Louisiana Administrative Law: A Practitioner's Primer

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I. INTRODUCTION

In 1974, according to the Public Affairs Research Council of Louisiana, one of the state's most "significant defects" was its administrative structure. The Council found the Louisiana administrative structure "weakened by the multiplicity of separate agencies and by the fragmentation of authority among numerous... commissions which enjoy special constitutional protection." Over thirty years later, the perennial debate about the structure of Louisiana's administrative set-up, the creation of the Division of...
Administrative Law, and the allocation of a limited set of powers between branches of the government and administrative agencies indicates that many may still hold such a critique. A cursory review of the Louisiana Legislature website indicates the existence of over 350 various boards and commissions, covering a wide range of topics including highway safety, seafood promotion and marketing, the eradication of Formosan termites and boll weevils (two separate boards), and barber examinations. This Comment seeks to shed some light on this continuing debate. To do so, it is necessary to understand some fundamental principles of Louisiana administrative law. While a primer of this sort certainly cannot be exhaustive, the authors have sought to reveal some of the most litigated and contentious issues in Louisiana administrative law. Throughout the Comment are spotlights on current problems that arise during litigation over the scope of the power of administrative agencies. Additionally, the authors make references to further commentary about state administrative law, and in particular, Louisiana administrative law.

Part II of this Comment addresses constitutional issues that have arisen in Louisiana courts concerning administrative agencies, particularly conflicts over separation of powers and the jurisdiction of agencies vis-à-vis the district and appellate courts of the state. Part III examines the two main functions of administrative agencies: (1) to adjudicate, ad hoc, issues arising between an agency and particular members of its regulated population, and (2) to promulgate rules of general applicability to that regulated population. In addition, there is a spotlight on a unique situation in which rulemaking and adjudication collide (without much guidance from the courts): issues involving the many, many, licensing boards of the state. Part IV examines the function and operation of judicial review and deference to agency actions. Part V offers brief concluding remarks. As the 2008 Louisiana Law Review Symposium demonstrates, the jury is still out on whether the rise of the administrative state has given Louisiana "good government." But, more important than the

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3. The complete list of Louisiana boards and commissions is available on the legislature's website at http://www.legis.state.la.us/boards.htm (last visited April 2, 2008).
actual decision on the "good government" question, is the dialogue, which the authors and the Volume 68 Louisiana Law Review hope will lead to developments in the law.

II. CONSTITUTIONAL ISSUES IN LOUISIANA ADMINISTRATIVE LAW

A. Separation of Powers

Article II of the Louisiana Constitution divides the power of the state government into "three separate branches: legislative, executive and judicial." Additionally, it declares that "no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." Administrative bodies such as boards and commissions thus raise constitutional separation of powers issues as they often grant appointees of the executive branch the authority to fill in the details of legislative policy.

1. Delegation of Legislative Power to Administrative Bodies

The propriety of delegation of authority to an administrative agency depends on whether such authority is purely legislative, which violates constitutional separation of powers, or merely ministerial administrative authority, which does not. The Louisiana Supreme Court has articulated a three-part test to determine whether a statute unconstitutionally delegates legislative authority. Under the Schwegmann test,

4. LA. CONST. art. II, § 1.
5. LA. CONST. art. II, § 2. The language of article II, section 2 and the principle that "unlike the federal constitution, a state constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its legislature" from State v. Miller, 857 So. 2d 423, 427 (La. 2003) (citing Meredith v. Ieyoub, 700 So. 2d 478, 481 (La. 1997) combine to derive the principle "that legislative power, conferred under constitutional provisions, cannot be delegated by the Legislature either to the people or to any other body of authority." Miller, 857 So. 2d at 427.
6. Schwegmann Bros. Giant Super Markets v. McCrory, 112 So. 2d 606, 613 (La. 1959) ("So long as the regulation or action of the official or board authorized by statute does not in effect determine what the law shall be, or involve the exercise of primary and independent discretion, but only determines within prescribed limits some fact upon which the law by its own terms operates, such regulation is administrative and not legislative in its nature.").
a delegation to an administrative agency is valid if the enabling statute (1) contains a clear expression of legislative policy, (2) prescribes sufficient standards to guide the agency in the execution of that policy, and (3) is accompanied by adequate procedural safeguards to protect against abuse of discretion by the agency.\(^7\)

This three-prong test applies regardless of whether the legislature has delegated authority related to civil or criminal actions. In *State v. All Pro Paint & Body Shop, Inc.*, defendants in a criminal case challenged their convictions on the grounds that the statutory and regulatory scheme under which they were charged constituted an unconstitutional delegation to the executive branch of the legislature's sole authority to define felonies.\(^8\)

In that case, the owner and operator of a paint and body shop paid a scrap dealer to dispose of several containers of paint thinner.\(^9\) The scrap dealer then disposed of the containers in two uninhabited houses.\(^10\) The owner of the houses later found the containers and reported them to the police.\(^11\)

The Louisiana Hazardous Waste Control Law makes it a criminal offense, *inter alia*, to transport, store, or dispose of materials defined as hazardous waste.\(^12\) While the legislature provided a definition of what constitutes "hazardous waste,"\(^13\) it vested the authority to develop objective criteria for determining the identifying characteristics of such waste to the Department of

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8. Id. at 711 ("[T]he determination and definition of acts which are punishable as crimes are purely legislative functions . . . ." (quoting State v. Taylor, 479 So. 2d 339, 341 (La. 1985))).
9. Id. at 708.
10. Id.
11. Id.
13. All Pro Paint, 639 So. 2d at 708 ("'Hazardous Waste' means any waste, or combination of wastes, which because of its quantity, concentration, physical, or chemical characteristics may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness, or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. Such definition shall be applied only to those wastes identified and designated as such by the department, consistent with applicable federal laws and regulations." (emphasis added) (citing § 30:2173(2))).
Environmental Quality (DEQ). Under such authority, the DEQ determined that one category of hazardous waste includes ignitable materials that have a flashpoint of less than 140 degrees Fahrenheit, as tests revealed the liquids at issue did. At trial, the defendants were convicted, fined, and placed on three years supervised probation.

On appeal, the Louisiana First Circuit Court of Appeal incorrectly concluded that the three-prong test did not apply to felony cases and reversed the convictions. On review, however, the Louisiana Supreme Court applied the Schwegmann test and found the delegation to be within the permits of the constitutional separation of powers requirements because the authority delegated to the DEQ to determine objective criteria “prescribe[d] sufficient standards to guide [the] DEQ’s enforcement of legislative will.”

Another criminal case, State v. Miller, highlights that proper delegations of legislative authority must contain an express enabling statute granting authority to an administrative body or official. Additionally, it provides an example of how a completely unfettered delegation can violate the second prong of the Schwegmann test.

In Miller, authorities indicted an inmate and two guards of the Jefferson Parish Correctional Center for offenses related to the discovery of a cell phone in the common area of the prison. Specifically, the defendants were alleged to have violated Louisiana Revised Statutes section 14:402(E), which prohibits both possession and introduction of several items on the premises of

14. Id. at 708 n.2 ("The HWCL authorizes the DEQ to 'develop, consistent with federal regulations, objective criteria for identifying characteristics of hazardous wastes and for listing the hazardous wastes which shall be subject to the provisions of this chapter.'" (quoting § 30:2186(A))).
15. Id. at 708.
16. Id. at 710.
17. Id. at 713.
18. Id. at 714.
20. Id. at 425 ("After obtaining a search warrant for the information stored in the phone and a subpoena duces tecum for the cellular phone company’s records, the investigating officers determined that the phone contained numbers directly linked to the defendant Corey Miller . . . . It was further discovered that Sheriff’s Deputies Latasha Witherspoon and Emanuel Stevenson were instrumental in placing the cellular phone in Miller’s possession.").
prisons.\textsuperscript{21} In addition to a specifically enumerated list of prohibited items, the last sentence of the statute read, "the definition of contraband is not restricted to those articles set forth hereinabove."\textsuperscript{22} Under this catchall provision, the sheriff determined that the cell phone constituted contraband.\textsuperscript{23}

The state argued that the legislature implicitly delegated the authority to define what constitutes contraband to the governing authority of the jail.\textsuperscript{24} The Louisiana Supreme Court, however, reasoned that "for the executive to have the power to perform legislative functions, \textit{there must first be an express delegation} either in the constitution itself or by the Legislature in a statute."\textsuperscript{25} Finding no such express delegation to the sheriff in the catchall provision, the court found that "classifying the cellular phone and charger as contraband under La. R.S. 14:402(E) constitutes an unconstitutional usurpation of legislative authority and a violation of the separation of powers doctrine."\textsuperscript{26}

Although the court could have stopped with its determination that the statute lacked express delegation, it further stated that even if the statute did contain a delegation of authority to the sheriff, that delegation would be improper under both the plain language of the constitution and the \textit{Schwegmann} test.\textsuperscript{27} First, the constitution prohibits local governments from defining and punishing felony

\begin{thebibliography}{99}
\bibitem{21} \textit{Id.} at 426.
\bibitem{22} \textit{Id.} (quoting § 14:402(E)).
\bibitem{23} \textit{Id.} at 430.
\bibitem{24} \textit{Id.} at 428.
\bibitem{25} \textit{Id.} (emphasis added). The court based its reasoning on principles of state constitutional law as well as an historical examination of Louisiana's separation of powers provision in article II, section 2. With respect to the latter, the court reasoned:
\begin{quote}
Article II, § 2 of the Louisiana Constitution of 1921 provided that "no one [branch], nor any person or collection of persons holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." In the revision of the constitution in 1974, the constitutional convention substituted the phrase "except as otherwise provided in this constitution" for the phrase "hereinafter expressly directed or permitted." The revised provision, however, was intended to retain the substantive effect of the previous provision, which mandated an express delegation of authority to another branch of government.
\end{quote}
\textit{Id.} (citations omitted).
\bibitem{26} \textit{Id.} at 430.
\bibitem{27} \textit{Id.}
A delegation to the sheriff to define contraband would grant an executive of local government authority to do just that in contravention of the constitution. Additionally, the delegation would be unconstitutional because "the provision provides absolutely no standards by which the power delegated is to be exercised and renders the delegation completely unfettered." Thus, the constitutionality of such delegation would fail under the second prong of the *Schwegmann* test.

Some commentators propose that rather than determining whether a legislative delegation contains sufficient standards under which an administrative body properly can make rules, a more appropriate determination is whether the enabling statutes contain sufficient procedural safeguards against arbitrary agency action. The Louisiana Supreme Court flirted with this idea in *State v. Broom*, but ultimately concluded that, at least in the context of criminal sanctions, the Louisiana Constitution's separation of powers provisions demand that the legislature provide sufficient standards so that an agency does not create or define offenses.

In *Broom*, the state charged the defendant truck driver, who allegedly left his explosive-transporting pickup truck unattended in a parking lot while ordering food in a restaurant, with violating an agency-promulgated rule stating that "the operator of a conveyance transporting explosives shall not leave such vehicle unattended except while actually making deliveries." The court considered

28. *Id.* at 431 (quoting LA. CONST. art. VI, § 9(A)(1) ("No local government subdivision shall define and provide for the punishment of a felony . . . ").

29. *Id.*

30. See *State v. Broom*, 439 So. 2d 357, 362 n.7 (La. 1983) ("Professor Kenneth Culp Davis, in his Administrative Law Treatise, points out that courts have often upheld delegations under the 'adequate guiding standards' test where there were virtually no expressed standards at all. For example, delegations have been upheld which were guided only by the following standards: 'just and reasonable' 'public interest' 'public convenience, interest, or necessity' 'unfair methods of competition' [and] 'reasonable variations.' He states that this result was imperative in view of the complexity of today's governmental undertakings. He concludes that a modern regulatory agency would be an impossibility if power could not be delegated with vague or non-explicit standards. Thus, the complexity of the issues has caused a need for the regulatory agencies, which the courts have recognized by upholding the delegations to the agencies. However, they do so by giving lip service to the adequate guiding standards test when in fact no such guiding standards exist." (citations omitted)).

31. *Id.* at 369.

the regulatory scheme under which the state charged the defendant. The legislature delegated to the Secretary of Public Safety the authority to "make, promulgate and enforce regulations setting forth minimum general standards covering manufacture, transportation (including loading and unloading), use, sale, handling and storage of explosives." The legislature delegated the authority to the Secretary of Public Safety with the standard that the regulations were to be both "reasonably necessary" to protect the "health, welfare and safety of the public," as well as in "substantial conformity with the published rules and standards of the Institute of Makers of explosives." The defendant argued that the state prosecuted him under rules that resulted from the unconstitutional delegation of legislative authority to the Secretary of Public Safety.

