section 27 of that instrument, and which was the extent of the separation of the powers found in the federal Constitution and in those of a number of the states composing the confederated Union at that time.

Id. at 457.

erally construed in the modern era.²¹³ The Supreme Court of Kentucky was not persuaded: “[I]t has been our view, in interpreting Sections 27 and 28, that the separation of powers doctrine is fundamental to Kentucky’s tri-partite system of government and must be ‘strictly construed.’ ”²¹⁴

The Court was not called upon in *L.R.C. v. Brown* to apply a political science concept of checks and balances, nor was it required to adjust that amorphous concept to changing times. Quite the contrary, the Court was called upon to apply the plain and “unusually forceful” language of sections 27 and 28 of the Kentucky Constitution to the statutes enacted by the 1982 General Assembly.²¹⁵

²¹³ See *L.R.C. v. Brown*, 664 S.W.2d at 910. In making this argument, the L.R.C. relied exclusively upon Kansas and New Hampshire cases—*State ex rel. Schneider v. Bennett*, 547 P.2d 786, 791 (Kan. 1976) and *Opinion of the Justices*, 431 A.2d 783, 786 (N.H. 1981)—for the contention that the doctrine of separation of powers should be liberally construed in the modern era. See Brief for Appellants, *supra* note 110, at 13-14. However, “the Constitution of Kansas contains no express provision requiring the separation of powers,” 547 P.2d at 790, and the New Hampshire Constitution contains perhaps the weakest separation of powers provision in the country. See N.H. CONST. pt. I, art. 37 (“the three essential powers [of government] . . . ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of unity and amity”). Obviously, these cases were not authority for construing the “unusually forceful” language of Ky. CONST. §§ 27, 28. See e.g., *State v. Hunter*, 447 A.2d 797, 799-800 (Me. 1982) (Federal separation of powers cases are not authority for construction of the Maine Constitution because, unlike the federal Constitution, the Maine Constitution has an express separation of powers provision.).

The L.R.C.’s argument also overlooked the fact that there are two types of separation of powers cases: (1) cases in which one branch of government usurps powers properly belonging to another branch of government; and (2) cases in which one branch of government exercises powers properly belonging to it, but encroaches upon the responsibilities of a coequal branch of government in the course of exercising its rightful powers. An example of a case involving the usurpation of power is the famous steel mill seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (seizure of steel mills by Presidential order an unlawful exercise of congressional power). An example of an encroachment case is *United States v. Nixon*, 418 U.S. 683 (1974) (grand jury exercised rightful power of issuing subpoena and President Nixon argued that subpoena should be quashed because it encroached upon core functions of executive branch).

²¹⁴ 664 S.W.2d at 912 (quoting *Arnett v. Meredith*, 121 S.W.2d 36, 38 (Ky. 1938)).

²¹⁵ See statutes cited *infra* notes 223-26.

2. *Legislative Action Having Force of Law Must Comply with All the Constitution's Procedural Requirements for Enacting Laws*

The American idea of diffusing governmental power was accomplished not only by separating the government into three branches, but also by imposing specific limitations upon the process of enacting laws. The Court of Appeals for the District of Columbia noted in *Consumer Energy Council v. Federal Energy Regulatory Commission*:²¹⁶ "Perhaps the greatest fear of the Framers was that in a representative democracy the Legislature would be capable of using its plenary lawmaking power to swallow up the other departments of the Government."²¹⁷

The remedies fashioned by the framers were bicameralism and the executive veto, both of which have become part of the American form of government²¹⁸ and are specifically embodied in sections 46, 56, and 88 of the Kentucky Constitution. All four Kentucky Constitutions have embodied the concept of bicameralism and the executive veto.²¹⁹ These concepts, and the procedures embodied in the Enactment Clause,²²⁰ were intended to insure that the legislative process is a deliberative one.²²¹ These constitutional requirements are fatal to any scheme which pur-

²¹⁶ 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983). See also THE FEDERALIST, No. 46 (J. Madison).

²¹⁷ 673 F.2d at 464.

²¹⁸ See *id.* at 464-65. The court observed:

What emerges from our analysis of the purposes of the lawmaking restrictions in Article I is that the Framers were determined that the legislative power should be difficult to employ. The requirements of presentation to the President and bicameral concurrence ultimately serve the same fundamental purpose: to restrict the operation of the legislative power to those policies which meet the approval of three constituencies, or a supermajority of two.

Id. at 464.

²¹⁹ Having as its primary objective limiting the legislative power, the Constitutional Convention wrote into the present Constitution a number of other preconditions to exercising the lawmaking power. See KY. CONST., §§ 37, 46, 51, 55, 56, 59. See also notes 209-10 *supra* and accompanying text.

²²⁰ KY. CONST. § 51.

²²¹ Cf. *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980) (Alaska Constitution's procedural requirements for the enactment of legislation are designed to prevent duplicity and insure a fair hearing and due deliberation). *Accord State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 633 (W. Va. 1981).

ports to allow a legislative committee, such as the L.R.C., to exercise the lawmaking power, whether during or between legislative sessions.²²²

In sum, the issues in *L.R.C. v. Brown* involved application of the Separation of Powers Clauses, the Bicameral Clause, the Adjournment Clause and the Enactment Clause. Pursuant to a strict construction of those provisions, the Court invalidated all the questioned statutes except two relating to the budget process.

B. *The Power of Appointment*

Several enactments of the 1982 General Assembly encroached upon the Governor's power to appoint members of executive boards and agencies. These statutes generally fell into four groups: [i] statutes permitting legislators to serve as members of executive boards and agencies;²²³ [ii] statutes permitting legislators to appoint members of executive boards and agencies;²²⁴ [iii] statutes permitting the L.R.C. or an interim committee to exercise power of advice and consent over gubernatorial appointments in the interim between legislative sessions;²²⁵ and [iv] statutes requiring the Governor to choose his appointees from lists composed by legislators.²²⁶ The decision in *L.R.C v. Brown* invalidated all of these statutes.

²²² Cf. 606 P.2d at 773 ("[W]hen the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having a binding effect upon those outside the legislature, it may do so only by following the enactment procedures.")

²²³ See KRS § 151.560(1)(a) (Cum. Supp. 1983) (requiring Governor to appoint two members of General Assembly to the Flood Control Advisory Commission); KRS § 154.675(1) (Cum. Supp. 1982) (Speaker and President Pro Tempore made *ex officio* members of the Enterprise Zone Authority).

²²⁴ The statutes permitting the Speaker of the House of Representatives and/or the President Pro Tempore of the Senate to appoint one or more members of boards and agencies within the executive department included: KRS § 31.015(1)(b)-(c) (Cum. Supp. 1983) (Public Advocacy Commission); KRS § 42.500 (Cum. Supp. 1983) (State Investment Commission); KRS § 103.2101(1)(a)-(b) (Cum. Supp. 1983) (Industrial Revenue Bond Oversight Committee); KRS § 117.015(2) (Cum. Supp. 1983) (State Board of Elections); KRS § 163.505 (Cum. Supp. 1983) (Commission on Deaf and Hearing Impaired); KRS § 164.010 (Cum. Supp. 1983) (Council on Higher Education); KRS § 174.105(2) (Cum. Supp. 1983) (Motor Carrier Regulatory Board); KRS § 230.220(1) (Cum. Supp. 1983) (State Racing Commission); KRS § 230.620 (Cum. Supp. 1983) (Kentucky Harness Racing Commission); KRS § 247.090(1)(f) (Cum. Supp. 1983) (State Fair Board); KRS § 441.615(1)(g) (Cum. Supp. 1983) (Kentucky Local Correction Facil-

1. *Statutes Empowering the Speaker and President Pro Tempore to Appoint Members of Executive Agencies Violate the Separation of Powers Clauses*