On first hearing, the court concluded that the prosecution under the Secretary of Public Safety's rules did not violate the constitution's separation of powers provisions. In reaching its conclusion, the court relied heavily on the fact that the legislature provided significant "procedural safeguards" against arbitrary administrative action by expressly stating that the secretary's promulgation of rules must be in accordance with the Louisiana Administrative Procedures Act (LAPA). Specifically, the court found that the provisions of Louisiana Revised Statutes sections 49:968 through 49:970, which provide for oversight of the rulemaking process by the legislature and the governor, rendered

33. Broom, 439 So. 2d at 358.
35. Id.
37. Id.
38. Id. The court summarized the procedural safeguards of the LAPA as follows:

The statute provides that prior to the adoption, amendment, or repeal of any regulations the agency must submit a report relative to the proposed rule change to the appropriate standing committees of the legislature. The Department of Public Safety is to report to the House Committee on the Judiciary and the Senate Committee on the Judiciary. La. R.S. 49:968(B)(13). The standing committees then conduct hearings on all proposed rule changes through oversight committees (a majority of the standing committee) with a special view toward determining whether the proposed rule is in conformity with the intent of the enabling legislation, and considering the advisability of the rule change. La. R.S. 49:968(D).
the defendant’s argument of unconstitutional delegation to be invalid.\textsuperscript{39}

On rehearing, however, the court rejected the notion that the procedural safeguards contained in the LAPA could save an otherwise unconstitutional delegation of legislative power.\textsuperscript{40} It specifically found the enabling statute at issue to be vague and without sufficient standards to direct the Secretary of Public Safety, particularly in light of the grave criminal penalties associated with violating the Secretary’s orders.\textsuperscript{41} Thus, where the legislature does not provide sufficient standards under which an agency can adopt rules, courts render its enabling statutes to violate the Louisiana Constitution’s separation of powers provisions.\textsuperscript{42}

2. Encroachment on the Powers of Another Branch

Article II’s prohibition on any one branch exercising powers constitutionally delegated to another branch creates additional separation of powers issues.\textsuperscript{43} Because the constitution grants the governor both the general power to appoint officials to boards and commissions as well as the power to execute the laws of the state,\textsuperscript{44} constitutional issues arise when the legislature delegates power to administrative boards and grants itself appointment power. Additionally, the constitution vests authority over the state’s fiscal affairs in the legislature, a power that raises separation of powers issues when administrative bodies and

\textsuperscript{39} Id.
\textsuperscript{40} Id. at 367.
\textsuperscript{41} Id. ("The legislature not only delegated to the director of public safety the authority to create felonies, it has relinquished most of the supervision over that authority to its subcommittees and the governor. . . . LSA-R.S. 40:1471.18 provides grave penalties for undefined felonies and is itself vague and ambiguous.")
\textsuperscript{42} Id.
\textsuperscript{43} LA. CONST. art. II, § 2.
\textsuperscript{44} LA. CONST. art. IV, §5(H) & (A).
officials spend state money in manners not expressly approved by the legislature.\footnote{See LA. CONST. art. III.}

\textit{a. Legislative Encroachment on Executive Power}

One example of alleged legislative encroachment on executive powers arose in the context of appointments to administrative boards and commissions. In \textit{State Board of Ethics v. Green}, the Board of Ethics for Elected Officials brought a civil action against defendants whom it alleged illegally made loans to a political campaign.\footnote{\textit{Id.} at 1034. Under article IV, section 5(A) of the Louisiana Constitution, the governor is the chief executive officer of the state, charged with seeing \textit{that laws are faithfully executed}. LA. CONST. art. IV, § 5(A).} While fighting the charges on the merits, the defendants argued that because the legislature granted itself the power to appoint members to the ethics board, the right of the board to bring civil actions against alleged violators interfered with the governor’s constitutional power to execute the state’s laws.\footnote{\textit{Green}, 545 So. 2d at 1037 (discussing the state’s argument vis-à-vis the Louisiana Constitution article IV, section 5(H)(1)). Article IV of the Louisiana Constitution provides, \textit{The governor shall appoint, subject to confirmation by the Senate, the head of each department in the executive branch whose election or appointment is not provided by this constitution and the members of each board and commission in the executive branch whose election or appointment is not provided by this constitution or by law.} LA. CONST. art. IV, §5(H)(1) (emphasis added).}

In \textit{Green}, the state argued that the constitution grants the governor power to appoint members of boards and commissions only where the law does not otherwise provide for appointment process.\footnote{\textit{Green}, 545 So. 2d at 1037 (discussing the state’s argument vis-à-vis the Louisiana Constitution article IV, section 5(H)(1)). Article IV of the Louisiana Constitution provides, \textit{The governor shall appoint, subject to confirmation by the Senate, the head of each department in the executive branch whose election or appointment is not provided by this constitution and the members of each board and commission in the executive branch whose election or appointment is not provided by this constitution or by law.} LA. CONST. art. IV, §5(H)(1) (emphasis added).} Positing that the legislature acted within its power to prescribe the appointment process for the Ethics Board, the state argued that the board was acting purely as an executive body when it instituted the civil action and thus did not violate constitutional separation of powers.\footnote{\textit{Green}, 545 So. 2d at 1037.}
On rehearing, the court agreed with the state, holding that the Legislature’s appointment of the majority of the board’s members did “not violate separation of powers principles as long as (1) the appointment of the members by the Legislature was constitutionally valid and (2) the appointees are not subject to such significant legislative control that the Legislature can be deemed to be performing executive functions through its control of the members of the board in the executive branch.” The court found that the language of Louisiana Constitution article IV, section 5, satisfied the first prong. With respect to the second, the court found that the appointment procedures imposed “significant restraints on legislative control over the actions of the Board,” and therefore did not violate the separation of powers provisions of the constitution.

Another example of legislative encroachment on the executive arose when the legislature enacted a statute declaring that a conviction of a felony constituted cause for mandatory termination of classified state employees. In AFSCME, Council # 17 v. State, the Louisiana Department of Health and Hospitals fired a classified employee after his conviction for aggravated battery. While the convicted employee’s appeal of the termination was pending before the State Civil Service Commission, he sought a declaratory

50. On original hearing, the Louisiana Supreme Court found the State’s argument to be without merit. Id. at 1031. Although the court found the legislatively-determined appointment procedures to be constitutionally valid, it held that

the issue in this case is not the power of the legislature to enact legislation providing for the appointment by the legislature itself of members of boards and commissions in the executive branch, but is the power of the legislature to vest such legislatively-appointed boards and commissions with the authority to exercise the exclusive executive function of enforcing the law by filing suit against alleged violators of the law.

Id. at 1037. Thus, the board could not institute civil proceedings against alleged violators of the Campaign Finance Disclosure Act. Id.

52. Id. at 624–25. See also supra note 48 for the language of article IV, § 5(H)(1).

53. Green, 566 So. 2d at 624–25.

54. Id. at 625–26. Specifically, the court noted that the legislation provided that “members of the Board are appointed for staggered six-year terms and can be removed only for cause. [Additionally,] [l]egislators, employees of the Legislature, and other public servants cannot be appointed.” Id.

55. 789 So. 2d 1263, 1265 (La. 2001).
judgment that, by statutorily defining cause for termination of all state employees, the legislature usurped the constitutional power of the Civil Service Commission to define the cause for disciplining a classified employee.\(^5\)

The court began its analysis by noting that the framers of the constitution incorporated the State Civil Service Commission within its provisions "to protect public career employees from political discrimination by eliminating the 'spoils' system."\(^5\) Article X of the Louisiana Constitution grants the Civil Service Commission the rulemaking "powers for the administration and regulation of . . . classified service, including the power to adopt rules for regulating employment" and "personnel matters."\(^5\) Under this rulemaking authority, the Civil Service Commission "define[d] cause for termination as 'conduct which impairs the efficient or orderly operation of the public service.'"\(^5\) The Department of Health and Hospitals, however, urged that the statute was a proper exercise of the legislature's power "to define and punish criminal conduct."\(^5\)

The court held that while the compulsory termination of classified state employees who have been judged guilty of a felony is a reasonable policy, such determination can come constitutionally only from the Civil Service Commission.\(^5\) Despite the fact that the legislature enjoys the general power to provide punishment for crimes, its attempt to condemn classified state employees to termination upon their felony convictions "encroach[ed] upon the constitutional authority of the Civil Service Commission" to define cause for termination.\(^5\)

\(^{56}\) Id. at 1265–66.

\(^{57}\) Id. at 1268 (citing Bannister v. Dep't of Streets, 666 So. 2d 641, 645 (La. 1996)).

\(^{58}\) LA. CONST. art. X, § 10(A)(1).

\(^{59}\) AFSCME, 789 So. 2d at 1268 (quoting Civil Service Rule 1.5.2.01).

\(^{60}\) Id. at 1266.

\(^{61}\) Id. at 1268.

\(^{62}\) Id.
b. Administrative / Executive Encroachment on Legislative Power

Louisiana courts have found encroachment on legislative power where executive departments have spent money in ways not expressly authorized by law. In Meredith v. Ieyoub, the Louisiana Supreme Court dealt with a situation in which the Attorney General contracted with a private law firm to "investigate and prosecute state environmental damage claims on a contingency fee basis" without any express authority to do so under the constitution or by statute. In that case, the Louisiana Independent Oil & Gas Association and some of its individual members collectively sought both judicial declaration that the agreement was in violation of the constitution as well as an injunction prohibiting the private law firm from acting under the terms of the contract.

Specifically, the plaintiffs alleged that the scheme violated the longstanding principle that "the possession, control, administration, and disposition of the property, funds, and revenues of the state, are matters appertaining exclusively to the legislative department." The Attorney General, on the other hand, argued that his constitutional authority to institute civil proceedings and to appoint assistant attorneys included the right to hire private firms to work on a contingency fee basis. Finding no

63. 700 So. 2d 478, 479–83 (La. 1997).
64. Id. at 479–80. In addition to the argument that the Attorney General lacked express authority to enter into the contract, the plaintiffs alleged that the statute specifically prohibited the contingency fee arrangement. Id. Louisiana Revised Statutes section 30:2205, the plaintiffs averred, provides that all sums recovered through recovery of judgments, penalties, and settlements arising out of environmental cases be paid into the state treasury for funding of the Hazardous Waste Site Cleanup Fund. Id. On this point and in addition to its finding that the contingency fee contract with the private law firm violated the constitution, the court agreed the plaintiffs. Id. It wrote, "[t]he language of [section 30:2205] is clear and unambiguous: 'all sums recovered through judgments’ means all sums, not all sums remaining after the Attorney General has paid his contingency fee lawyers." Id. at 482.
65. Meredith, 700 So. 2d at 481 (citing State v. Duhe, 9 So. 2d 517, 521 (1942)).
66. Id. at 482. Article IV, section 8 of the Louisiana Constitution provides: As necessary for the assertion or protection of any right or interest of the state, the attorney generally shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by
authority for the Attorney General to enter into a contingency fee arrangement with private law firms in his constitutional grant of power, the court held that "the power over finances must be expressly granted by the constitution to another branch of government or else that power remains with the Legislature." 67

c. Executive Encroachment on Executive Power

While the 1974 Constitution provides for three coequal branches of state government, it separates the executive branch into the offices of governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, and commissioner of elections (each operating as independent executive entities). 68 As the constitution provides for powers and duties of each of these offices, Louisiana's disjunctive executive at least raises the possibility of one officer of the executive branch encroaching on the constitutional power of another officer of the same branch.

Although the case law surrounding this issue is not well developed, the constitutional question did arise in the context of a controversy as to whether the governor or attorney general would represent the state in the desegregation cases of 1991. 69 The constitution declares that the governor is the "chief executive officer of the state . . . and shall see that the laws are faithfully executed." 70 On the other hand, the constitution defines the attorney general as the "chief legal officer of the state" and gives him the power to instigate or intervene in ongoing cases "[a]s necessary for the assertion or protection of any right or interest of the state." 71 The issue arose in federal court, and the United States Fifth Circuit Court of Appeals certified the question to the

the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or . . . (b) to supersede any attorney representing the state in any civil or criminal action."

LA. CONST. art. IV, § 8.
67. Meredith, 700 So. 2d at 482.
68. See Art. IV, §§ 5–12.
70. Art. IV, § 5.
71. Art. IV, § 8.
Louisiana Supreme Court. Before the court decided the issue, however, the Fifth Circuit withdrew the question and the Louisiana Supreme Court never issued a ruling. Older case law suggests that the attorney general exists regardless of the governor's approval. However, no case law examines the issue after the adoption of the 1974 Constitution.

B. Jurisdiction

Further constitutional tensions arise in the context of the scope of original jurisdiction. Article V of the Louisiana Constitution "vests the district courts with 'original jurisdiction of all civil ... matters,' and 'exclusive original jurisdiction of ... cases involving ... the state ... as a defendant.'" In the context of administrative law, issues arise under this constitutional provision when the legislature attempts to confer jurisdiction to bodies other than the district courts where the constitution does not expressly provide for such jurisdiction.

For example, in In re American Waste & Pollution Control v. State, the Louisiana Supreme Court considered the consolidation of four cases in which the DEQ either denied the issuance of waste disposal and water discharge permits or issued "such permits with conditions." Particularly, the court had to decide the constitutionality of the statute which provided that the Louisiana First Circuit Court of Appeal should hear appeals of the DEQ decisions.

By the language of Louisiana Revised Statutes section 30:2024, the legislature decreed that appeals of final decisions or orders of the DEQ in permit or enforcement actions should be brought to the Louisiana First Circuit Court of Appeal. After consolidating these cases, however, the first circuit repudiated its...
own jurisdiction to review the decisions of the DEQ.\textsuperscript{79} Specifically, the court found that judicial review of DEQ decisions is an "exercise of original jurisdiction" and that DEQ decisions are "civil matters."\textsuperscript{80} As such, the court held the statutory language granting it jurisdiction to review DEQ decisions failed the constitutional muster of article V.\textsuperscript{81} The Louisiana Supreme Court, however, found that judicial review of agency decisions constituted an exercise of appellate jurisdiction, not original jurisdiction.\textsuperscript{82} Additionally, it found that DEQ decisions were not "civil matters" and that in the context of administrative hearings, the DEQ and the state could not be considered "defendants" in matters arising from an application process before a regulatory agency.\textsuperscript{83}

\textsuperscript{79} Id. at 368–69.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 369–70. In reaching this conclusion, the court distinguished Bowen v. Doyal, 253 So. 2d 200 (1971), an earlier case which held that "district courts exercise original jurisdiction when they review determinations of administrative agencies," by noting that the 1921 Constitution (in force at the time of Bowen) endowed district courts with only original jurisdiction, except in limited cases of reviewing decisions of courts of limited jurisdiction and justice of the peace courts. The American Waste court reasoned that it was thus a matter of necessity for the Bowen court to characterize the review of agency decisions as an exercise of original jurisdiction, writing:

> Confronted with those provisions in the 1921 Louisiana Constitution, and recognizing, in the absence of any constitutional mandate to the contrary, that the district courts should be permitted to review administrative agency determination, the Bowen court chose to construe what was actually appellate review of agency determinations as "original jurisdiction."

\textsuperscript{83} American Waste, 588 So. 2d at 370. At any rate, the court did leave open the possibility that where the legislature specifically has provided for the article V courts to review agency decisions de novo, such review may be an exercise of original, rather than appellate, jurisdiction. \textit{Id.} For an argument that the American Waste court’s reliance on the 1974 Constitution to characterize its jurisdiction as appellate may have been misplaced, see Marcello, supra note 1, at 224–25 (noting that there is no evidence in the debate transcripts suggesting an "intent to characterize a district court’s review of non-judicial, agency proceedings as an exercise of the district court’s ‘appellate’ jurisdiction").