The Kentucky Constitution does not contain an Appointments Clause. Indeed, there was an Appointments Clause in the Constitution as submitted by the 1890 Convention to the voters, but when the Convention reconvened after the referendum, it deleted the Appointments Clause.²²⁷ As approved, section 93 of the Constitution, which provides for the constitutional officers, Governor and Lieutenant Governor, states:

The duties and responsibilities of these officers shall be prescribed by law, and all fees collected by any of said officers shall be covered into the treasury. Inferior State officers, not specifically provided for in this Constitution, may be appointed or elected, in such manner as may be prescribed by law, for a term not exceeding four years, and until their successors are appointed or elected and qualified.²²⁸

The L.R.C. contended that, in the absence of an Appointments Clause, section 93 gives the General Assembly not only the power to prescribe the method by which executive officers are to be selected, but also the power to *appoint* those Executive Officers.²²⁹ However literally sensible that interpretation might be, it is completely inconsistent with the "unusually forceful" separation of powers provisions contained in the Kentucky Constitution.²³⁰

It is generally recognized that the power to appoint Executive Officers is inherently executive, and that to hold otherwise is to

ities Construction Authority). *See also*, KRS § 151.560(1)(b) (Cum. Supp. 1983) (L.R.C. authorized to appoint nine members of the Flood Control Advisory Commission); KRS § 153.380(3) (Cum. Supp. 1983) (L.R.C. authorized to appoint five members of the Kentucky Oral History Commission).

²²⁵ *See* KRS § 248.510(1)(b) (1981) (Kentucky Tobacco Research Board); KRS § 278.050(1) (Cum. Supp. 1984) (Public Service Commission).

²²⁶ *See* KRS § 18A.050(2) (Cum. Supp. 1984) (State Personnel Board); KRS § 151.560(1)(b) (Cum. Supp. 1982) (Flood Control Advisory Commission).

²²⁷ *See* note 59 *supra*.

²²⁸ KY. CONST. § 93.

²²⁹ *See* Brief for Appellants, *supra* note 110, at 32-33.

²³⁰ *See* KY. CONST. §§ 27, 28. *See also* notes 209-15 *supra* and accompanying text.

deprive the Chief Executive of the right to control his own branch of government.²³¹ The Governor's obligation to faithfully execute the law implies, as a necessary incident, the power to appoint those who will act under his direction in discharging this obligation.²³²

L.R.C. v. Brown was not the first case in which it was argued that section 93 should be interpreted to permit the Speaker and President Pro Tempore to appoint members of executive agencies. In fact, the same argument was rejected in *Sibert v. Garrett*.²³³ In a post-*Sibert* decision, Judge Simeon Willis stated: "It is settled in this state that . . . the appointment to a state office is an executive function. . . ." ²³⁴

The L.R.C.'s hopes of getting *Sibert v. Garrett* overruled did not rest solely upon the Palmore Court's constitutional viewpoint as expressed in *Brown v. Barkley* that the executive branch exists principally to serve the legislature. It also rested upon the Court's previously inconsistent interpretations of section 93. In advancing this argument and asking that *Sibert* be overruled, the L.R.C. was merely asking that precedents adopted prior to *Sibert* be reinstated.

The earliest interpretations of section 93 came during the tumultuous political era of 1898-1901 that culminated in the assassination of William Goebel.²³⁵ The first case that interpreted

²³¹ See, e.g., *Springer v. Philippine Islands*, 277 U.S. 189, 203 (1928).

²³² Cf. *Myers v. United States*, 272 U.S. 52, 117 (1926). The Supreme Court observed:

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the responsible implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.

Id. (citations omitted).

²³³ See 246 S.W. at 458.

²³⁴ See *Rouse v. Johnson*, 28 S.W.2d 745, 752 (Ky. 1930) (Willis, J., dissenting).

²³⁵ See *Poyntz v. Shackelford*, 54 S.W. 855, 856-58 (Ky. 1900) (members of State Board of Election Commissioners to appoint new Commissioners to fill vacancies); *Purnell v. Mann*, 48 S.W. 407, 410 (Ky. 1898) (legislature to appoint members of State Board of Election Commissioners); *Commissioners of Sinking Fund v. George*, 47 S.W. 779, 781-82 (Ky. 1898) (legislature may appoint members of the Board of Penitentiary Commissioners).

section 93 was *Commissioners of Sinking Fund v. George*,²³⁶ in which Senator William Goebel was the successful appellate advocate. The Court held that the General Assembly in joint session could elect the members of the Board of Penitentiary Commissioners.²³⁷ This seemingly innocuous result led to the controversial "Goebel election law," which created a three-person State Election Commission.²³⁸ The Election Commission, whose members were appointed by the General Assembly, had the power to resolve certain disputes and the power to appoint the members of every local Election Commission.²³⁹ The statute was upheld in *Poyntz v. Shackelford*²⁴⁰ and *Purnell v. Mann*²⁴¹ by votes of four to three.

The Goebel election law led to the General Assembly's reversal of the 1899 election.²⁴² The General Assembly threw out the elections of the Republican candidates for Governor and Lieutenant Governor, thereby seating Goebel as Governor and Beckham as Lieutenant Governor.²⁴³ These events, unfortunately, culminated in the assassination of Goebel and a state of anarchy in Frankfort.²⁴⁴

The Goebel election law was subsequently invalidated in *Pratt v. Breckenridge*,²⁴⁵ with the Kentucky Court of Appeals thereby overruling its previous decisions in *George*, *Poyntz* and *Purnell*.²⁴⁶ *Pratt* involved a contest of the 1899 election for Attorney General.²⁴⁷ Relying upon *George* and its progeny,²⁴⁸ appellants argued that the language in section 93 which states that additional inferior officers "may be appointed or elected, in such manner as may be provided by law," does not give the

²³⁶ 47 S.W. 779.

²³⁷ See *id.* at 781-82.

²³⁸ See An Act to Further Regulate Elections, Mar. 10, 1898, ch. 13, § 1, 1898 Ky. Acts 43.

²³⁹ See *id.*

²⁴⁰ 54 S.W. 855.

²⁴¹ 48 S.W. 407.

²⁴² See *Taylor v. Beckham*, 56 S.W. 177, 178 (Ky. 1900).

²⁴³ See *id.*

²⁴⁴ See H. TAPP & J. KLOTTER, *supra* note 13, at 447-50.

²⁴⁵ 65 S.W. 136 (Ky. 1901).

²⁴⁶ See cases cited *supra* note 235.

²⁴⁷ See note 238 *supra* and accompanying text.

²⁴⁸ See cases cited *supra* note 235.

Governor exclusive power of appointment.²⁴⁹ The Court in *Pratt* rejected this interpretation of section 93, thus overruling *George* and its progeny. The Court held that section 93 was intended to permit the General Assembly to determine whether inferior state officers are to be popularly elected or appointed by the Governor.²⁵⁰ The Court went on to conclude that if section 93 were not limited to that interpretation then the General Assembly would be the dominant branch of government, a result that is completely contrary to the political sentiment that sought to restrict legislative power in the Constitution.²⁵¹

Pratt was expressly reaffirmed in *Sibert v. Garrett*, which involved the State Highway Commission created by the 1922 General Assembly. The Act named two members of the Commission and provided that the remaining two would thereafter be elected by the General Assembly.²⁵² Expressly rejecting the argument that section 93 permits the General Assembly to appoint members of executive agencies,²⁵³ the Court invalidated

²⁴⁹ See 65 S.W. at 137.

²⁵⁰ See *id.* at 140-41.

²⁵¹ See *id.* at 140, 142-43. But see IV DEBATES, *supra* note 1, at 5728-29 for the Revisory Committee report that a clause granting the Governor exclusive power to appoint state officers not required to be elected would conflict with § 93. “[I]t would disturb that settled principle which, we believe, has been approved by the people, that as to all these subordinates, it should be left to the power of the General Assembly to say whether they should be elected or appointed, and if not elected by the people, by whom they should be appointed.” *Id.* at 5728. The next case chronologically after *Pratt* was *Sewell v. Bennett*, 220 S.W. 517 (Ky. 1920). The issue in *Sewell* was whether a generally applicable statute requiring the advice and consent of the Senate to all gubernatorial appointments applied to the newly-created Workmen’s Compensation Board since the act creating that board did not require such advice and consent. The Kentucky Constitution does not contain an advice and consent clause. In the course of holding that the legislature may impose the advice and consent requirement upon gubernatorial appointments by statute, the *Sewell* Court unfortunately referred to the holding in *Commissioners of Sinking Fund v. George* saying the legislature could have made the appointment itself. See *id.* at 519. Thus, “[t]he Court, indeed, seemed to retreat from *Pratt* and revitalize *George*.” *L.R.C. v. Brown*, 664 S.W.2d at 922. However, *Sewell v. Bennett* did not deal directly with the power of appointment, and was chronologically sandwiched between *Pratt* and *Sibert*. Thus, the Court in *L.R.C. v. Brown* had no difficulty in determining that the controlling precedent was *Sibert v. Garrett*: “It is our view that *Sibert* has been unchanged and is therefore dispositive of the central issue present in these contested statutes.” 664 S.W.2d at 923.

²⁵² See An Act to Amend an Act, app. § 1, 1922 Ky. Acts 459, 460.

²⁵³ 246 S.W. at 460. The Court concluded:

[W]ere we to adopt the opposite construction . . . it would lead to a virtual

this statute as violative of the separation of powers embodied in section 28 of the Constitution and refused to ignore *Pratt* or to follow the *George* case and its progeny.²⁵⁴ Directly addressing the argument that section 93 permits the General Assembly itself to appoint members of executive agencies, the Court in *Sibert* held that only the executive branch can appoint the officers who are to serve in its departments.²⁵⁵

In spite of the Court's definitive holding in *Sibert* that the

overthrow of [the Constitution's] sections 27 and 28, separating the functions of the state government into three grand departments. . . .

[T]he power of the Legislature . . . is broad enough in section 93 to confer the power on the Legislature, if appellants' contention be true, to appoint all inferior state officers, . . . whether their functions be strictly legislative, executive, or judicial. The logical result of the contention, if adopted and followed, would empower the Legislature to appoint or elect [inter alia] the private secretary to the Governor. . . . If such power would not tend or serve to destroy the purpose and intention sought to be accomplished by separating the powers of government in the Constitution, it would be difficult to conceive of one that would. *Id.*

²⁵⁴ See *id.* at 458. The Court stated:

To begin with, the latest utterance of this court in the Pratt-Breckinridge Case . . . holds that under no provisions of our present Constitution is it competent for the Legislature to itself elect, designate, or appoint officers whose duties are of the nature and character attempted to be conferred on appellants in this case. But *it is said that the opinion in that case was what might be termed a political one, and which in a sense may be accepted as true*, and that its reasoning should not be followed on that account, but rather should the doctrine of Sinking Fund Commissioners v. George . . . be applied in this case. Answering that contention, it might be conceded that there would be much force in it if the *George* opinion and those following it were supported by reasoning as sound or sounder than is found in the Pratt-Breckinridge opinion, which, however, we are not prepared to admit. Without incorporating excerpts from the latter opinion, *we are convinced, beyond doubt, that its reasoning is far more convincing than that contained in its short-lived predecessors, and, according to our view, is practically unanswerable.* Besides, the doctrine of stare decisis has not lost its place in the law, and . . . it is entitled to great weight and is adhered to by most courts, unless the principle established by the prior decisions is clearly erroneous.

Id. (emphasis added).

²⁵⁵ See *id.* at 460. The Court stated:

[W]hen sections 93 and 107 conferred the power upon the Legislature to provide for the "filling of inferior state officers in such manner as may be prescribed by law," or to "provide for the election or appointment" of created county or district officers, the conclusion is inevitable, from the language employed and in the light of the purpose of the constitutional requirement segregating and separating the functions of government, that

legislature may not constitutionally usurp the Governor's power of appointment, the Court held two years later in *Craig v. O'Rear*²⁵⁶ that the legislature may choose the members of a temporary agency. *Craig* involved the General Assembly's creation of a temporary commission for selecting Morehead and Murray as college towns.²⁵⁷ The members of the commission were appointed by the Speaker and President Pro Tempore.²⁵⁸ The Court distinguished *Craig* and *Sibert* by observing that *Craig* involved selecting members of a temporary agency "appointed to perform a particular task, who serve without term and whose functions cease when the purpose is accomplished. . . ."²⁵⁹

In *L.R.C. v. Brown* the L.R.C. argued that *Craig* diluted *Sibert's* holding that the power of appointment is purely an executive function.²⁶⁰ The Court rejected such a broad interpre-

the authority of the Legislature is limited to making such provisions by exercising its authority to pass an act containing them and directing upon whom or with whom the power to appoint or elect was lodged, which electing and appointing agency should, perhaps, be selected from the department to which the duties of the office necessarily appertain.

Id. At most, the absence of an express gubernatorial appointments clause means that the power of appointing some executive subordinates may be reposed in elected Executive Officers other than the Governor. See *Rouse v. Johnson*, 28 S.W.2d at 751.

²⁵⁶ 251 S.W. 828 (Ky. 1923).

²⁵⁷ See *id.* at 829-30.

²⁵⁸ See *id.*

²⁵⁹ *Id.* at 830-31. The Court stated:

The act is assailed on the ground that it violated sections 27 and 28 of the Constitution. . . . The first objection to the act is that it is an assumption of executive power by the Legislature. *Sibert v. Garrett*, 197 Ky. 17, 246 S.W. 455, is relied on. That case merely held that appointment to office was an executive function which could not be exercised by the Legislature itself. The court, however, was careful to point out that the rule was confined solely to the appointment of officers and was not intended to apply to mere temporary agents. While the purpose of the language employed was to call attention to the exception to the rule, and cannot be regarded as controlling, practically all of the courts hold that mere temporary agents appointed to perform a particular task, who serve without term and without pay, and whose functions cease when the purpose is accomplished, may be appointed by the Legislature itself, or in any manner that it may provide, and we have no doubt of the correctness of this view.

Id.

²⁶⁰ See 664 S.W.2d at 923. The Court stated:

Appellants urge the *Craig v. O'Rear*, 199 Ky. 553, 251 S.W. 828 (1923), decided two years after *Sibert*, constituted another veer by the court and is controlling. We do not agree. In that case, the Court ruled that

tation of *Craig* and held that the rationale of *Sibert* was dispositive of the issue in *L.R.C. v. Brown*, that is, whether the legislature could constitutionally appoint Executive Officers.²⁶¹

If, rather than operating under the American tripartite system of government, the power to appoint state executive officials was reposed in the General Assembly, our government would more resemble the British parliamentary system in which the executive branch is little more than a committee of members of Parliament. Political scientists may well debate whether the bipartite or tripartite system is preferable, but so long as the Jeffersonian doctrine of separation of powers continues to be embodied in sections 27 and 28 of the Kentucky Constitution, the tripartite form of government is constitutionally mandated. The Court was therefore correct in rejecting the L.R.C.'s interpretation of section 93 and holding that the power of appointment is intrinsically executive and therefore, under section 28, only to be exercised by an Executive Officer.²⁶²

2. Statutes Requiring the Governor to Choose His Appointees from Persons Nominated by the Legislature Violate the Separation of Powers

Another question raised in *L.R.C. v. Brown* was whether the General Assembly can require the Governor to choose his appointees from a small list of nominees prescribed by the Speaker or the President Pro Tempore (or any other member of the General Assembly).²⁶³ The Court held that the constitutional infirmity in this bill is the same as in the bills purporting to empower the Speaker and President Pro Tempore to make the

the General Assembly could appoint "temporary" agents to perform a particular task, to serve without term and without pay and whose functions cease when the purpose of such appointment was accomplished.