\textsuperscript{83} American Waste, 588 So. 2d at 373. The court rejected the First Circuit’s argument that Louisiana Constitution article V, section 16(A) required the district court to exercise original jurisdiction of the matter because the state is a defendant. The court reasoned,

> In this type of case, neither party is a "defendant," whether in court or before the DEQ. The appellant and appellee in the reviewing court come to the court of appeal from the first instance tribunal in which they were
The most substantive aspect of *American Waste* is its discussion regarding whether appeals of DEQ decisions constitute civil matters under the meaning of article V. The court revealed that history determines whether administrative rulings are civil matters. The rulings, the court said, are civil matters where the issue that gave rise to the hearing was a traditional civil matter at the adoption of the 1974 constitution and would have been handled by the judicial branch at that time. With respect to the DEQ permit cases at issue, the court found that they were not civil matters "because waste disposal and water discharge permitting did not exist as a traditional civil matter in 1974 and has never been delegated in the first instance to the judicial branch, and because such matters were thereafter constitutionally delegated by the Legislature to the DEQ within the executive branch."

One year prior to adopting the history-based framework of *American Waste*, the Louisiana Supreme Court decided a seminal case in which it invalidated a legislative attempt to divest district courts of jurisdiction. In *Moore v. Roemer*, one of the most well-recognized and oft-cited cases in the realm of Louisiana administrative law, the court addressed the legislature’s attempt to grant the Office of Worker’s Compensation Administration (OWCA) the exclusive original jurisdiction to adjudicate workers’...
compensation claims. Noting that the district courts heard the claims "from [the] inception [of worker's compensation] through the Constitutional Convention of 1974," the court concluded that the claims were civil matters under the meaning of article V. It therefore held the legislature's attempt to "divest the district courts of original jurisdiction over workers' compensation claims" to be unconstitutional. Subsequent to the decision, the legislature proposed a constitutional amendment, approved by the voters, which granted the OWCA original jurisdiction over workers' compensation claims.

In Pope v. State, the Louisiana Supreme Court also found an unconstitutional grant of jurisdiction to an administrative agency. In Pope, the court considered a statute that empowered the Department of Corrections (DOC) to adopt an internal administrative procedure for the handling of tort claims by inmates. The Louisiana Corrections Administrative Remedy Act (CARP) provided, inter alia, that the DOC or sheriff could adopt exclusive "administrative remedy procedure[s] for receiving, hearing, and disposing of complaints and grievances," as well as personal injury and medical malpractice claims brought by inmates of their respective correctional facilities. Although the statute provided that an offender could appeal the decisions in favor of the DOC to the 19th Judicial District Court, it limited the review to oral argument, "based on the record" created in "the administrative remedy proceeding." Moreover, the statute authorized the court to "reverse or modify the decision only for limited reasons enumerated in the statute," such as "arbitrary or capricious behavior, abuse of discretion and manifest error.

88. 567 So. 2d at 77.
89. Id. at 80. The court's reasoning at least in part hinged on the fact that it found worker's compensation claims to be a matter of private law, rather than public law. For a more thorough examination of Moore v. Roemer and particularly the private law distinction, see John Devlin, Louisiana Constitutional Law, 51 LA. L. REV. 295, 313–18 (1990).
90. Moore, 567 So. 2d at 77.
91. 792 So. 2d 713 (La. 2001).
92. Id.
93. Id. at 715–16 (citing LA. REV. STAT. ANN. § 15:1177 (2008)).
94. Id. at 716.
95. Id.
The court in *Pope* concluded without discussion that a tort action is "clearly a civil matter."\(^{96}\) It did, however, back up its conclusion with a nod to the *American Waste* decision, writing, "[m]oreover, the district courts historically have exercised original jurisdiction in tort actions as civil matters, and were doing so when the 1974 Constitution was adopted."\(^{97}\) The court also invoked *American Waste* to note that the statute there at issue was "vastly different from statutes granting original jurisdiction to an administrative agency in tort actions, *even those in which the government is the alleged tortfeasor.*"\(^{98}\) Although the court defined its decision in terms of tort actions being civil matters, it probably could have distinguished *American Waste* better by focusing on the provision of article V, section 16(A) that grants exclusive original jurisdiction to district courts in matters in which the state is a defendant.\(^{99}\)

After this examination of the types of constitutional challenges facing agencies, this Primer considers the primary functions of administrative law and their operation.

### III. PRIMARY FUNCTIONS OF ADMINISTRATIVE LAW

It should not be surprising to find that in Louisiana's discussion of administrative law, statutes of an individual agency vis-à-vis the Louisiana Administrative Procedure Act (LAPA) are construed in accordance with the maxim: the specific controls over the general. In administrative law, the more specific laws are those which govern a particular agency; those specific laws control "over the more general laws of the LAPA or of the Louisiana Code of Civil Procedure."\(^{100}\) This means that unlike the Code of Civil Procedure, which mandates what procedure is required to reach a

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96. *Id.* at 717.

97. *Id.* at 719.

98. *Id.* (emphasis added).

99. The *American Waste* court was able to sidestep this provision by characterizing the parties in that case not as plaintiff and defendant, but as applicant for permit and state regulatory agency. *In re Am. Waste & Pollution Control*, 588 So. 2d 367, 368–69 (La. 1991). In tort actions, it would be difficult to classify the parties as anything other than plaintiff and defendant.

particular result, the LAPA functions in a suppletive manner, "fill[ing] in the gaps" "[w]here agency laws are silent."\textsuperscript{101}

The LAPA generally segregates the primary functions of administrative law into two categories: (1) adjudication, involving litigating the rights and obligations of an individual within a regulated group, and (2) rulemaking, the right of an agency to prescribe rules of conduct or procedure for the regulated group as a whole. However, this cabining of agency actions as either adjudication or rulemaking is subject to critique. Professor Arthur Bonfield noted that "some issues of specific fact that emerge in rulemaking may be only satisfactorily resolved through the use of essentially adjudicatory procedures, and some issues of general fact that emerge in an adjudication should be resolved wholly through the use of rulemaking procedures."\textsuperscript{102} This clash of functions and procedural mechanisms reveals itself further in subpart C of this section, which involves the challenges faced by licensing boards.

\textit{A. Adjudication}

While administrative "courts" consider issues of fact and law and issue decisions and orders, they do not exercise judicial power in the same sense as courts set up by article V of the Louisiana Constitution. The Louisiana Supreme Court has characterized administrative agencies as "governmental hybrid[s that] exercise powers similar to those exercised by all three branches of our government."\textsuperscript{103}

Recognizing the legislatively-created, quasi-judicial, quasi-executive function of administrative agencies, the question arises as to what role agency adjudication plays in the development of Louisiana's administrative law. Prior to 1996, the answer clearly involved an agency policy-making function.\textsuperscript{104} Administrative

\begin{footnotes}
\item[101.] \textit{Id.}
\item[102.] Arthur E. Bonfield, \textit{The Federal APA and State Administrative Law}, 72 VA. L. REV. 297, 309. Bonfield later counters that the distinction may be necessary to cabin the excessive costs involved in invalidating agency actions because of the use of incorrect procedures. \textit{Id.} at 311.
\item[103.] Wooley v. State Farm Fire and Cas. Ins. Co., 893 So. 2d 746 (La. 2005).
\item[104.] For discussion of the issues resulting from Louisiana's adoption of the central panel system, see Jay S. Bybee, \textit{Agency Expertise, ALJ Independence and}
agencies hired their own administrative law judges, who could be hired and fired pursuant to the same civil restrictions as other agency employees and often had a level of expertise in the agency’s field. As issues arose for adjudication, the hearing process provided an impetus for agencies to bring enforcement actions and establish policy.

In 1995 (effective in 1996), however, the legislature began to alter the structure of Louisiana’s administrative law system and lessened the policy-making function of adjudications through two basic reforms. First, the legislature created the Division of Administrative Law (DAL), a central panel of administrative law judges (ALJs). Administrative law judges serve as employees of the Department of State Civil Service and are not subject to supervision by the agencies for which they adjudicate. Indeed, subject to the determination of the Department of Civil Service, they may rotate from one type of agency hearing to another. Second, by amendment in 1999, the legislature decreed that “no agency or official thereof . . . shall be entitled to judicial review of a decision made pursuant to this chapter [by administrative law judges].” Thus, administrative agencies cannot appeal ALJ decisions with which they disagree. Nor can they independently act to circumvent the effect of an ALJ ruling. In its restructuring of the state’s administrative law, the legislature declared that agencies have no authority to override an ALJ’s decision or order, despite the fact that administrative proceedings are sub-judicial.

These legislative changes are a source of great controversy. Proponents of the new structure argue that the independence of

105. Id. at 432–33.
106. Id. at 460–61.
107. See id. at 455–66. See also infra Part III.B.1.
109. See Bybee, supra note 104, at 453.
110. Id. at 433.
111. § 49:992(B)(3); 1999 La. Acts No. 1332.
113. § 49:992(B)(2).
114. See Bybee, supra note 104, at 459–60.
ALJs encourages both better decisions and orders, as well as more public respect for agency rulings.115 Opponents, on the other hand, insist that the new structure leads to a feeble state executive.116 Without commenting here on the virtues of the new system, it is clear that the changes represent a significant shift in the law.

The structural changes, however, do not apply across the board to strip all agencies of the pre-revision power they enjoyed to handle adjudications.117 In its adoption of the DAL central panel system, the legislature explicitly exempted a significant number of agencies from the application of the new structure, effectively allowing them to continue to employ their own administrative law judges.118 Thus, the broad principles of the statutes governing adjudications in 1995 warrant discussion here as they continue to apply to those agencies exempted from the DAL.

Louisiana Revised Statutes section 49:955 et seq. sets forth the principles governing traditional administrative hearings. This section discusses the provisions of those statutes in the following six contexts: (1) the right to hearings and the basic rights afforded to parties subjected to agency hearings; (2) the limited scope of subject matter jurisdiction within adjudications; (3) the duties and responsibilities of the agency, its members, and/or its presiding officers; (4) evidentiary standards; (5) ensuring agency review of the facts and law of a particular case; and (6) reconsideration, review, and rehearing of agency decisions and orders.

To the extent that the analysis of these six aspects of administrative hearings differs for adjudications handled by the DAL, this section notes the differences within the appropriate subsection.

115. See Marcello, supra note 1, at 220. Although the author explicitly resists providing his personal opinion of the creation of the DAL, he offers a brief outline of the proponents of the new system. Id.
116. See Bybee, supra note 104.
117. See § 49:992(D).
118. Specifically, the statute exempts the following boards and agencies from having its adjudicatory jurisdiction given to the DAL: (1) those which federal law provides must consider or render a final order in an adjudication proceeding; the Office of Workers' Compensation; (2) the Office of Insurance Administration; (3) professional and occupational licensing boards; (4) the Department of Agriculture and Forestry; (5) adjudications by the Assistant Secretary of the Office of Conservation; and (6) the Public Service Commission. § 49:992(D)(2)–(8).
1. Right to Hearings

The LAPA, adopted in 1967 and modeled after the 1961 Model State Administrative Procedure Act, affords parties subject to administrative adjudication the right to a hearing as well as notice thereof unless the parties have waived their rights. At hearings held under the statutes of the LAPA, all parties have the right to present evidence on issues of fact and make arguments on issues of law. Findings of fact are only to derive from the evidence and matters officially noticed in the adjudication.

Like trials of civil matters in courts set up by article V of the Louisiana Constitution, informal disposition can resolve disputes (be it by stipulation, settlement, consent order, or default), so long as the law does not provide otherwise.

Not all state agency action, however, brings with it the entitlements of an LAPA hearing. The Act defines "adjudication" as "agency process for the formulation of a decision or order." Moreover, it defines "decision" or "order" as "the final disposition of any agency, in any manner other than rulemaking, required by constitution or statute to be determined on the record [only] after notice and opportunity for an agency hearing." It follows from these definitions that unless an agency conducts a hearing, which by definition necessarily results in a decision or order, it is not adjudication under the LAPA.

Where agency action does
not fall under the LAPA definition of adjudication, the rights associated with an LAPA hearing do not apply.

In Caracci v. Louisiana State Racing Commission, for example, horse owners sought to enjoin racing stewards from further investigating the qualifications of their horse without full due process standards being granted to them. The Court found, however, that the due process protections of the LAPA did not apply to the actions of the racing stewards because such actions "do not fall under the definition of 'adjudication' so as to require application of the [Louisiana] Administrative Procedure Act."

Additionally, in Government Computer Sales, Inc. v. State, the plaintiff, GCSI, was an unsuccessful bidder for a state computer contract and invoked the LAPA to request a hearing before an ALJ to challenge the qualifications of the winning bidder. When the Office of State Purchasing refused to grant the hearing, GCSI again invoked the LAPA to seek judicial review of the refusal of the Office of State Purchasing to grant it a hearing on the merits of the contract. However, the Louisiana First Circuit Court of Appeal noted that the LAPA and the Division of Administrative Law Act "merely set forth the procedures to be followed if a hearing is required by the constitution or statutory authority under which the agency is acting." Finding that GCSI had neither a statutory right to a hearing under the procurement code nor a property right which would trigger a constitutional requirement for a hearing, the first circuit concluded, "[b]ecause disposition of the protest by the Office of State Purchasing does not constitute an 'adjudication' as defined by the [L]APA, the provisions of the Division of Administrative Law Act do not apply and a hearing . . . is not required."

award of the contract to the lowest bidder to the procurement officer of the Office of State Purchasing. Id. at 58.

127. 556 So. 2d 1249 (La. 1990).
128. Id. at 1250.
129. 720 So. 2d at 55.
130. Id.
131. Id. at 56.
132. Id. at 58.
2. Limited Scope of Subject Matter Jurisdiction

The subject matter jurisdiction of administrative hearings is not as plenary as that exercised by the article V courts. In *Albe v. Louisiana Workers’ Compensation Corporation*, for example, the Louisiana Supreme Court struck down the Office of Worker’s Compensation Administration (OWC) determination that the statutory denial of medical treatment to an incarcerated claimant for benefits violated his constitutional due process rights.\(^{133}\)

Citing the “overwhelming weight” of jurisprudential authority, the court held that “[i]n general, administrative agencies lack the power to hold statutory provisions unconstitutional.”\(^{134}\) In its discussion of the case, the court noted that state agencies do not enjoy judicial power, which article V of the Louisiana Constitution vests specifically in the Louisiana Supreme Court, the courts of appeal, and the district courts.\(^{135}\) Judicial review, according to the court, “represents the highest exercise of judicial power . . . . Thus . . . ministerial officers cannot question the constitutionality of the statute under which they operate.”\(^{136}\)

3. Deciding Authority: Agency Members and Presiding Officer; ALJs

The LAPA provides for several duties and responsibilities of the agency or its subordinate presiding officer of administrative proceedings.\(^{137}\) An agency or its presiding officer has the general power to regulate the course of the hearings, including the power to set the time and place for hearings, fix the time for filing briefs, and direct the parties to consider the simplification of the issues.\(^{138}\) The presiding officer also has the power to administer oaths and affirmations.\(^{139}\)

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133. 700 So. 2d 824 (La. 1997).
134. *Id.* at 827.
138. § 49:956(4).
139. *Id.*
Another key function of the agency or its presiding officer is to issue subpoenas in the name of the agency. The subpoenas can require a person to attend and provide testimony at a hearing and compel the production of documentary evidence. Although the agency does not have the power to hold those who refuse to comply with agency-issued subpoenas in contempt, the LAPA does give presiding officers the enforcement mechanism of applying to the court of the district where the disobeying person resides or can be found. Upon the agency's issuance of proper proof, the district judge can then issue an order to enforce the requirements of the agency-issued summons and punish a person for default or disobedience.

The LAPA provides that agency members and presiding officers cannot serve in proceedings in which they are unable to give the parties a fair and impartial hearing. Additionally, the LAPA delineates the procedures by which any party can request the removal of an agency member or presiding officer on the ground of his inability to provide a fair and impartial hearing.

With respect to adjudications handled by the DAL, administrative law judges function as the rough equivalent of the presiding officer. The DAL itself has a hierarchical structure, summarized by the Louisiana Supreme Court as follows:

The DAL shall commence and handle all adjudications in the manner required by the LAPA, that the ALJ shall issue the final decision or order and the agency shall have no authority to override the decision or order, that the governor shall appoint, and the Senate confirm, a director for DAL, who, in turn, shall employ the ALJs and that the

140. § 49:956(5)(a).
141. Id.
142. § 49:956(c).
143. Id.
144. § 49:960(B). This same standard applies to ALJs hearing adjudications under the DAL. § 49:999. In such cases, after a party has requested the disqualification of an administrative law judge, the director "shall promptly determine whether or not to disqualify an administrative law judge based on the request, or alternatively, he may hold a preliminary hearing at least ten calendar days prior to the hearing date for the purpose of receiving evidence relating to the grounds alleged for disqualification." § 49:999(B)(2).
145. § 49:960(B).
146. See § 49:994(D)(3).
current ALJs employed by the various affected agencies shall be transferred to and employed in the DAL.\(^{147}\)

The statutes set forth the requisite qualifications for ALJs\(^{148}\) and additionally vest them with the authority to regulate adjudicatory proceedings, issue decisions and orders, and exercise the above mentioned powers vested in the presiding officers of adjudications.\(^{149}\) The LAPA additionally vests the director with broad administrative power over the DAL.\(^{150}\)

4. Evidentiary Standards

The Louisiana Code of Evidence does not apply to adjudications unless the legislature or the agency requires it for specific proceedings. Section 956 of the LAPA sets forth the rules of evidence in adjudications. Generally, the section provides for a relaxed evidentiary standard that allows agencies to admit evidence "which possesses probative value commonly accepted by

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148. Each administrative law judge employed by the division must be a resident of Louisiana, be licensed to practice law in Louisiana, and have practiced law for at least five years prior to his appointment. § 49:994(A). The LAPA sets forth the same requirements for the director of the DAL. § 495(A). For an in depth look at the Division of Administrative Law through the eyes of its current director, see Ann Wise, The Division of Administrative Law, Louisiana's Independent Administrative Hearings Agency, 68 LA. L. REV. 1169 (2008).
149. § 49:994(D). Additionally, the statute gives the ALJ the power to conduct adjudications or conference by telephone or video conference, so long as the parties do not object. § 49:994(D)(4). Louisiana Revised Statutes section 49:998 also grants administrative law judges the power to conduct prehearing conferences for the purpose of dealing with, \textit{inter alia}, settlement possibilities, stipulations, clarification of issues, objections to proffers of evidence, and schedules for the submission of written briefs. § 49:998. The ALJ may conduct the prehearing conference on his own motion or that of any party. \textit{Id.} Additionally, the ALJ must set the time and place of the prehearing conference, and gives reasonable notice to the parties of the conference. \textit{Id.}
150. The director's responsibilities include, \textit{inter alia}, the organization of the division into appropriate sections, the assignment of administrative law judges, the development and maintenance of a training program for ALJs, the keeping of records, and the supervision of adjudications. § 49:996.
reasonably prudent men in the conduct of their affairs." This standard allows for the admission of hearsay evidence. Additionally, the LAPA expressly delineates situations under which evidence not always admissible in the district courts is acceptable in administrative adjudications. For instance, all documentary evidence offered by the agency may be in the form of copies or excerpts, or by incorporation by reference. Additionally, the Act cites the interests of efficiency to allow for evidence to be received in written form when doing so does not substantially prejudice the parties. Finally, the Act allows for notice of both judicially cognizable facts as well as generally recognized technical or scientific facts within the agency’s specialized knowledge.

The agency, its presiding officer, or any party to a proceeding can depose witnesses and conduct discovery to the extent that such is allowed in civil actions. All such depositions are admissible in the administrative proceedings.

Though the Act relaxes the evidentiary standard applied in courts set up by article V of the Louisiana constitution, certain restrictions nonetheless apply to administrative hearings. First, the statutes compel agencies to recognize the privileges created by law. Additionally, they provide that agencies “may exclude incompetent, irrelevant, immaterial, and repetitious evidence.”

Despite the statutory language that suggests exclusion of incompetent evidence is not compulsory, jurisprudence holds that incompetent evidence is inadmissible in agency hearings.

151. § 49:956(1).
152. See generally Spreadbury v. State, 745 So. 2d 1204, 1208 (La. App. 1st Cir. 1999) (“It is clear that the usual rules of evidence need not apply in administrative hearings, and, thus, hearsay may be admitted.”).
153. § 49:956(2).
154. Id.
155. § 49:956(1).
156. § 49:956(3).
157. § 49:956(6).
158. Id.
159. § 49:956(1).
160. Id.
161. Id.
162. See Superior Bar & Grill v. State, 655 So. 2d 468 (La. App. 1st Cir. 1995) (holding that where that an undercover and alleged underage confidential informant did not testify, her parents did not testify, her birth certificate and
Louisiana Supreme Court has adopted a case-by-case "facts and circumstances" test to determine whether, in the context of administrative hearings, hearsay can be regarded as competent evidence. The formula generally qualifies hearsay as competent "provided that the evidence has some degree of reliability and trustworthiness and is of the type that reasonable persons would rely on."

The jurisprudence is unclear as to whether the residuum rule applies to hearsay evidence in Louisiana agency proceedings. The overarching principle of the residuum rule is that while hearsay evidence generally may be used in administrative hearings, it cannot form the sole basis of the decision resulting from the adjudication. The Louisiana Supreme Court, however, has never held that the residuum rule must apply to direct the outcome of agency adjudications, and the rule has not received universal acceptance within the state's appellate courts. In Germany v. State, for example, the second circuit upheld the Department of Health and Human Resource's admission of out-of-court statements taken from a school bus driver to determine residency issues. The court ruled that "it is... clear from the [L]APA and interpretive jurisprudence that hearsay is admissible in the instant cause in determining the ultimate issue."

Finally, certain documents and records that qualify as "confidential and privileged" under the LAPA are not subject

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165. See Rothbard v. Gerace, 354 So. 2d 225, 226 (La. 4th Cir. 1978) (citing Toliver v. Doyal, 297 So. 2d 476 (La. App. 2d Cir. 1974); Gardere v. Brown, 170 So. 2d 758 (La. App. 1st Cir. 1964)) (discussing the residuum rule). The first circuit noted that many Louisiana intermediate appellate decisions have followed the rule, but ultimately concluded the rule was inapplicable to the case at hand.
166. 493 So. 2d 800 (La. App. 2d Cir. 1986).
167. Id. at 805. Somewhat contradictorily, however, after finding that the hearsay statements were admissible, the court in Germany found that the agency's use of it to deny the plaintiffs welfare compensation was manifestly erroneous because there were "too many other plausible explanations" for the school bus driver picking up the child at the residence in question. Id.
either to being made available at the hearing or to being subpoenaed. In addition to where otherwise specifically exempted by statute, the LAPA limits such exemptions to “private contracts, geological and geophysical information and data, trade secrets and commercial or financial data, which are obtained by an agency through a voluntary agreement between the agency and any person . . . [and] designated as confidential by the parties when obtained.”

To promote obedience to the privileged and confidential provisions of the LAPA, the Act waives the state’s sovereign immunity from suit for damage resulting from improper disclosures.

While there is no significant difference between the evidentiary standards of adjudications handled by agencies and those handled by the DAL, it is worth noting that in the case of the latter, the statutes grant the director of the division the power to “[d]evelop uniform standards, rules of evidence, and procedures . . . to regulate the conduct of adjudications.”

5. Ensuring Agency Review of Evidence and Arguments

Several provisions of the LAPA seek to ensure that an agency considers the evidence and arguments on the record before rendering a decision adverse to a party other than the agency itself. This subsection first discusses the substantive requirements that the LAPA places on agencies to give consideration to individual cases before rendering a final decision or order. It then examines LAPA requirements of what must compile the records of administrative hearings.

169. § 49:956(8)(b). Louisiana Revised Statutes section 956 does allow for certain agencies related to healthcare to make available and use records and documents which otherwise would be deemed confidential or privileged, provided that any medical or patient records are altered to conceal the identity of the patient. § 49:956(8)(d).
170. § 49:956(8)(c).
171. § 49:996(6) (emphasis added).
172. Many of such provisions may be waived by written stipulation. Additionally, the agency may eliminate the requirements in the event that there is no contest. See id. §§ 49:957–58.
173. See infra Part III.A(5)(a).
174. See infra Part III.A(5)(b).
a. Requirements of Agency Review of Facts and Law

In cases where a majority of the decision-rendering officials of the agency have not heard the case or read the record, the decision cannot be made final until the agency does two things. First, it must serve the proposed order on the parties. Along with the proposed order, the agency must also give the adversely affected parties a statement of the factual findings, as well as the reasons for its decision. A person who heard the case or read the entire record must prepare the statement. Second, it must give the adversely affected parties the opportunity to file exceptions, present briefs, and make oral arguments to the decision-rendering members of the agency. The agency must follow the same two steps in cases where someone other than a member of the agency prepares the order.

Additionally, the final decision or order must be in writing or stated in the record. Where statutory language delineates requisite findings of fact for the agency to make an adverse ruling, it must justify its findings of fact with a concise and explicit statement supporting the findings. The agency shall notify parties of its decision or order in person or by mail. Upon request, a copy of the decision or order shall be mailed to each party and his attorney.

Significantly, the LAPA prohibits improper entanglement between the decision-rendering members of the agency and the parties to the adjudication, including those performing investigatory or prosecutorial functions. Specifically, unless notice has been served and all parties have had the opportunity to participate in the discussion, the decision-rendering members cannot communicate with the parties in any direct or indirect

175. § 49:957.
176. Id.
177. Id.
178. Id.
179. Id.
180. Id.
181. § 49:958.
182. Id.
183. Id.
184. Id.
185. See § 49:960(A).
manner.\textsuperscript{186} The court in \textit{Allen v. Louisiana State Board of Dentistry}, for example, overturned the Board’s ten-year suspension of a dentist’s license after finding insufficient separation of functions between the fact finder and the prosecutor.\textsuperscript{187} There, although the Board made the decision as to the question of guilt, the office of the prosecutor drafted the findings of fact.\textsuperscript{188}

In the context of the DAL, the LAPA provides that the director of the DAL shall take certain steps to evaluate the performance of the central panel ALJs.\textsuperscript{189} Specifically, the director is to focus on the three areas of competence, productivity, and demeanor in evaluating the judicial performance of the ALJs.\textsuperscript{190} Although the evaluation is not to include a review of any result from a proceeding heard by the ALJ,\textsuperscript{191} the statutes order the director to take comments from randomly selected litigants and lawyers who have appeared before the particular ALJ under evaluation.\textsuperscript{192}

\textit{b. Composition of the Record}

The LAPA also imposes basic requirements for what must comprise the records of adjudications.\textsuperscript{193} All pleadings and motions must go into the record.\textsuperscript{194} Additionally, the Act stresses that the record must include rulings, decisions, and opinions of the

\textsuperscript{186} \textit{Id.} If such communication is required for the disposition of ex parte matters authorized by law, the communication between the decision-making members and the parties and their representatives is not strictly prohibited as in other cases. \textit{Id.}

\textsuperscript{187} 543 So. 2d 908, 915 (La. 1989).

\textsuperscript{188} \textit{Id.}

\textsuperscript{189} \textsection 49:997.

\textsuperscript{190} \textsection 49:997(B). The statute provides for the evaluation of the three areas of competence, productivity, and demeanor to include consideration of the following: (1) Industry and promptness in adhering to schedules. (2) Tolerance, courtesy, patience, attentiveness, and self-control in dealing with litigants, witnesses, and counsel and in presiding over adjudications. (3) Legal skills and knowledge of the law and new legal developments. (4) Analytical talents and writing abilities. (5) Settlement skills. (6) Quantity, nature, and quality of caseload disposition. (7) Impartiality and conscientiousness.

\textit{Id.}

\textsuperscript{191} \textsection 49:997(D).