Id.

²⁶¹ See 664 S.W.2d at 913. See also notes 197-99 *supra* and accompanying text for a discussion of *Sibert*.

²⁶² Under *Rouse v. Johnson, Brown v. Barkley* and *Ex parte Auditor of Public Accounts*, the executive power of appointment can be conferred on other elected constitutional Executive Officers. At what point would that infringe upon the Governor's "supreme executive power" under § 69?

²⁶³ See 664 S.W.2d at 920.

actual appointments.²⁶⁴ The executive branch must be able to choose its own subordinates to discharge its duty to faithfully execute the law.²⁶⁵

If the power of appointment is intrinsically executive, the legislature may not so restrict the field from which the executive may choose the appointee that it amounts to a legislative appointment.²⁶⁶ The statutes involved in *L.R.C. v. Brown* attempted to limit the Governor's power of appointment to nominees chosen by members of the General Assembly.²⁶⁷ This indirect method of conferring the executive power of appointment upon legislators was held invalid for the same reasons as were the statutes purporting to permit the Speaker and President Pro Tempore to actually make appointments.²⁶⁸

3. Statutes Empowering the L.R.C. to Exercise the Power of Advice and Consent Regarding Executive Appointments Are Unconstitutional

Statutes giving the L.R.C. or an interim committee the power of advice and consent over the Governor's appointments to the Public Service Commission and the Kentucky Tobacco Research Board constituted the final encroachment upon the executive power of appointment.²⁶⁹ Perhaps because it does not have an Appointments Clause, Kentucky's Constitution does not have an Advice and Consent Clause.²⁷⁰ But that was not the issue in

²⁶⁴ See *id.* at 923.

²⁶⁵ *Id.* at 924. *Accord* *Myers v. United States*, 272 U.S. 52; *Bradner v. Hammond*, 553 P.2d 1, 6-7 (Alaska 1976).

²⁶⁶ *Mow Sun Wong v. Hampton*, 435 F. Supp. 37, 41 n.6 (N.D. Cal. 1977) (“[Q]ualifications prescribed by Congress [may] not amount to a ‘legislative designation’ of the appointee. . . .”), *aff’d sub nom.* *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

²⁶⁷ 664 S.W.2d at 923.

²⁶⁸ *Id.* Subsequent to the Court's denial of the petition for rehearing, the L.R.C. asserted that the portion of the Court's opinion stating that the Governor may make appointments “without limitation by the General Assembly” required repeal of statutes relating to such matters as the partisan or gender membership ratios of boards and commissions. However, that issue had been disposed of in *Elrod v. Willis*, 203 S.W.2d 18 (Ky. 1947), and was never an issue in *L.R.C. v. Brown*.

²⁶⁹ See KRS § 248.510(a)(b) (1981); KRS § 278.050(1) (Cum. Supp. 1984).

²⁷⁰ The Court did, however, uphold a statute requiring Senate approval of appointments in *Sewell v. Bennett*, 220 S.W. 517. See note 251 *supra* for a discussion of *Sewell*.

L.R.C. v. Brown. The infirmity in these statutes was that whatever power of advice and consent may be exercised by the General Assembly when in session, that power may not be delegated to an interim committee to be exercised after expiration of the constitutional, sixty-day limit on legislative sessions.²⁷¹

4. *Section 28 Prohibits Legislators from Serving on Executive Boards*

Even under an elastic version of the separation of powers, the power to execute laws must be kept separate from the power to enact laws. This concept is embodied in section 28 of the Kentucky Constitution which provides that "[n]o person . . . being [a member of one branch of government], shall exercise any power properly belonging to either of the others." Thus, it is clear that section 28 prohibits a legislator from sitting as a member of a board or agency within the executive department.²⁷² A Kentucky case directly on point is *Meagher v. Howell*,²⁷³ in which the Court held that a state Senator's acceptance of appointment as State Banking Commissioner caused the Senator to have immediately vacated his Senate seat by operation of law.²⁷⁴

Kentucky is not unique in adhering to this view. Indeed, the great weight of authority holds that statutes permitting legislators to be members of executive agencies are void for violating the constitutional principle of separation of powers.²⁷⁵

The L.R.C. nevertheless contended that the statutes were

²⁷¹ See 664 S.W.2d at 921, 924 (While the trial court held that it was improper for the General Assembly to delegate the power of advice and consent to the L.R.C., the Supreme Court merely declared the statute invalid.).

²⁷² Responding to a petition for rehearing, the Court modified its opinion to divide the invalidated statutes into two categories. Those statutes providing for appointment of Executive Officers by the legislative branch were held to create valid offices which must constitutionally be filled by the executive branch. Those statutes creating executive offices filled ex officio by legislators were held to have created unconstitutional offices. *L.R.C. v. Brown*, 664 S.W.2d at 924.

²⁷³ 188 S.W. 373 (1916).

²⁷⁴ *Id.* at 374.

²⁷⁵ See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Greer v. State*, 212 S.E.2d 836 (Ga. 1975); *Book v. State Office Bldg. Comm'n*, 149 N.E.2d 273 (Ind. 1958); *People v. Tremaine*, 168 N.E. 817 (N.Y. 1929); *State ex rel. Wallace v. Bone*, 286 S.E.2d 79 (N.C. 1982); *State ex rel. State Bldg. Comm'n v. Bailey*, 150 S.E.2d 449 (W. Va. 1966).

valid as a mere exercise of legislative oversight through minority membership on executive boards and commissions.²⁷⁶ The Court had little difficulty dismissing this argument and invalidating those statutes making certain legislators *ex officio* members of executive boards and agencies.²⁷⁷

C. *The Legislative Veto of Administrative Regulations*

Perhaps the most sweeping power conferred upon the L.R.C. by the 1982 General Assembly was the power to veto administrative regulations.²⁷⁸ Prior to 1982, the L.R.C. merely reviewed and commented upon administrative regulations.²⁷⁹ The new legislation gave the L.R.C. the power to grant or withhold legal effect from any administrative regulations promulgated by the executive branch when the General Assembly was not in session.²⁸⁰ Thus, these statutes embodied the so-called "legislative veto of administrative regulations" that Congress and some state legislatures have experimented with in recent years. Significantly, *every* decided case involving the validity of such statutes has declared them unconstitutional.²⁸¹

The L.R.C. attempted to evade the holdings in these cases by belittling the Kentucky procedure. The L.R.C. noted that the review and comment provisions of the bill had been in effect

²⁷⁶ See Brief for Appellants, *supra* note 110, at 34. The L.R.C.'s reliance on *State ex rel. Fatzer v. Kansas Turnpike*, 273 P.2d 198 (Kan. 1954), was misplaced. The Kansas Constitution contains no express separation of powers provision. See *id.* at 206; *State ex rel. Schneider v. Bennett*, 547 P.2d at 790.

²⁷⁷ See 664 S.W.2d at 924.

²⁷⁸ See KRS § 13.088 (repealed by Acts of 1984, ch. 417,36, effective Apr. 13, 1984). The statute had a nonseverability clause which provided that, if the power of the L.R.C. to veto administrative regulations were to be declared invalid, the executive department would have no power whatsoever to promulgate administrative regulations. See KRS § 13.092(3). See also text accompanying note 301 *infra*.

²⁷⁹ See KRS §§ 13.080-.125 (repealed by Acts of 1984, ch. 417, § 36, effective Apr. 13, 1984).

²⁸⁰ See KRS § 13.092(1) (repealed by Acts of 1984, ch. 417, § 36, effective Apr. 13, 1984).

²⁸¹ See *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc), *aff'd*, 103 S. Ct. 3556 (1983); *Consumer Energy Council v. Federal Energy Regulatory Comm'n*, 673 F.2d 425 (D.C. Cir. 1982); *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769; *Opinion of the Justices*, 431 A.2d 783; *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981).

since 1980 and inaccurately asserted that the only substantive change enacted in 1982 was that which prevented the executive department from issuing emergency regulations when the L.R.C. vetoed a proposed regulation.²⁸² Obviously, however, that change was critical. Under preexisting law, the L.R.C.'s objections were merely precatory and did not have force of law.²⁸³ Agencies could still implement the desired regulations by simply labeling them emergency regulations.²⁸⁴ Thus, the change wrought by the 1982 bill was the attempt to give legal effect to the L.R.C.'s disapproval of administrative regulations. This change violated the Constitution because it amounted to exercising the lawmaking power in the interim after adjournment by less than all the members of the General Assembly.²⁸⁵

The L.R.C. also asserted that the 1982 bill did not really permit the L.R.C. to veto administrative regulations, but rather only permitted it to suspend the legal effect of the regulation until the General Assembly re-convened.²⁸⁶ The L.R.C. steadfastly contended that there was a difference of constitutional dimension between vetoing administrative regulations—which the General Assembly can do by joint resolution—and merely suspending their legal effect.²⁸⁷ However, when the L.R.C. suspends the effectiveness of a regulation, it deprives the regulation of force of law. This action is both an improper encroachment into the power of the executive branch to issue regulations and an impermissible exercise of the lawmaking power after adjournment of the General Assembly.²⁸⁸

²⁸² See Brief for Appellants, *supra* note 110, at 54-55.

²⁸³ See 664 S.W.2d at 918.

²⁸⁴ See KRS § 13.087(4) (repealed by Acts of 1984, ch. 417, § 36, effective Apr. 13, 1984).

²⁸⁵ See notes 216-22 *supra* and accompanying text. See also 664 S.W.2d at 918-19 (scheme of legislative or L.R.C. review as enacted is an encroachment into the power of the executive branch).

²⁸⁶ Brief for Appellants, *supra* note 110, at 57.

²⁸⁷ *Id.* The L.R.C. relied upon Opinion of the Justices, 431 A.2d 783. The precise holding in that advisory opinion was that a New Hampshire statute was an unconstitutional violation of the concept of bicameralism because it vested the veto power in a legislative committee. See 431 A.2d at 789. The New Hampshire Court did suggest that the legislature investigate the Wisconsin procedure of suspending a regulation's effectiveness. See *id.* However, the Wisconsin procedure had already been ruled unconstitutional because suspending regulations constitutes lawmaking by an interim committee. See 1974 Wisc. Op. Att'y Gen. 159.

²⁸⁸ 664 S.W.2d at 918-19 n.12.

The Court found that these statutes did "have the effect of creating a legislative veto of the actions of the executive branch."²⁸⁹ Whatever power the General Assembly, while in session, may have to veto an administrative regulation, it is constitutionally impermissible for the General Assembly to attempt to delegate that lawmaking power to a committee, such as the L.R.C., to be exercised in the interim after adjournment.²⁹⁰ In addition to noncompliance with the Enactment and Presentment Clauses, the Kentucky bill was a delegation of legislative power to a small group (in violation of the Bicameral Clause) to be exercised in the interims between legislative sessions (in violation of the Adjournment Clause).²⁹¹ The L.R.C. attempted to rationalize its veto power over administrative regulations by contending that it could veto a proposed regulation only if it did not comply with the legislative intent of the statute being implemented by the regulation.²⁹² There are a number of fallacies in this argument.

First and foremost, it overestimates human nature to believe that legislators ignore current political forces when they "judicially review" proposed regulations.²⁹³ Legislators will not limit themselves to objective evidence of an earlier legislative intention, but "will inevitably" work out a present intention—a decision based on what is presently politically desirable or acceptable.²⁹⁴ This, of course, is the essence of the lawmaking power. The legislative process is by design "political" in the sense that it works by compromise responsive to the popular will, but the faithful execution of the laws is supposed to be a

²⁸⁹ *Id.* at 918.

²⁹⁰ See notes 216-22 *supra* and accompanying text. See also 664 S.W.2d at 918-19.

²⁹¹ See KY. CONST. §§ 46, 56, 88. See also *State ex rel. Barker v. Manchin*, 279 S.E.2d at 635-36 (legislative committee veto is unconstitutional vesting of legislative power in the hands of a few).

The Court rejected the L.R.C.'s contention that L.R.C. oversight was necessary to prevent the executive branch from exceeding its authority and to preserve the balance of power between the legislative and executive branches. See 664 S.W.2d at 919.

²⁹² See Brief for Appellants, *supra* note 110, at 59-60; 664 S.W.2d at 919 & n.14 (anyone may form an opinion as to whether an action is legal or not, but not to the point of vetoing executive action). See also KRS § 13.087(4) (repealed by Acts of 1984, ch. 417, § 36, effective Apr. 13, 1984).

²⁹³ See 279 S.E.2d at 632 n.5; Schubert, *Legislative Adjudication of Administrative Legislation*, 7 J. PUB. LAW 134, 157-58 (1958).

²⁹⁴ See 673 F.2d at 478.

rational response to previously established policy.²⁹⁵

Second, the long-standing rule in Kentucky is that the power to determine whether an administrative regulation is invalid as exceeding the scope or intent of the underlying statute is a judicial power.²⁹⁶ By giving the L.R.C. the power to determine whether administrative regulations comply with legislative intent, the General Assembly was attempting to confer upon its leadership (who ex officio comprise the L.R.C.) an inherently judicial power. However, under sections 27 and 28 of the Kentucky Constitution, the legislative branch may not exercise any judicial powers other than those expressly conferred upon it by specific provisions of the Constitution.²⁹⁷ Accordingly, the Court held the statute unconstitutional for delegating to members of the General Assembly an inherently judicial power.²⁹⁸

Third, L.R.C. review of proposed regulations for conformity with legislative intent also violates the doctrine of separation of powers by seriously encroaching upon the judiciary's ability to discharge *its* constitutional function of reviewing administrative regulations.²⁹⁹ For example, when the courts are determining whether an administrative regulation is valid, they often look to legislative intent. Under the scheme prescribed by KRS 13.087(4), however, the courts would also be required to look at the L.R.C.'s intervening review and approval of the regulation. This could become a special problem where the regulation was implementing a statute enacted decades before the regulation was promulgated. When the L.R.C.'s interpretation differed from the court's, what

²⁹⁵ See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1419 (1976-77). After studying how the Congressional veto had actually been implemented, the authors concluded:

[I]n all cases congressional review was primarily based on policy. The reason is not hard to divine: the traditional and constitutional role of Congress is the formulation and alteration of policy. . . . Members of Congress are unaccustomed, and the institution is ill-equipped, to make a restrained and judicious examination of a rule's subservience to statutory purpose.

Id.

²⁹⁶ See 664 S.W.2d at 919.

²⁹⁷ For example, the Constitution specifically confers judicial powers on the legislative branch in KY. CONST. §§ 67 and 109.

²⁹⁸ 664 S.W.2d at 919.

²⁹⁹ See *id.*

would the court have done? If the L.R.C. had approved the regulation, would the court have been precluded from invalidating it?³⁰⁰ Thus, injecting the L.R.C. into the process of judicial review was not only a usurpation of judicial power by legislators, but also an encroachment upon the judicial power which has been exclusively vested in the Court of Justice by the Constitution.