\textsuperscript{192} \textsection 49:997(C).

\textsuperscript{193} \textsection 49:955(E).

\textsuperscript{194} \textsection 49:955(E)(1).
presiding officer of the hearing.\(^{195}\) Likewise, the record generally must contain the evidence introduced and considered at the hearing, including a statement of matters officially noticed.\(^{196}\) The agency must insert into the record all offers of proof, objections,\(^ {197}\) proposed findings, and exceptions.\(^ {198}\)

Parties to a proceeding can request that the agency prepare and produce a transcript of the hearing for their review.\(^ {199}\) Normally, the requesting party must pay the cost of the transcript.\(^ {200}\) However, the statute creates an exception in such cases where the governing statute provides that the record be furnished without cost.\(^ {201}\)

### 6. Rehearing

In cases where the agency decision or order is in clear contravention of the law, or where a party discovers new evidence or issues not previously considered, the adjudication may be subject to rehearing, reopening, or reconsideration by the agency.\(^ {202}\) Such action must take place within ten days from the date of the entry of the original order or decision.\(^ {203}\)

Parties must institute such actions for rehearing, reconsideration, or review by setting forth the grounds justifying the action.\(^ {204}\) The ground on which the agency grants the action limits the scope of the hearing.\(^ {205}\)

\(^{195}\) § 49:955(E)(6).

\(^{196}\) § 49:955(E)(2)–(3).

\(^{197}\) § 49:955(E)(4).

\(^{198}\) § 49:955(E)(5).

\(^{199}\) § 49:955(F).

\(^{200}\) Id.

\(^{201}\) Id.

\(^{202}\) § 49:959(A) ("A decision or order in a case of adjudication shall be subject to rehearing, reopening, or reconsideration by the agency, within ten days from the date of its entry. The grounds for such action shall be either that: (1) The decision or order is clearly contrary to the law and the evidence; (2) The party has discovered since the hearing evidence important to the issues which he could not have with due diligence obtained before or during the hearing; (3) There is a showing that issues not previously considered ought to be examined in order properly to dispose of the matter; or (4) There is other good ground for further consideration of the issues and the evidence in the public interest.")

\(^{203}\) Id.

\(^{204}\) § 49:959(B).

\(^{205}\) Id.
B. Rulemaking

“One wonders what would happen in a society in which there were no rules to break. Doubtless everyone would quickly die of boredom.” Susan Howitch, Author

1. Current State of the Function of Rulemaking

For many reasons, such as political import or difficulty in enacting statutory changes through the legislative process, an executive agency may choose to create policy by adopting standards in individual adjudications and then applying those standards consistently to subsequent adjudications. In 1999, (now) Judge Jay S. Bybee remarked that legislative changes to administrative law have “effectively cut off adjudication as a means for agencies to establish policy.” He further predicted that agencies would “adopt more regulations and more specific regulations as a means of cabining ALJs’ discretion.” One of the ways that an agency can limit the discretion of an ALJ is to limit, or eliminate, the ALJ’s ability to find certain facts. For example, in Heckler v. Campbell, the United States Supreme Court found that the Department of Health and Human Services could eliminate the discretion of an ALJ to determine whether a claimant

206. For example, the National Labor Relations Board, operating in the setting of labor-management relations under which judicial review patterns can vary depending on the pro- or anti-union status of a particular area, “hardly ever engages in rulemaking about its regulatory concerns.” Peter L. Strauss et al., Gellhorn and Bye’s Administrative Law 566 (10th ed. 2003). See also Allentown Mack Sales & Serv., Inc. v. Nat’l Labor Relations Bd., 522 U.S. 359, 374 (1998) (finding that the NLRB, “uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field though adjudication rather than rulemaking”).


was considered "disabled" for the purpose of receiving Social Security disability benefits. The claimant argued that the Secretary of Health and Human Services should have made an individualized determination of her ability to participate in a job in the national economy; the Secretary, however, relied on standardized determinations promulgated by rule. Under the regulations, if Campbell could participate in a job in the national economy, she was not disabled; the agency created a medical-vocational matrix to determine the availability and number of jobs available.

The Court found that although the Social Security Act contemplated individual determinations of disability based on hearings, the Secretary could "rely[] on rulemaking to resolve certain classes of issues . . . that do not require case by case consideration." In Heckler, the "class of issues" was the determination of the types and number of jobs available in the national economy, and that it was not necessary to litigate the availability or existence of those jobs in each case. Upholding these regulations took away the power of an individual ALJ to determine whether there was a job in the national economy for any given claimant. Thus, the Court upheld the agency's use of rulemaking to alter the fact-finding power of an ALJ.

Judge Bybee was commenting, of course, on changes made to the LAPA in 1995, which created the DAL central panel system, removing administrative law judges from the purview of particular agencies and placing them in a central office where ALJs rotate

210. Id. at 461–62. The Department of Health and Human Services developed the guidelines after continued critique of the use of vocational experts in individual cases that led to inconsistent results among similarly situated disability applicants. Id. at 461. The ALJ, based on the promulgated medical-vocational guidelines, determined that Campbell was not disabled; this determination was affirmed by the Social Security Appeals Council and the district court reviewing the case. Id. at 463.
211. Id. at 468.
212. Id. at 467.
213. Id. at 468. In Louisiana, courts have followed the principles in Heckler to defer to the Social Security Administration's rules regarding the amount of weight to be given to particular medical testimony. See generally Albert v. Barnhart, No. 03-1166, 2004 WL 385055 (E.D. La. 2004).
between different types of cases. Judge Bybee's concern was one of practical significance given the legislature's mandate that decisions of an ALJ are unappealable by an agency. It was logical to assume that removing policy-making adjudications from the purview of an agency would push agencies more towards policy-making through rulemaking. This likelihood was strengthened by the Louisiana Supreme Court's decision in Wooley v. State Farm, which found that decisions of ALJs, who do not exercise judicial power, are not subject to enforcement, and do not have the force of law.

In 2005, the legislature reacted to Wooley...
by requiring that "[u]pon the issuance of such a final decision or order [issued by the ALJ], the agency or any official thereof shall comply fully with the final order or decision of the administrative law judge."\(^{218}\) In effect, the legislature has required that an agency follow the "non-judicial" mandate of an ALJ, which underlies the Louisiana Supreme Court’s reasoning for upholding the creation of the DAL in the first place.\(^{219}\)

Furthermore, in *Bonvillion v. Department of Insurance*, the Louisiana First Circuit Court of Appeal, relying on the *Wooley* rationale of non-enforcement of ALJ decisions, refused to grant a bail bond applicant’s petition for mandamus (requiring the Insurance Commissioner to renew his license) after an ALJ overruled a decision by the Insurance Commission denying the license renewal.\(^{220}\) The *Bonvillion* decision was rendered on February 16, 2005. Louisiana Acts 2005, No. 204 § 1, requiring that an agency comply fully with the decision or order of an ALJ, was approved by the legislature on June 29, 2005. Had Mr. Bonvillion’s case been pending during the passage of the Act, the court may have reached the opposite result.

*Wooley*, the first circuit, and the legislature together have created the next logical step for review by the Louisiana Supreme Court—if an ALJ’s decision is not enforceable because it is non-judicial, but an agency must, according to the legislature, comply fully with the decision, and a court refuses to issue mandamus relying on *Wooley*, then what effect exactly does the non-enforceable non-judicial decision of an ALJ have? This is especially complicated given that *enforcement* of a regulatory scheme still solidly belongs to the agency. In theory, an ALJ cannot tell an agency that the agency cannot enforce a particular penalty against a person, because enforcement is an executive function. If an ALJ can tell an agency not to enforce a rule against a particular person (say, through a declaratory judgment action, which the court left open as a possibility in *Wooley*), and now the agency "shall comply fully" with the order, then the non-judicial ALJ clearly has encroached on an agency’s executive function.

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220. 906 So. 2d 596 (La. App. 1st Cir. 2005).
2. The Rulemaking Process

Louisiana’s rulemaking process fits (or, rather, sits, somewhat uncomfortably) within the above-mentioned framework. The LAPA procedure for the adoption of rules is set out in Louisiana Revised Statutes sections 49:953 et seq. Rules, in the roughest sense, are the policies and procedures used to run an agency and the requirements that the agency imposes upon anyone whose conduct the agency has the power to regulate. The LAPA requires notice of intent to promulgate a rule and a reasonable opportunity for interested persons to submit comments and possibly appear before the agency if a rule is substantive in nature. However, if the group interested in submitting comments or other argument is (1) at least twenty-five persons, (2) a governmental agency, or (3) a committee of either house of the legislature, the LAPA requires that the right to publicly submit data or make other public comments or arguments be granted. The Louisiana requirement of mandatory public hearings to allow comments in certain substantive instances stands in marked contrast to the federal APA, which allows an agency to decide whether or not all evidence submitted in a hearing will be in written form, even if “formal” rulemaking is required. Unlike

221. § 49:951(6) ("'Rule' means each agency statement, guide, or requirement for conduct or action, exclusive of those regulating only the internal management of the agency and those purporting to adopt, increase, or decrease any fees imposed on the affairs, actions, or persons regulated by the agency, which has general applicability and the effect of implementing or interpreting substantive law or policy, or which prescribes the procedure or practice requirements of the agency. 'Rule' includes, but is not limited to, any provision for fines, prices or penalties, the attainment or loss of preferential status, and the criteria or qualifications for licensure or certification by an agency. A rule may be of general applicability even though it may not apply to the entire state, provided its form is general and it is capable of being applied to every member of an identifiable class. The term includes the amendment or repeal of an existing rule but does not include declaratory rulings or orders or any fees.").

222. § 49:953(A). For a detailed discussion of the timetable for rule promulgation, as well as its uncertainties through continual amendments to the LAPA, see Marcello, supra note 1, at 198–99.


224. 5 U.S.C. § 556(d) (2006) ("In rule making . . . an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."). See also Long Island R.R. Co. v. United States, 318 F. Supp. 490 (D.C.N.Y. 1970) (holding that section 556(d) allowed the Interstate Commerce Commission to proceed with incentive charge hearings for
the federal APA, Louisiana does not draw the same distinction between formal rulemaking—where an agency’s governing statute requires rulemaking to be “on the record after notice and hearing”—and informal “notice and comment” rulemaking. In Louisiana, all rulemaking is accomplished through the “notice and comment” procedure.

Emergency rules are generally exempted from the notice requirement provided that the agency provides a statement of reasons explaining the specific emergency. A broad statement that a rule is necessary to protect the health, welfare, and safety of the public, without more, has been found to be incomplete; emergency promulgation requires a description of the facts and circumstances that justify a conclusion of imminent peril.

The use of the emergency rulemaking procedure in Louisiana is widespread. For example, by the time of the February 2008 Louisiana Law Review Symposium, over thirty emergency rules had been promulgated awaiting codification in the Louisiana Register. Such “imminent peril” has been alleged by the Department of Health and Hospitals, the Department of Public Safety and Corrections, the Department of Revenue, the Department of Social Services, and the Department of Wildlife and Fisheries.
Given that policy-making through individual adjudication has been hamstrung by the legislature and the Louisiana Supreme Court, agencies are now pushed into the position of anticipating a broad range of factual scenarios to arise in any particular agency and attempting to resolve them prospectively through the rulemaking process. Agencies can issue guidance documents, including statements, guides, requirements, circulars, and directives; however, if those documents constitute a rule, they are invalid unless adopted pursuant to the procedures outlined in the LAPA.\textsuperscript{230}

In 1996, the Louisiana First Circuit Court of Appeal found that a letter allegedly "clarifying" the Department of Revenue's position in pending collection suits regarding components of refinery gas was a "rule" subject to the LAPA.\textsuperscript{231} In \textit{Star Enterprise}, the Department of Revenue and Taxation notified three particular oil refineries that it would determine the taxable value of a refinery gas component in a manner different from that previously adopted by the Department and published in the Louisiana Administrative Code.\textsuperscript{232} The court rejected the Department's characterization of the letter as "mere correspondence," given that it was of general applicability to all manufacturers of refinery gas and had the effect of implementing substantive tax law.\textsuperscript{233}

More recently, in 2006, the same court invalidated an "advisory opinion" by the Louisiana State Board of Nursing (LSBN) finding that it is within the scope of practice for a certified registered nurse anesthetist (CRNA) to administer certain

\textsuperscript{230} § 49:962 ("Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders and rulings as to the applicability of any statutory provision or of any rule or order of the agency. Declaratory orders and rulings shall have the same status as agency decisions or orders in adjudicated cases.") \textit{See also} § 49:963(C), (E) (allowing a court to invalidate any rule not promulgated according to the LAPA and paragraph (E)); \textit{Liberty Mutual Ins. Co. v. La. Ins. Rating Comm'n}, 696 So. 2d 1021, 1025–26 (La. App. 1st Cir. 1997) (finding that an "interpretive directive" having general applicability to all insurers has the effect of interpreting LIRC's substantive policy and was therefore invalid because it was not promulgated in accordance with the LAPA).

\textsuperscript{231} \textit{Star Enter. v. State Dep't of Revenue & Taxation}, 676 So. 2d 827 (La. App. 1st Cir. 1996).

\textsuperscript{232} \textit{Id.} at 830.