Once the Supreme Court invalidated the legislative veto of administrative regulations, it became necessary to decide the validity of the draconian nonseverability clause included in the statute. This clause provided that, if the L.R.C. could not veto proposed regulations, then the executive department would thereafter be prohibited from issuing any regulations pursuant to any other statute.³⁰¹

The nonseverability provision raised questions that go to the heart of modern administrative law. The doctrine of delegation of legislative power to administrative agencies has generally fallen into disuse and disrepute. In fact, it has been disavowed in Kentucky.³⁰² By enacting this provision, however, the General Assembly advanced the constitutional and political argument that, because administrative agencies have only those powers delegated to them by the legislature, the legislature may withdraw those powers, including the power to issue administrative regulations.

The Court resolved this fundamental question when it invalidated the nonseverability clause. The Court held that, when the legislature has enacted a statute, it becomes the constitutional duty of the Governor and his subordinates to "faithfully execute" that law.³⁰³ It is often necessary to issue regulations in

³⁰⁰ Cf. 634 F.2d at 430-32. This problem is compounded when one considers the well-settled rule that the testimony of legislators after enactment of a statute is not admissible in court on the issue of legislative intent. See, e.g., *Epstein v. Resor*, 296 F. Supp. 214, 216 (N.D. Cal. 1968), *aff'd*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970); *Decker v. Russell*, 357 S.W.2d 886 (Ky. 1962); *Wheeler v. Board of Comm'rs*, 53 S.W.2d 740, 742 (Ky. 1932).

³⁰¹ See KRS § 13.092(3) (repealed by Acts of 1984, ch. 417, § 36, effective Apr. 13, 1984).

³⁰² See *Butler v. United Cerebral Palsy*, 352 S.W.2d 203 (Ky. 1961). *But see Miller v. Covington Dev. Auth.*, 539 S.W.2d 1 (Ky. 1976).

³⁰³ See 664 S.W.2d at 919.

order to faithfully execute the law. Administrative regulations inform the public of the interpretation placed on the statutes by the enforcement officials " 'so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance.' " ³⁰⁴ Statutory enactments often have ambiguities which must be clarified in the enforcement process. Indeed, "[t]he chief function of executive agencies is to implement statutes through the adoption of coherent regulatory schemes." ³⁰⁵ Thus, the issuance of administrative regulations is a necessary incident to the constitutional duty to faithfully execute the law, and it therefore cannot be totally abrogated by the legislature. ³⁰⁶

The cornerstone of administrative law is that the legislature must make policy decisions when enacting statutes so that the executive department is doing nothing more than faithfully executing the law when it issues a regulation. If the legislature enacts a statute conferring standardless discretion on an administrative agency, it is the statute (not just the regulation) that is invalid as an unlawful delegation of legislative power. ³⁰⁷ Similarly, any regulation that exceeds the scope of the statutes being implemented is unlawful because it exceeds the duty to execute the law and amounts to a seizure of legislative power by the executive branch. ³⁰⁸ Although it is true that without statutes there is nothing for the executive branch to execute, the power to execute arises from section 81 of the Kentucky Constitution and not from any particular statute. ³⁰⁹

This is not to contend that the executive branch has unbridled power to issue regulations. There are many statutes that are self-executing and others that can be implemented without regula-

³⁰⁴ 448 A.2d at 443 (quoting *Boller Beverages Inc. v. Davis*, 183 A.2d 64 (N.J. 1962)).

³⁰⁵ *Id.*

³⁰⁶ *Cf. Burton v. Mayer*, 118 S.W.2d 161 (Ky. 1928) (Court has inherent power to promulgate judicial rules of practice).

³⁰⁷ 539 S.W.2d at 1. The Supreme Court adopted this position in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), but later limited *Schechter* to its facts. *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947).

³⁰⁸ 664 S.W.2d at 919. *See generally* *Preston v. Clements*, 232 S.W.2d 85, 88 (Ky. 1950) (proper delegation to agency).

³⁰⁹ 664 S.W.2d at 919.

tions. Furthermore, future General Assemblies can restrict the power to issue regulations by amending the underlying statutes. However, there are some statutes that cannot properly be executed without statements by the executive branch clarifying its enforcement policy. Whether these announcements are called interpretive bulletins, rules, regulations, or whatever, it is unconstitutional for the General Assembly to totally prohibit the executive branch from issuing them.³¹⁰

D. The Power of the Purse

It is an axiom of American government that the legislature holds the purse strings. The federal and most state constitutions, for example, require that the budget originate in the House of Representatives, the arm of government most representative of the populace.³¹¹ This is traditionally viewed as the means by which the representatives of the people hold their most powerful check and balance upon the executive branch. Therefore, this is the area in which Kentucky's sixty-day limitation upon the legislature's biennial sessions had perhaps its greatest political impact.

The sixty-day limitation afforded the Governor the opportunity to withhold presentation and enactment of the budget until late in the session.³¹² This strategy gave the Governor a monopoly upon budgetary information so that his critics would not be well armed to oppose his proposal. Withholding the

³¹⁰ *Id.* at 919-20. The Court stated:

The statute in question not only impliedly reorganizes the executive duties of the Governor, but also attempts to usurp these powers. Having failed at the first part, it further attempts to restrict the ability of the Governor to carry out his sworn duties. The General Assembly, by enacting the clause, has restricted the power of the Governor to carry out his duties. . . .

The restriction placed on the executive by KRS 13.092(3) effectively and unconstitutionally limits and interferes with the Governor's mandated duties.

Id. at 920. See also *Kenton Water Co. v. City of Covington*, 161 S.W. 988, 992 (Ky. 1913) (legislature may not accomplish by a condition that which is excluded from its power). See generally Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1959-60).

³¹¹ See, e.g., U.S. CONST. art. I, § 7, cl. 2; KY. CONST. § 47.

³¹² See KY. CONST. §§ 46, 56, 88.

budget until the end of the session also functioned as a powerful logrolling tool, as legislators bargained for the inclusion of their pet projects in the budget. The reformation of the budgetary process was perhaps the most politically important aspect of the drive towards legislative parity that culminated in the 1982 General Assembly.

The 1982 General Assembly enacted several changes in the budgetary process, many of which were not contested by Governor Brown and his Secretary of Finance and Administration, Robert Warren.³¹³ For example, the Governor did not oppose the requirement that the budget be presented on the tenth legislative day.³¹⁴ There were, however, several budgetary enactments of the 1982 General Assembly which were impleaded in the litigation,³¹⁵ and this is the one area of the case in which the legislature prevailed on almost all of the issues.

The 1982 Budget Bill³¹⁶ gave the L.R.C., rather than the Governor, the power to promulgate the budget instructions used by all executive agencies in preparing the Governor's proposed budget.³¹⁷ It also required the budget to be presented as a joint resolution, rather than as a bill,³¹⁸ and provided that the budget resolution could not implicitly repeal any provisions of the Kentucky Revised Statutes.³¹⁹ The bill also contained provisions requiring the Governor's proposed budget, as well as the budget enacted by the General Assembly, to specify how the respective branches would cope with revenue shortfalls during the interims between sessions of the legislature.³²⁰

A related issue involved block grants. With the federal government's shift from grant-in-aid programs targeted by subject matter to block grants, state legislatures became increasingly

³¹³ Mr. Warren had served as Deputy Auditor of Public Accounts under George Atkins and had participated directly in the efforts of the so-called "Black Sheep" to open the last budget proposed by Governor Julian Carroll. Mr. Warren favored many of the reforms enacted by the 1982 General Assembly.

³¹⁴ See KRS § 48.100(1) (Cum. Supp. 1984).

³¹⁵ See Brief for Appellants, *supra* note 110, at 36 for a list of statutes impleaded.

³¹⁶ See Act of Apr. 12, 1982, ch. 450, §§ 1-30, 1982 Ky. Acts 1568 (codified at KRS chapter 48 (1983)).

³¹⁷ See KRS § 48.040 (Cum. Supp. 1984).

³¹⁸ See KRS § 48.300 (Cum. Supp. 1984).

³¹⁹ See KRS § 48.130 (Cum. Supp. 1984).