\textsuperscript{233} \textit{Id.} at 832.
medications for pain management purposes.\textsuperscript{234} Regarding the effect of the LSBN advisory opinion, the court stated, "the LSBN statement has the effect of both interpreting and implementing substantive law regarding CRNAs' scope of practice . . . . Such a substantive expansion of the scope of practice clearly constitutes a rule within the meaning of Louisiana Revised Statutes section 49:951(6)."\textsuperscript{235} The court found that the advisory opinion had general applicability because it could be applied to every CRNA, and all CRNAs were able to freely access the opinion on the LSBN website and in its regular practitioner journal.\textsuperscript{236} One could argue that the inclusion of Louisiana Revised Statutes section 49:963(E) (added in 1997 and declaring that a rule not promulgated in accordance with the LAPA is invalid) is unnecessary, given that the court in \textit{Star Enterprise} had already established the unenforceability of a rule not promulgated in accordance with the LAPA.\textsuperscript{237}

Finding that "advisory opinions," although allowable by the LAPA, could be "rules" subject to the LAPA's formal rulemaking requirements sets up an agency clash. Agencies are authorized to issue advisory opinions by Louisiana Revised Statutes section 49:962.\textsuperscript{238} Advisory opinions, which are considered rulings concerning the applicability of a particular statutory provision, "shall have the same status as agency decisions or orders in adjudicated cases."\textsuperscript{239} One commentator noted that "prohibiting the use of advisory opinions might actually strengthen an agency's hand by encouraging the agency to apply its interpretation of the law to a real controversy in an ad hoc adjudication without any

\textsuperscript{235} Id. at *8.
\textsuperscript{236} Id. Note that the court used the same "general applicability" rationale in both cases, even though in \textit{Star Enterprise}, the agency initiated the communication, and in \textit{Spine Diagnostics}, the communication was initiated by a nurse subject to LSUEN's regulations.
\textsuperscript{237} LA. REV. STAT. ANN. § 49:951(6) (2008). \textit{See also Star Enterprise}, 676 So. 2d at 832.
\textsuperscript{238} § 49:962.
\textsuperscript{239} Id. For example, in \textit{Spine Diagnostics}, the court was considering an advisory opinion requested by a CRNA regarding the scope of practice under the Nurse Practice Act (Louisiana Revised Statutes section 37:918(18) gives the LSBN the authority to develop rules and regulations governing the scope of practice for advance practice registered nurses.).
prior warning to the affected party.\textsuperscript{240} Arguably, agencies could use advisory opinions, which are considered "decisions or orders in adjudicated cases," as a subterfuge to avoid the cumbersome rulemaking process. However, it seems to be that courts are carefully scrutinizing the effect of such advisory opinions; if the effect of the opinion is one that would be reached in the rulemaking process, courts have required that rulemaking occur.\textsuperscript{241} Advisory opinions in the previous two instances differ from commonly-called "letter opinions" of an agency (that clarify an issue upon request of an interested party), because letter opinions are not binding on a reviewing court and have no precedential effect for other interested parties.\textsuperscript{242} Where an agency renders a letter opinion that does not result in general applicability, a court should not require rulemaking.\textsuperscript{243} The inclusion of interpretations of substantive agency law as rules is a departure from the federal APA, which specifically exempts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" from the proscriptions of administrative rulemaking.\textsuperscript{244}

\textsuperscript{240} Marcello, supra note 1, at 233. Marcello posits several arguments as to why the courts should encourage "interpretive" rulings by agencies. \textit{Id.} at 233–35.

\textsuperscript{241} This particular application of the law of the effects of transaction, rather than the law of the stylization of a transaction should not seem unusual to a Louisiana practitioner. The Louisiana Civil Code makes clear that in many cases, the courts should look to an action's effects, rather than its characterization. \textit{See generally} LA. CIV. CODE ANN. arts. 2025–28 (2008).

\textsuperscript{242} These are also known as letter rulings. CITGO Petroleum Corp. v. State Dep't of Revenue & Taxation, 845 So. 2d 558, 563 (La. App. 1st Cir. 2003) (finding that IRS letter rulings, while they may be persuasive, are not binding on a reviewing court or the agency).

\textsuperscript{243} Indeed, it would be hard for a party to challenge such an advisory opinion based on \textit{La. Commission on Governmental Ethics v. Leake}, 264 So. 2d 675 (La. App. 1st Cir. 1972). In \textit{Leake}, the first circuit found that an advisory opinion concerning conflicts of interest by a potential beneficiary of a contract of architectural employment could not be appealed, given that there was no final determination of issues (based on Louisiana Revised Statutes section 42:1119D(4), giving the Commission the power to issue advisory opinions). \textit{Id.} at 677.

\textsuperscript{244} 5 U.S.C. § 553(b)(A) (2006). Federal courts have distinguished between interpretations which cover a duty fairly encompassed within the regulation that the agency purports to construe and leave decisionmakers with discretion (not requiring rulemaking) and those that deny the decisionmaker discretion in the area of the interpretation's coverage (requiring rulemaking). \textit{Compare} Air Transport Ass'n of Am., Inc. v. F.A.A., 291 F.3d 49, 56 (C.A.D.C. 2002), \textit{with} Gen. Elec. Co. v. E.P.A., 290 F.3d 377 (C.A.D.C. 2002).
C. A Specialized Function (and Its Problems)—Licensing Boards

1. Scope of the Problem

The ability of an agency to issue orders, as discussed in Part III, section A, can collide with the rulemaking process. Given that an agency has the discretion to announce policy through the ad hoc adjudication process, and that such a decision or order can be applied to future adjudications by the agency involving the same issue, an agency can effectuate "general applicability" policy-making through adjudication. Such general applicability policy-making properly belongs in the purview of rulemaking. The tension between litigant-specific orders and the necessity of the rulemaking process can be illustrated by particular issues involving a board's control over licensing issues. "Order," as defined by the LAPA, specifically includes the "whole or any part of the final disposition . . . when the grant, denial, or renewal of a license is required by constitution or statute to be preceded by notice and opportunity for a hearing." To illustrate the scope of any one individual agency's involvement in the licensing process, consider this: in 2005, the Louisiana Department of Labor published the "Louisiana Licensing Guide," detailing the occupational licensing requirements for over seventy separate and distinct occupations and the business license requirements for over sixty separate and distinct business types.

245. See supra note 104 and accompanying text.
246. The definition of a "rule" includes that which has "general applicability." LA. REV. STAT. ANN. § 49:951(6) (2008). For a further discussion of the fine lines between adjudication and rulemaking, see Bonfield, supra note 102.
247. § 49:951(3).
248. The 2005 Louisiana Licensing Guide is available at the Louisiana Department of Labor website: www.laworks.net. For those attorneys representing barbers, florists, or interior designers, as well as those members of occupations one would expect to be subject to a licensing scheme, the authors suggest taking a look at the guide.
2. Extra, Statutory Process Due for Existing Licensees Under Louisiana State Board of Medical Examiners v. Bertucci

Administrative rules regarding licensing apply when the "grant, denial, or renewal" of a license is required to be preceded by notice and opportunity for a hearing. After the Louisiana Fourth Circuit Court of Appeal's decision in *Louisiana State Board of Medical Examiners v. Bertucci*, licensees are generally given (in addition to the opportunity to show compliance with the requirements for the retention of a license) a chance to show that actions complained of do not violate the law or agency rules before the institution of formal adjudicatory proceedings. The court based its decision on Louisiana Revised Statutes section 49:961(C), which states that:

> [n]o revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gives notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license.

This is commonly known as a *Bertucci* hearing, although the term "hearing" may be somewhat of a misnomer. Unfortunately, the fourth circuit has provided little definitive guidance as to what would satisfy the requirements of *Bertucci*. The court noted that in all agency adjudications, notice and an opportunity to be heard are required by due process. The LAPA, however, requires "an additional step." The court defined the additional step as "an opportunity, prior to the institution of formal proceedings, to show that actions complained of do not violate the law or agency rules." *Bertucci* "opportunities" are required only when the issue is one of suspension, revocation,

249. 593 So. 2d 798, 801 (La. App. 4th Cir. 1992).
250. § 49:961(A).
251. *Bertucci*, 593 So. 2d at 801.
253. *Bertucci*, 593 So. 2d at 800.
254. *Id.* at 801.
annulment or withdrawal of an existing license, not when a hearing concerns the issuance, denial, or renewal of a license.\textsuperscript{255} The court grounded its decision in legislative intent, finding that the legislature intended the additional step in the limited instances enumerated in subsection C.\textsuperscript{256} However, the court was careful to note that due process, which is satisfied by an initial opportunity for notice and hearing, does not necessarily require such an additional step.\textsuperscript{257}

Given that a license can be suspended by formulation of an order, which can then be extended by analogy to other similarly situated licensees, such that an agency's position about particular conduct becomes a rule of general applicability, it is important to flesh out exactly what is required by the fourth circuit, or, as the court stated, the language of section 49:961(C).

3. Illustration of the Problem Through a Hypothetical

a. Setting

To illustrate, consider a likely hypothetical:\textsuperscript{258} A doctor receives a letter informing her that based on a complaint from a patient she is going to be investigated for violating the Medical Malpractice Act. The Board of Medical Examiners requires a written response from her within thirty days. Based on those written responses, and together with written responses from the initial complainants, an investigator—who may be (but is most likely not) an actual member of the Board—will submit a report to the Board itself.\textsuperscript{259} After the report, the Board will dismiss the complaint, request additional information, or conduct a formal hearing into the charges.

Do these written responses satisfy Bertucci? At least in theory, a written opportunity to contest the charges would provide an

\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Bertucci, 593 So. 2d at 801.
\textsuperscript{258} The authors would like to thank attorney Celia R. Cangelosi for her insight into this particular issue and its importance.
\textsuperscript{259} Many agencies are statutorily authorized to employ non-board member investigators. See, e.g., LA. REV. STAT. ANN. § 37:1270 (2008) (authorizing investigators and special agents to participate in investigations conducted by the Board of Medical Examiners).
opportunity to show that the doctor's disputed actions do not violate the law or any board rules. If the Bertucci "additional step" is not grounded in due process concerns, arguably there needs to be no actual meeting between board members and the investigated doctor in order to provide such a step. On the other hand, it is debatable whether or not a written opportunity, without the chance for a face-to-face interaction, would actually provide a fair opportunity to contest any charges. The Bertucci court, however, stated that the later, formal hearing satisfied due process.

While the court in Bertucci did not clearly indicate whether a face to face meeting with Board members was required, the same court, in Reaux v. Louisiana Board of Medical Examiners continually referred to the "informal setting" in which the licensee would be allowed to explain herself. For most practitioners, "informal setting" would likely contemplate a physical place, therefore requiring a face to face encounter.

*b. Who Needs to Be Present?*

Continuing with the hypothetical: The non-board member investigator decides that he needs further answers concerning the doctor's written responses. The doctor appears at a meeting in which the following persons are present: the doctor, her attorney, the investigator, and the Board's attorney.

Does this meeting, during which no actual board members are present, satisfy Bertucci? If the Board has authority to appoint a non-board member investigator, does that appointment serve as a delegation of authority to a non-board member? Louisiana Revised Statutes section 49:491(C) requires that the "agency" give notice; presumably, the chance to show that the licensee has complied with applicable law requires a showing also to the "agency." Does the meeting with no agency board members present satisfy this requirement? If Bertucci requires a meeting, then arguably, to comply with section 49:961(C), actual board members must attend that meeting, given that the requirement of providing an opportunity to refute charges is relegated to an

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260. 850 So. 2d 723, 731 (La. App. 4th Cir. 2003).
261. § 49:961.
"agency." "Agency," as defined by the LAPA, does not include a non-board member investigator.\textsuperscript{262}

The fourth circuit has indicated that an agency has some discretion in how to carry out the informal opportunity mandated by \textit{Bertucci}. In \textit{Reaux}, the court further stated, "[t]he Board has some discretion as to the manner of providing that opportunity [under \textit{Bertucci}] and the licensee is not entitled to dictate to the Board in that regard."\textsuperscript{263} However, it is unlikely that such a granting of discretion includes delegating board responsibilities to a non-board member investigator. Other courts have held that Louisiana law prohibits public boards from delegating statutory duties to non-board members. For example, in \textit{State ex rel. DeBarge v. Cameron Parish School Board}, the Louisiana Third Circuit Court of Appeal affirmed a grant of summary judgment in favor of a discharged school principal who sought a writ of mandamus against the school board by arguing that the school board could not delegate to the superintendent the authority to act on its behalf.\textsuperscript{264}

\[\text{[A public board] alone must finally determine every subject committed to its discretion and judgment. The general rule, succinctly stated, is that legislative and discretionary powers devolved by law on a public board or governing body politic cannot be delegated or referred to the discretion and judgment of its subordinates or any other authority. A contrary rule prevails, however, as to ministerial duties or administrative functions of such board or body.}\textsuperscript{265}\]

It is unlikely that an investigator's assistance is a ministerial or administrative function of any board. However, the fourth circuit has indicated that it may not consider a \textit{Bertucci} "opportunity" part of a board's investigatory process.\textsuperscript{266} A board's hearing panel may be assisted by independent legal counsel retained by the board who has not "participated in the investigation or prosecution of the

\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Reaux,} 850 So. 2d at 731.
\textsuperscript{264} 202 So. 2d 34 (La. App. 3d Cir. 1967).
\textsuperscript{265} \textit{Id.} at 38.
\textsuperscript{266} \textit{Reaux,} 850 So. 2d at 731–32.
Such independent counsel can rule on evidentiary objections and other procedural issues raised during the hearing. The fourth circuit held that the independence of the counsel authorized by the Louisiana Administrative Code is not compromised when the attorney in question has previously participated in a Bertucci hearing on the matter. In *In re Shiplov, D.M.D.*, the court rejected the argument that participation in the Bertucci hearing violates the attorney’s independence, provided that the attorney has not been involved in the “investigation” of the charges. Since the fourth circuit decided Bertucci, it is clear that the court does not consider a Bertucci hearing part of a board’s investigatory process.

c. Commingling of Functions

If the Bertucci “opportunity” is not part of a board’s investigatory process, then what part of the process is it? Any board’s process must be either investigatory or adjudicatory. If a Bertucci “opportunity” is not investigatory, then it must be adjudicatory. As an adjudicatory process, the commingling of functions is constitutionally prohibited during a Bertucci “opportunity.”

Assume now that the meeting with the doctor, her attorney, the investigator, and the Board’s attorney satisfied Bertucci. The board function required by section 49:961(C) is an adjudicatory function; presuming that it could be delegated to a non-board member, it is unlikely that it could be delegated to the investigator that serves a prosecutorial function. In *Allen v. Louisiana State Board of Dentistry*, the Louisiana Supreme Court stated, “The idea of the same person serving as judge and prosecutor is anathema under our notions of due process.” This brings a practitioner to an interesting conclusion—a Bertucci hearing, which is not mandated by due process, could actually be anathema to due process when a non-board member investigator requests a meeting.