³²⁰ See *id.*

interested in subjecting the block grant revenues to the power of appropriation. The 1982 General Assembly tried to do this by requiring that “[n]o state administering agency shall submit any block grant application to a federal administering agency unless approved by the [L.R.C.]”³²¹ The act also provided that, if the court invalidated the provision requiring L.R.C. approval of the expenditure of block grant monies, then no block grant monies could be expended until the next session of the General Assembly.³²²

In *L.R.C. v. Brown*, the Court acknowledged the legislature’s preeminence in budgetary matters, while invalidating some of the statutes as an infringement upon the Governor’s constitutional obligation to “faithfully execute” the budget.³²³

1. *Managing Revenue Shortfalls in the Interims Between Legislative Sessions*

The Governor’s ability to spend surplus revenues during the interims between sessions of the legislature, or to determine budget cuts in the event of a revenue shortfall, has been a traditional source of political power to the Governor and, consequently, a source of considerable irritation to legislators. Nevertheless, this power had withstood challenges in the courts because the General Assembly had delegated the power to the Governor by statute.³²⁴

The governorship of John Y. Brown, Jr. was one of deficits, not surpluses. During the first biennium of his administration he was required to make severe cuts in the budget enacted by the legislature. This situation, together with the general wave of legislation asserting legislative independence, produced a new statute prescribing how revenue shortfalls would be handled.³²⁵

The executive branch argued that these statutes were uncon-

³²¹ See KRS § 45.3511(2) (Cum. Supp. 1984).

³²² See KRS § 49.359 (Cum. Supp. 1984). See also 664 S.W.2d at 928-29.

³²³ See 664 S.W.2d at 919-20. It is well-settled that the administration of a budget act, after its enactment, is an executive function which cannot be delegated to an interim legislative committee. See, e.g., *Anderson v. Lamm*, 579 P.2d 620 (Colo. 1978); *State ex rel. Schneider v. Bennett*, 547 P.2d 786 (Kan. 1976); *In re Opinion of the Justices*, 295 S.E.2d 589 (N.C. 1982).

³²⁴ See, e.g., *Hopkins v. Ford*, 534 S.W.2d 792 (Ky. 1976).

³²⁵ See KRS §§ 48.040, .130, .400, .600 (1983) (Cum. Supp. 1984).

stitutional because they permitted the L.R.C. to determine whether budget cuts proposed by the Governor could be implemented.³²⁶ The Court simply disagreed with that reading of the statute. The Court held that requiring the executive branch to implement a legislatively enacted spending reduction plan for revenue shortfalls of less than 5 percent is not an intrusion into the constitutional powers of the executive branch.³²⁷ The Court also construed the statute as not permitting the L.R.C. to veto actions by the Governor pertaining to the executive budget in revenue shortfalls exceeding five percent, but only requiring the Governor to report those actions to the L.R.C. Thus, the statute was narrowly construed to avoid the constitutional question.

The revenue shortfall issues were the only issues in this case having a financial impact upon the judicial branch, and it is interesting to note the Court's disposition of those issues. For example, the Court was careful to emphasize, albeit subtly, that revenue shortfalls are dealt with separately and specifically by the head of each branch of government.³²⁸ In other words, no longer can the Governor reduce the budget of the Court of Justice in the event of a revenue shortfall; only the Chief Justice has that right.³²⁹

The impact upon the judiciary may also explain its curious treatment of KRS section 48.600. The language of that statute

³²⁶ See Brief for Appellees, *supra* note 93, at 98-101.

³²⁷ See *id.* at 925-27. The executive branch had also contended that KRS §§ 48.130 and 48.500 permitted the L.R.C., in the interims between sessions of the legislature, to veto decisions of the executive branch implementing the budget. See Brief for Appellees, *supra* note 93, at 103-05. The Supreme Court narrowly construed the statutes as limiting the L.R.C. to oversight functions. In upholding the statutes, the Court said:

If the [L.R.C.] disagrees with [any] branch's interpretation [of the appropriations act], that branch may not implement its plan *unless* and *until*: (1) its interpretation is amended to conform to that of the [L.R.C.], or (2) the branch notifies the [L.R.C.] of its intention not to agree with the [L.R.C.] and explains its view for noncompliance. When the branch complies with either of the conditions, it may proceed with its own interpretation.

664 S.W.2d at 927 (emphasis in original).

³²⁸ See 664 S.W.2d at 927.

³²⁹ *Id.* One might envision that even if the statutes upheld by the Court in *L.R.C. v. Brown* had been repealed, the Court would have relied upon *Ex parte Auditor of Public Accounts* to hold as a matter of constitutional law that this result is required. See notes 127-43 *supra* and accompanying text.

as enacted and codified makes it applicable to a “projected deficit . . . of less than five percent (5%).”³³⁰ There is no provision in the statute for revenue shortfalls exceeding five percent. Many observers thought this meant that if the shortfall exceeded five percent, the Governor would be required to call a special session of the legislature to cope with the problem. Nonetheless, the Court’s original slip opinion said: “KRS 48.600 provides for the situation when revenue shortfalls exceed 5% of the estimates.”³³¹ In their Response to the Petition for Rehearing, attorneys for the executive branch pointed out this seeming inconsistency to the Court.³³² The Court’s response was twofold. It added a footnote which cites KRS section 48.130, a statute which also applies to revenue shortfalls of “not more than 5%.”³³³ Viewing KRS sections 48.130 and 48.600 as being in apparent conflict with each other, the Court—in a novel use of grammatical signals to resolve an issue of statutory constructions—added the word “sic” to its quotation from KRS 48.600, thereby making the statute applicable to revenue shortfalls exceeding five percent.³³⁴ This resolution of the seeming conflict in the statutes comports with the Court’s preferences for the allocation of power among the three branches. It permits the Chief Justice, rather than the Governor, to allocate reductions in the budget of the Court of Justice, and it obviates the necessity of a special session of the legislature.

2. *The Budget Must Be a Bill, Not a Joint Resolution*

The new legislation also required that the budget bill be a joint resolution.³³⁵ Furthermore, it provided that the budget resolution could not implicitly repeal any statutory provision.³³⁶ The obvious problem is that, should the General Assembly inadvertently overlook some obscure statute that was inconsistent

³³⁰ See KRS § 48.600(1) (Cum. Supp. 1984) (emphasis added).

³³¹ L.R.C. v. Brown, 664 S.W.2d 907 Slip op. at 40.

³³² Appellees’ Response to Petition for Rehearing at 9, L.R.C. v. Brown, 664 S.W.2d 907 (Ky. 1984).

³³³ See 664 S.W.2d at 925 n.24.

³³⁴ *Id.*

³³⁵ See KRS § 48.300 (Cum. Supp. 1984).

³³⁶ See KRS § 48.310 (Cum. Supp. 1984).

with the funding level prescribed in the budget resolution, the inconsistent statute would not be impliedly repealed.

The Court also held that the Constitution requires that the budget take the form of a bill.³³⁷ The Kentucky Constitution requires the budget to be enacted by "a bill" which the Governor may veto line-by-line.³³⁸

3. *Encompassing Federal Block Grants into the Budgetmaking Process*

The 1982 block grant bill conferred upon the L.R.C. final authority for approval of block grant applications: "No state administering agency shall submit any block grant application to a federal administering agency unless approved by the legislative research commission. . . ."³³⁹ The Court invalidated this provision for two reasons.³⁴⁰ First, "[t]he preparation and adop-

³³⁷ See 664 S.W.2d at 928.

³³⁸ KY. CONST. §§ 47, 88. Concurrent resolutions, in Kentucky, must be enacted as statutes and presented to the Governor for veto. KY. CONST. § 89.

³³⁹ See KRS § 45.3511(2) (Cum. Cupp. 1984).