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268. Id.
269. *In re Shiplov, D.M.D.*, 945 So. 2d 52, 64 (La. App. 4th Cir. 2006).
270. Id.
271. 543 So. 2d 908, 916 (La. 1989).
with a person under investigation. Although not explicitly stated, the fourth circuit has put practitioners in the position of requesting an informal hearing that would likely have to operate in much the same way as a formal hearing. Although outgrowths of the fourth circuit’s decision can be confusing, it appears that a valid Bertucci “opportunity” likely requires presence of the particular board, the person under investigation (most likely with his or her counsel), and the actual investigator may be prohibited from attending if the investigator’s presence violates Allen.

4. Records and Waiver

Curiously, the fourth circuit has held that a person under investigation is not entitled to have a record preserved of a Bertucci “meeting.”\textsuperscript{272} Contents of the record on appeal from an administrative decision are prescribed by Louisiana Administrative Code section 46:9921(e), and it does not include a record of the proceedings at a section 961(C) meeting.\textsuperscript{273} Furthermore, in Reaux, a licensee’s refusal to participate in a section 961(C) hearing that was not transcribed for the record and then participation in subsequent discovery and pre-hearing conferences operated as a “waiver” of the right to a section 961(C) meeting.\textsuperscript{274} Specifically, the board involved found, “La. R.S. 49:961(C), does not require that the licensee’s right to ‘an opportunity to show compliance’ must be recorded, and therefore, the Board did not violate Dr. Reaux’s rights by refusing to conduct the ‘961(C) meeting’ with a court reporter present.”\textsuperscript{275} It is important to note that the fourth circuit referred to a “961(C) meeting” in quotes, because the parties in that particular case characterized it as such. Arguably, the fourth circuit refers to the meeting this way in order to step away from the possible rigid interpretations of Bertucci, still not defining the actual procedure necessary to satisfy its decision.

\textsuperscript{272} Reaux v. La. Bd. of Med. Exam’rs, 850 So. 2d 723, 731 (La. App. 4th Cir. 2003)
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 731.
\textsuperscript{275} Id.
5. Extension of Bertucci and Rulemaking Conflicts

The fourth circuit extended the Bertucci rationale in 1994 in a situation that did not involve a section 961(C) hearing. In Amato v. Office of the Louisiana Commissioner of Securities, a stockbroker filed suit against the Commissioner of Securities for terminating his license to sell securities before the opportunity for a hearing. Amato submitted a U-4 form for re-registration of his securities license with a new securities company. The U-4 form required that any current investigation regarding the applicant be reported; Amato left that part of the form blank because he "had no notice that he was the subject of an investigation" by the Louisiana Securities Commissioner. In fact, there was no way for Amato to be aware that he was under investigation; testimony by the Deputy Securities Commissioner indicated that there was "no such thing" as notice of an investigation and there was no file in the commissioner’s office of persons under investigation in which an applicant could check. The Deputy Commissioner then contacted Amato’s current securities company and informed the company that it must voluntarily withdraw Amato’s U-4 form or risk non-renewal of the company’s license. The company chose to withdraw Amato’s registration form. The Deputy Commissioner argued that the Louisiana Securities Law affording an applicant notice and opportunity for a hearing prior to refusal of registration did not apply to the case, given that Amato’s employer voluntarily withdrew his U-4 form.

276. 644 So. 2d 412 (La. App. 4th Cir. 1994).
277. Id. at 415.
278. Id.
279. Id. The Deputy Commissioner argued that Amato should have been aware of an investigation into his personal acts as a securities officer because he signed for a subpoena directed to his former securities company, Brennan Ross Securities. Id.
280. Id.
281. Id.
282. Id. at 416. Louisiana Revised Statutes section 51:703(E)(1) required that an order be entered refusing to register an applicant "after affording an applicant a hearing or an opportunity for a hearing," and Louisiana Revised Statutes section 51:716(A) required the commissioner to promptly send to an applicant a notice of opportunity for a hearing before entering an order refusing to register any person.
The court rejected this argument and found that due process required an informal procedure before a refusal of registration.\textsuperscript{283} To make this determination, the court examined its purposes in crafting the \textit{Bertucci} “hearing” under section 961(C)—“to ‘short circuit’” the institution of formal proceedings under the LAPA by giving a licensee the opportunity to show compliance with all lawful requirements.\textsuperscript{284} The court then acknowledged that “Amato’s license was terminated before his U-4 was submitted and § 961(C) is not applicable.”\textsuperscript{285} Extending \textit{Bertucci}, the court held that \textit{Bertucci} clearly indicates that an informal procedure is appropriate when statutory requirements are met.\textsuperscript{286} To meet this requirement, the court ordered that the Commissioner promulgate rules and regulations in accordance with the LAPA.\textsuperscript{287} In this instance, the court at least acknowledges the tension between generally applicable rules made for all licensees and many agencies’ use of individual adjudication in situations where rulemaking would be more appropriate.

IV. JUDICIAL REVIEW AND ENFORCEMENT OF ADMINISTRATIVE DECISIONS

After all of the deliberation (and litigation) over whether an agency can promulgate rules, whether it can hear disputes, or whether it can operate in any other manner that may be inconsistent with the Louisiana Constitution, the courts are not yet free from the wrangling of power between agencies and the state.\textsuperscript{288} At the end of the administrative law circle is a court’s exercise of the obligation of judicial review. The judicial review function of the courts has been affected by Louisiana’s move to its central panel system. California created the first central panel in 1945; Louisiana’s central panel, the Division of Administrative

\textsuperscript{283} \textit{id.} at 417.
\textsuperscript{284} \textit{id.} at 416.
\textsuperscript{285} \textit{id.}
\textsuperscript{286} \textit{id.}
\textsuperscript{287} \textit{id.} at 417.
\textsuperscript{288} Edward Richards, Harvey A. Peltier Professor of Law at the LSU Paul M. Hebert Law Center, maintains a database of administrative law cases in Louisiana and elsewhere and the interesting questions that such cases may raise at http://biotech.law.lsu.edu/cases/adlaw.htm.
Law (DAL) followed fifty years later. Today's state central panels are said to represent a trend—"the emerging trend of restricting or eliminating agency review of state ALJ decisions thereby making them . . . subject only to judicial review." For some, this restrictive trend cuts against one of the tenants of administrative law, that "[u]nless the courts maintain their independence, disallow unconstitutional intrusions into judicial power, and exercise meaningful appellate review of agency adjudications, the judicial power necessary to protect individuals from the effects of biased, arbitrary, or oppressive governmental and bureaucratic action can be undermined."  

Although commentators have recognized this trend, not all central panels directly affect agency review of actions. Whether a state imposes further restrictions by making some or all of an ALJ's findings binding on an agency is a matter of state by state determination. In Louisiana, ALJs have the power to enter final orders unreviewable by the agencies that the orders affect. Additionally, no agency (except those exempted by the LAPA itself) has the right to appeal a decision decided against it.

289. For more information on the move towards a central panel system, including the different types of systems and the experiences of several states, see James F. Flanagan, Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standard of Agency Review, 54 ADMIN. L. REV. 1355 (2002).

290. Id. at 1356 (emphasis added).

291. James L. Dennis, Judicial Power and the Administrative State, 62 LA. L. REV. 59, 60 (2001). Judge Dennis, of the United States Fifth Circuit Court of Appeals, surmises that under several appellate review theory standards, Louisiana courts have "performed well in maintaining judicial independence and providing a constitutional rule of law check and balance upon legislatively created adjudicatory tribunals." Id. at 93.

292. LA. REV. STAT. ANN. § 49:992(B)(2) (2008) ("In an adjudication commenced by the division, the administrative law judge shall issue the final decision or order, whether or not on rehearing, and the agency shall have no authority to override such decision or order. Upon the issuance of such a final decision or order, the agency or any official thereof shall comply fully with the final order or decision of the administrative law judge.").

293. § 49:992(B)(3) ("However, no agency or official thereof, or other person acting on behalf of an agency or official thereof, shall be entitled to judicial review of a decision made pursuant to this Chapter."). See also § 49:964(A)(2) ("No agency or official thereof, or other person acting on behalf of an agency or official thereof shall be entitled to judicial review under this Chapter [adjudication].") Judge Bybee refers to this provision as "astonishing." Bybee, supra note 104, at 457.
A. Review and Enforcement of Rulemaking

The fact that an agency can no longer appeal a decision against it has both judicial review and enforcement consequences. For example, an agency may establish policy through rulemaking, only to have an ALJ undermine that policy by refusing to enforce those rules or construing the rules contrary to the agency's views.294

The LAPA provides the procedure by which the validity or applicability of a rule may be challenged.295 In the rulemaking context, in the absence of an agency's more specific rules, a challenge that a rule exceeds the statutory authority of an agency or was adopted without substantial compliance with the LAPA procedures can only be made through an action for declaratory judgment.296 Furthermore, an action for declaratory judgment cannot be brought if review of the validity and applicability of a rule can be made in conjunction with a contested adjudicated case.297 The First Circuit Court of Appeal has concluded that if a plaintiff can challenge a rule's validity in an adjudication, such that the plaintiff's remedy is reversal based on the invalid rule, the plaintiff lacks standing to challenge the rule through the LAPA declaratory judgment action.298 When a plaintiff brings an invalid declaratory judgment action, any subsequent injunctive relief is void.299 The first circuit has indicated that the restrictiveness of the LAPA in regards to limited review of administrative rules places a "legal 'catch 22'" upon parties who must attack a procedurally defective rule only when no other remedy is available: a party must violate the rule to challenge the rule.300

294. See Bybee, supra note 104, at 460.
295. § 49:963.
296. § 49:963(A).
297. § 49:963(D). Challenging a rule through declaratory judgment requires that a plaintiff first require the agency to pass upon the validity or applicability of the rule. Id. If such review would not provide an adequate remedy and would inflict irreparable injury, a plaintiff can bring an action for declaratory judgment. Id. See also Liberty Mutual Ins. Co. v. La. Ins. Rating Comm'n, 696 So. 2d 1021, 1027–28 (La. App. 1st Cir. 1997) (finding that it was inappropriate for the district court to proceed in accordance with the general declaratory judgment provisions of the Louisiana Code of Civil Procedure).
298. Id. at 1028 n.6.
299. Id. at 1029.
300. Id. at 1029–30 (on rehearing).
However, the court has also held that a party can enjoin enforcement of a rule through a preliminary injunction in a case where the rule was illegally adopted as an interpretive measure. In *Spine Diagnostics*, the first circuit allowed a declaratory judgment / injunctive relief action to proceed even though not in the context of a specific adjudication. Under the LAPA, it is not necessary to exhaust all administrative remedies before a challenge to the interpretive measure. The petitioner in *Spine Diagnostics* challenged the Louisiana State Board of Nursing advisory opinion that interventional pain management constituted the practice of medicine. This decision was at odds with the Louisiana State Board of Medical Examiners advisory opinion that interventional pain management constituted the practice of medicine and could only be performed by a physician. It is likely that had the LSBN adopted its stance on interventional pain management in a rulemaking proceeding, the petitioner would have challenged the rule as being beyond the statutory authority of the agency.

In addition to challenging the statutory authority of an agency in promulgating rules, an interested person can petition an agency for the adoption, amendment, or repeal of a rule. Any agency faced with such a petition must either deny the petition in writing with reasons or initiate rulemaking procedures within ninety days of receipt of the request.

A court may dismiss a case against an agency on an exception of no cause of action for failure to follow the LAPA procedures. For example, in *Merrick Construction Co. v. Louisiana Department of Environmental Quality*, the First Circuit Court of Appeal dismissed a case against the DEQ by the unsuccessful bidder of a state cleanup contract after determining that the challenge involved not only an attack on the contract between the

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302. *Id.* at *1 n.3.
305. *Id.*
306. § 49:953(C).
307. *Id.*
308. 700 So. 2d 236, 238 (La. App. 1st Cir. 1997).
state and the successful bidder, but a challenge to the underlying DEQ regulations.\textsuperscript{309}

\textbf{B. Review and Enforcement of Agency Action}

Agencies enforce regulatory policy in a number of ways. For example, licensing boards enforce their policies by suspending or revoking a licensee’s right to operate.\textsuperscript{310} Such revocations generally happen in the context of an internal agency procedure. To illustrate: the Department of Health and Hospitals receives a complaint about a local restaurant’s cleanliness. Upon inspection, a sanitarian or other state health officer makes a detailed report of any violations and provides a notice of violation to the restaurant’s owner.\textsuperscript{311} Failure to correct the violation results in a compliance order issued by the agency, from which the owner has a specified amount of time to appeal to the DAL.\textsuperscript{312} If the owner then fails to comply with the compliance order, the agency may suspend the restaurant’s operating license, seek injunctive relief, or impose a civil fine or mandate that the owner attend training sessions in lieu of a fine.\textsuperscript{313} An agency’s inability to request judicial review of a decision against it may compel an agency to bring fewer, to prevent an ALJ from establishing policy contrary to the agency’s view by deciding against the agency.\textsuperscript{314} Bringing fewer adjudications leads to less enforcement of agency policy; although a case may be factually marginal, marginal cases help agencies understand the limits of their authority.\textsuperscript{315} Some agencies, such as the DEQ, have the option of initiating civil enforcement actions rather than adjudicative proceedings.\textsuperscript{316} Agencies that can bring

\footnotesize{\textsuperscript{309} Id. at 238–39. The DEQ was charged by the Legislature with enacting regulations to implement a solid waste tire recycling and reduction program. Id.}
\footnotesize{\textsuperscript{310} See supra Part III.C.}
\footnotesize{\textsuperscript{311} LA. ADMIN. CODE tit. 51, pt. 1, § 105 (2008).}
\footnotesize{\textsuperscript{312} Id. § 111.}
\footnotesize{\textsuperscript{313} Id. § 113.}
\footnotesize{\textsuperscript{314} See Bybee, supra note 104, at 461.}
\footnotesize{\textsuperscript{315} Id.}
\footnotesize{\textsuperscript{316} See Louisiana Environmental Quality Act, LA. REV. STAT. ANN. § 30:2025 (2008) (granting civil enforcement authority to the Department of Environmental Quality). See also Bybee, supra note 104, at 461 (discussing the reasons why an agency may use civil enforcement over intra-agency enforcement).}
enforcement actions either before an ALJ or a court could end up with conflicting policies on similar issues.

The filing of a petition in a district court seeking review of an agency adjudication does not, by itself, stay the enforcement of an administrative order. In order to determine whether a stay of the agency’s action is warranted, courts consider four factors: (1) the likelihood of the petitioner prevailing on the merits; (2) the possibility of irreparable injury in the absence of a stay; (3) the possibility that the stay will harm other parties interested in the proceedings; and (4) the public interest involved.

Although there is a presumption of judicial review of administrative agency proceedings, judicial review of agency decisions or orders is confined to the agency record and decisions are subject to reversal or modification only upon two conditions—(1) prejudice to “substantial rights of the appellant” based on (2) findings, conclusions, or decisions that are:

a. in violation of constitutional or statutory provisions;
b. in excess of the agency’s statutory authority;
c. made according to unlawful procedure;
d. affected by other error of law;
e. arbitrary, capricious, or characterized by abuse of discretion; or
f. not supported and sustainable by preponderance of the evidence.

Review is only available for “decisions” or “orders.” In Delta Bank & Trust Co. v. Lassiter, the Louisiana Supreme Court

318. Summers, 428 So. 2d at 1125.
319. This presumption of review has been said to arise as a result of the debates of the 1974 Constitution over then enactment of the “Right to Judicial Review” in article I, section 19 providing for “the right of judicial review based upon a complete record of all evidence upon which the judgment is based.” LA. CONST. art. I, § 19. An examination of the transcripts of the debate indicate that one delegate, reading the amendment, thought that the delegates were “providing for judicial review of, in [his] opinion, all administrative agency determinations.” See Marcello, supra note 1, at 190.
320. § 49:964(G). For the presumption of judicial review, see Bowen v. Doyal, 253 So. 2d 200, 203 (1971) (finding that the presumption of reviewability stems from Louisiana’s legal system and traditions). See also Buras v. Bd. of Trs. of Police Pension Fund, 367 So. 2d 849, 851 n.4 (La. 1979).
articulated a standard for determining when an agency action is considered a "decision" or "order" and thus subject to judicial review.321

[T]he [Louisiana] Administrative Procedures Act provides for a hearing only in an adjudication. An adjudication is a proceeding resulting in an order or decision. A decision or order is, for purposes of the act, a disposition required by constitution or statute to be made only after notice and a hearing. Therefore, unless there is some provision in the constitution or statutes requiring a hearing, an agency disposition is not a "decision" or "order" as defined for purposes of the act. And unless a proceeding results in a decision or order, it is not an adjudication as defined in the act. It is apparent, then, that an adjudication for purposes of the act means an agency proceeding that results in a disposition that is required to be made (by constitution or statute) after notice is given and a hearing is held. . . . Since the act provides for hearings only if there is an adjudication, it follows that unless a hearing is required by some statute or the constitution, the provision of the act as to hearings does not apply.322

In In re Carline Tank Services, the Louisiana First Circuit Court of Appeal, under the standard articulated in Delta Bank, held that the denial of a request for a hearing by the Department of Environmental Quality related to the granting of a barge cleaning permit to another company was not a decision or order subject to judicial review under the LAPA.323 The Assistant Secretary of the DEQ was authorized to either accept or deny a petition when any person that might be adversely affected requested an adjudicative hearing.324 Because the DEQ was not required by statute to hold a hearing in this particular circumstance, the decision not to grant a hearing was not subject to judicial review. The LAPA requires an adjudicatory hearing only when an agency's organic statute or the

321. 383 So. 2d 330 (La. 1980).
322. Id. at 333. See also supra Part III.A.1.
323. 626 So. 2d 358 (La. App. 1st Cir. 1993).
324. Id. at 360–61.
Louisiana Constitution requires a hearing on the record.\textsuperscript{325} This requirement differs from the federal APA, which allows for a process of "informal adjudication."\textsuperscript{326}

Additionally, an internal advisory opinion made by the Department of Health and Hospitals (DHH) as to which one of two companies should be approved to build a DHH home (notice of which was sent to the non-approved company) was held not to be a decision or order under the LAPA.\textsuperscript{327} In \textit{Bell Oaks v. Louisiana Department of Health and Hospitals}, the Louisiana First Circuit Court of Appeal found that the committee's decision, reached after reviewing application documents, was a not a decision reached after an adjudication.\textsuperscript{328} The adjudication in that case occurred after Bell Oaks, the company not awarded the state contract, requested an "appeal" from DHH to challenge the agency's decision.\textsuperscript{329} Although internal DHH regulations referred to the hearing as an "administrative appeal," the court found that the hearing could not in fact be an appeal, because there was no underlying adjudication.\textsuperscript{330}

A board's enacting statute may attempt to preclude judicial review. However, Louisiana courts have held that if a denial of judicial review does not comport with the minimum requirements of due process, the Louisiana Constitution requires judicial review under the LAPA.\textsuperscript{331} Furthermore, judicial review of agency adjudications made under the presumption of review and a court's constitutionally vested judicial power, and not specifically

\textsuperscript{325} \textsection{49:951}(1) \& (3).
\textsuperscript{326} \textsection{17}{5 U.S.C. \textsection{555} (2006). Under the APA structure, adjudication refers to agency action that leads to a final disposition and is not rulemaking. \textsection{551}(6)\textendash (7). "Informal adjudication" includes adjudications not required to be determined on the record after a hearing. \textit{See also} Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990) (finding that an informal hearing to restore pension plans previously terminated by PBGC complied with the minimal requirements for section 555).
\textsuperscript{327} \textit{Bell Oaks, Inc. v. La. Dep't of Health \& Hosps.}, 697 So. 2d 739 (La. App. 1st Cir. 1997).
\textsuperscript{328} \textit{Id.} at 748.
\textsuperscript{329} \textit{Id.}
\textsuperscript{330} \textit{Id.}
\textsuperscript{331} \textit{See} Ogburn v. City of Shreveport, 614 So. 2d 748 (La. App. 2d Cir. 1993); Werner v. Bd. of Trs. of Police Pension Fund, 360 So. 2d 615 (La. App. 4th Cir. 1978).
challenged under the LAPA, must include standards of application that are substantially similar to those under the LAPA.  

Louisiana's peculiar practice of appellate de novo review of facts applies in the administrative law context also. Under Louisiana Revised Statutes section 49:964(G), when a decision is being examined for proper factual support, the court can make its own findings of fact based on an independent examination of the entire record available for judicial review. Although a reviewing court is entitled to review facts de novo, Louisiana courts have crafted an entitlement of "great weight" to an ALJ's findings of fact, absent manifest error. It is not necessary for the agency to state with particularity which one of the aforementioned six standards was determinative in any given case.

Although findings of fact by an administrative tribunal are reviewed under the manifest error standard, a trial court reviews an agency's conclusions of law and exercise of discretion according to the arbitrary and capricious test. An agency's conclusions of law will stand, under the arbitrary and capricious test, to the extent that the action taken is "reasonable under the circumstances." In order to determine whether an agency's action is reasonable under the circumstances, courts must delve deeply into the minutiae of complex agency rules and regulations. Complex, fact-driven opinions arise frequently in the environmental law context, for instance, where a court is required to review the classification of a landfill as a particular type of facility under DEQ Regulations.

333. For a discussion of Louisiana's standard of appellate review of facts based on its history as a "hybrid civil and common law jurisdiction," see Ellis v. Weasler Eng'g Inc., 258 F.3d 326, 332–34 (5th Cir. 2001).
334. LA. REV. STAT. ANN. § 49:964(G)(6) (2008). De novo review is somewhat limited by deference ("due regard") given to an ALJ's determination of credibility issues, when such credibility has been determined by first hand observation of the demeanor of the witness. Id.
335. Bell Oaks, 697 So. 2d at 744. See also Hosp. Corp. of Am. v. Robinson, 499 So. 2d 246, 250 (La. App. 1st Cir. 1986).
336. See generally Ouzts v. Sec'y, La. Dep't of Health & Hosps., 880 So. 2d 918 (La. App. 2d Cir. 2004).
338. Id.
339. See Oakville Cmty. Action Group v. La. Dep't of Env'tl. Quality, 935 So. 2d 175, 186 (La. App. 1st Cir. 2006) (finding that the DEQ's classification of a
The Louisiana Second Circuit Court of Appeal has defined arbitrariness as the “absence of a rational basis.”[^340] This definition also requires a heavily fact-intensive review of agency action. In *Magill v. Louisiana State Police Troop G*, the second circuit reviewed a decision of the State Police towing and recovery association to remove a tow truck driver from a list of rotating tow truck operators available to answer police calls.[^341] A review of the case required the court to delve deeply into an altercation between a tow operator and local police officer, in which numerous obscenities were thrown and threats made to “lay [someone] out.”[^342] The narrow question involved was whether the tow operator’s threatening demeanor was grounds for removing him from the rotation list given that he made threats not *during the actual operation of the tow truck.*[^343] The court held that it was not arbitrary or capricious for the police to remove the tow operator from the rotation under the circumstances.[^344] Such interesting dialogue, that one would assume usually only arises in the criminal context, is fodder for judicial review in the administrative context under the “arbitrary and capricious” standard. The arbitrary and capricious standard has also been held to apply to review of punishment or disciplinary action.[^345]

In the event that an agency’s action is considered arbitrary and capricious, an action for mandamus can lie to correct the performance (or non-performance) of the arbitrary administrative act.[^346] In the licensing context, this should mean that if an ALJ

[^341]: Id. at 140.
[^342]: Id. at 141.
[^343]: Id. at 143.
[^344]: Id. at 143.
[^345]: Davis v. La. State Bd. of Nursing, 691 So. 2d 170, 173 (La. App. 1st Cir. 1997).
[^346]: State ex rel. Torrance v. City of Shreveport, 93 So. 2d 187, 189 (La. 1957). Mandamus, however, is an extraordinary writ that will not operate when ordinary remedies are available to grant a petitioner relief. See generally Bonvillian v. Dep’t of Ins., 906 So. 2d 596 (La. App. 1st Cir. 2005). Additionally, mandamus will not lie in an action where an official’s decision contains an element of discretion. Id. at 599.
finds that an agency revoked a licensee’s permit or license arbitrarily, that the permit or license holder should be able to file a mandamus action to compel the agency to reinstate the license or permit. However, one could argue that the availability of mandamus as a remedy to force an agency to act may be unnecessary given that an agency, by legislative amendment to the LAPA, “shall comply fully with the final order or decision of the administrative law judge.”

C. Deference to Agency Interpretations

In 1984, the United States Supreme Court, in its *Chevron* decision, enunciated what has become the rule of deference to administrative agency interpretations of their own statutes. According to one commentator, the Court announced *Chevron*’s rule of deference without any serious discussion of a pre-existing “complex body of law aimed at calibrating judicial deference on matters of law to a number of relevant considerations (including agency expertise, the timing of the legal representation, and the relative consistency of the agency’s position over time).”

Under the rubric of *Chevron*, the Louisiana First Circuit Court of Appeal announced that the same standard of review must be afforded to the Department of Environmental Quality regarding whether a landfill was an “existing facility” under its promulgated Solid Waste Regulations. The court noted specifically, “[w]e believe that the situation posed by an agency’s interpretation of the

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348. *Chevron, U.S.A., Inc.* v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that the determination of whether to accept an agency’s action involves a two-part test: (1) whether Congress has addressed the precise question at issue, and (2) if not, an examination of the reasonableness of the agency’s interpretation). The Court defers in cases in which Congress has not addressed the question at issue and the agency’s interpretation of its power and the exercise thereof in the given regulatory scheme is reasonable. *Id.*
349. Jody Freeman, *The Story of Chevron: Environmental Law and Administrative Discretion*, in *ENVIRONMENTAL LAW STORIES* 172 n.10 (Lazarus & Houck, eds., 2005). According to Freeman, the “shocking” result in *Chevron* was “new law in a dramatic fashion” and no one, not even the litigants, “appears to have foreseen that *Chevron* would be a major administrative law case.” *Id.* at 194. Although *Chevron* was a controversial case for its environmental implications, the deference issue and the separation of powers implications have come to “dominate” the scholarly commentary on *Chevron*. *Id.* at 197.
rules and regulations which it drafted is analogous to the situation where the legislature has enacted a statute and explicitly left a void for the agency to fill." Therefore, the DEQ's interpretation of its own Solid Waste Regulations was affirmed, given that the determination was not arbitrary, capricious, or manifestly contrary to the regulations at issue. Without mentioning Chevron, the Louisiana First Circuit Court of Appeal in a subsequent case articulated that this standard is one of "considerable weight" absent "inconsistent interpretation of the overall scheme or use of the wrong rule." Since the First Circuit's nod to Chevron in 1994, few cases have directly referred to what has come to be known as administrative Chevron deference. Even more surprising, there are few cases that discuss the scope of deference given to agency action in general.

V. CONCLUSION

Justice Felix Frankfurter, in 1927, referred to administrative law as the filling in of the details of statutory policy. It is clear from a survey of the Louisiana jurisprudence that there may be more filling to be done. For instance, there are few Louisiana decisions construing some basic elements of administrative law, such as the meaning of some of the grounds for overturning an agency's decision in an adjudication, or the bounds by which a private party can force an agency to act through the use of compelled rulemaking. Such large gaps make it difficult to develop a comprehensive notion of state administrative law. The

351. Id.
352. Id.
355. For a more searching critique of the scope of Chevron deference, including a view that Chevron may be "dead," see Ann Graham, Chevron Lite: How Much Deference Should Courts Give to State Agency Interpretation?, 68 LA. L. REV. 1105 (2008).
task of the 2008 Louisiana Law Review Symposium was to examine current trends in administrative law and determine, through consultation and discussion, which of those trends should be disregarded, embraced, or modified to improve Louisiana state governance. The authors hope that the 2008 Louisiana Law Review Symposium laid the foundation for such improvement, and that this Primer of issues and the state of Louisiana administrative law will help practitioners in their battles with the proliferation of Louisiana state agencies.

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