³⁴⁰ The Court's holding made it unnecessary to respond to two L.R.C. arguments. One of the L.R.C.'s arguments in support of this bill was that federal law required this procedure. See Brief for Appellants, *supra* note 110, at 44. However, federal law neither authorizes nor requires legislative veto of block grant applications. See 42 U.S.C. §§ 9901-12 (1982). While it does require citizen participation via "public hearings" conducted by a legislative committee, see 42 U.S.C. § 9904(b), there is a substantial distinction between "public hearings" and "legislative hearings." Legislative hearings envision a decision-making and information gathering process by the legislators, whereas public hearings envision a public forum for citizen participation, without any requirement of legislative decision-making following the hearing. Both the legislative history and regulations implementing the relevant federal statutes demonstrate that Congress was concerned with participation by the public, not with a veto by state legislators. See 47 Fed. Reg. 29, 474-75 (1982). See also 1981 U.S. CODE CONG. & AD. NEWS 893.

The L.R.C. also argued that block grant funds are really state funds and therefore must be appropriated by the General Assembly. See Brief for Appellants, *supra* note 110, at 44. There is a split in authority as to whether federal grants are state funds subject to legislative power of appropriation or federal funds to be administered by a state's executive branch. Compare *Shapp v. Sloan*, 391 A.2d 595 (Pa. 1978) (federal funds subject to General Assembly's power to make appropriations) and *Opinion of the Justices*, 381 A.2d 1204 with *Tribe v. Arizona Dept. of Adm'n*, 528 P.2d 623 (Ariz. 1974) (legislature lacks authority); *MacManus v. Love*, 499 P.2d 609 (Colo. 1979) (legislature could create a health planning and development agency to appropriate federal monies); *Opinion of the Justices*, 378 N.E.2d 433 (Mass. 1978) (legislature may not appropriate money received in trust from the federal government); and *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974) (legislature lacks authority).

tion of a budget is a *legislative* matter and the General Assembly may not delegate this law making power to the L.R.C.³⁴¹ Second, the General Assembly may not circumvent the Adjournment Clause by attempting to “legislate through its agent, the [LRC]” during the interims between legislative sessions.³⁴² By holding that the L.R.C. may not appropriate block grants, the Court had to determine the validity of the nonseverability clause of that bill, which provided: “If any other section of [this Act] is declared unconstitutional, any other statute to the contrary notwithstanding, no block grant money received from the United States government shall be spent or allocated unless appropriated by the general assembly in regular or special session.”³⁴³

The trial court had invalidated this provision as an unconstitutional condition because, in practical terms, Kentucky’s receipt of millions in federal funds between the 1982 and 1984 sessions of the General Assembly would have been jeopardized if the state government had spent this money illegally.³⁴⁴ Constitutionally, however, the provision was valid as an exercise of legislative “responsibility for the preparation and adoption of the state budget.”³⁴⁵

The Supreme Court was able to moot the practical problem by waiting until the 1984 session convened to issue its opinion.³⁴⁶ The legislature could then respond to the problems created when the Court upheld the nonseverability provision.³⁴⁷ The result is that block grant monies, along with all other revenues, are now estimated and appropriated in the biennial budget.³⁴⁸

E. Executive Reorganizations

Prior to 1982, the Governor was empowered by statute to

³⁴¹ 664 S.W.2d at 928-29. This holding comports with the holdings in the only other reported decisions on the issue. See Advisory Opinion *In re Separation of Powers*, 295 S.E.2d 589 (N.C. 1982); *State ex rel. McLeod v. McInnis*, 295 S.E.2d 633 (S.C. 1982).

³⁴² 664 S.W.2d at 928-29.

³⁴³ KRS § 45.359 (Cum. Supp. 1984).

³⁴⁴ *L.R.C. v. Brown*, 664 S.W.2d 907 *Opinion and Judgment* at 14.

³⁴⁵ See 664 S.W.2d at 930.

³⁴⁶ Oral argument was held in March, 1983 and the opinion was rendered January 19, 1984, a few days after the 1984 General Assembly convened.

³⁴⁷ See 664 S.W.2d at 930.

³⁴⁸ KRS § 45.305 (Cum. Supp. 1984).

reorganize the executive department, with certain statutory exceptions.³⁴⁹ The L.R.C. was permitted to comment upon interim reorganizations, but its comments did not have the force of law.³⁵⁰ However, if the Governor's reorganization was not approved by the next General Assembly, it became inoperative.³⁵¹

This procedure was altered by the 1982 General Assembly. Under (new) KRS section 12.028(2), the Governor's temporary reorganization plan was required to be "approved by the [L.R.C.]" before it could go into effect.³⁵² The Supreme Court correctly held that, as with the veto of regulations, this statute purported to give the L.R.C.'s veto the same force of law as that of the General Assembly in regular session.³⁵³

The L.R.C. sought to justify this exercise of lawmaking power by asserting that an L.R.C. veto "does not constitute a legislative act since [the L.R.C. does] not affirmatively take any action, [but] merely *react[s]* to action initiated by the Governor."³⁵⁴ However, absent the provisions of that statute, an executive order reorganizing the executive branch would have legal effect the instant it was promulgated by the Governor. Thus, regardless of the label affixed to the L.R.C.'s action under the bill, the L.R.C.'s ability to refuse to approve a reorganization would have prevented executive branch action and would have had the force of law. However, a group of legislators may not give force of law to its action without complying with all constitutional provisions for the enactment of a statute.³⁵⁵

Furthermore, *Brown v. Barkley* leaves no doubt that, in Kentucky, reorganization is an executive power.³⁵⁶ Thus, once the General Assembly determines that the power to reorganize state government during the interims between legislative sessions

³⁴⁹ See *L.R.C. v. Brown*, 664 S.W.2d at 930. See also *Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1982) (Statute does not authorize Governor to transfer certain functions, personnel, and funds from Dep't of Agriculture to newly created Energy and Agriculture Dep't.).

³⁵⁰ 664 S.W.2d at 930.

³⁵¹ *Id.*

³⁵² See KRS § 12.028(2)(4) (Cum. Supp. 1984).

³⁵³ See 664 S.W.2d at 930.

³⁵⁴ Brief for Appellants, *supra* note 110, at 54 (emphasis in original).

³⁵⁵ See, e.g., *Consumer Energy Council v. Federal Energy Regulatory Comm'n*, 673 F.2d at 465-68. See also *General Assembly v. Byrne*, 448 A.2d 438.

³⁵⁶ See 628 S.W.2d at 622.

must exist and enacts an enabling statute, *Brown v. Barkley* makes it clear that the exercise of that power constitutes an executive function.³⁵⁷ The L.R.C. cannot exercise executive functions.³⁵⁸

In sum, the Governor has no inherent power to reorganize government absent an enabling statute.³⁵⁹ Accordingly, executive orders effecting reorganizations can, by statute, be rendered inoperative if not approved in the next session of the General Assembly.³⁶⁰ However, the legislature cannot condition the Governor's reorganization power upon approval by the L.R.C.³⁶¹ Consequently, the Court invalidated that portion of KRS section 12.028(2) that vested the L.R.C. with power to veto executive reorganizations.³⁶² The remainder of the reorganization statute continues in force.

CONCLUSION: IN PRAISE OF *L.R.C. v. Brown*

No decision of the Kentucky Supreme Court prior to *L.R.C. v. Brown* involved as many historically significant constitutional issues. The Court's resolution of those issues produced an opinion of historic magnitude, not merely because it disposed of so many significant issues, but because it disposed of them in an extremely well-crafted opinion which convincingly explains the correctness of the Court's decision.

³⁵⁷ See 664 S.W.2d at 930.

³⁵⁸ See *id.*

³⁵⁹ See *id.* at 931.

³⁶⁰ *Id.* at 930-31.

³⁶¹ *Id.*

³⁶² See *id.* at 930.

